CALIFORNIA BAR PAST EXAMS

カリフォルニア州司法試験過去問

⑤ TORTS

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Torts

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2001 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

QUESTION 5

Ann, an attorney, represented Harry in his dissolution of marriage proceedings, which involved an acrimonious dispute over custody of Harry and Wilma's minor children.

Ann advised Harry that a favorable custody ruling would be more likely if he could show that Wilma had engaged in improper behavior. Two days after receiving this advice Harry came to Ann's office with his wrist heavily bandaged. Harry told Ann that, when he went by the family home the prior evening to get some of his things, Wilma had tried to run over him with her car, actually hitting him. This was the first suggestion of any violence between Harry and Wilma. After listening to Harry's story, Ann urged Harry to sue Wilma for assault and battery. Ann said: "Filing this suit will improve our bargaining position on custody." Ann did nothing to investigate the truth of Harry's story.

Just before the hearing on custody, Ann filed a tort action on Harry's behalf alleging Wilma had committed an assault and battery on Harry. Ann referred to the tort action at the custody hearing, and Wilma denied that the incident ever occurred. The judge, however, believed Harry's version and awarded sole custody to Harry.

Three months later, Ann learned that Harry had fabricated the story about how he injured his wrist. Ann did not report Harry's lie to anyone and merely failed to prosecute the tort action, which, as a result, was dismissed with prejudice. Wilma then sued Ann for malicious prosecution, abuse of process, and defamation. Wilma also filed a complaint against Ann with the State's office of lawyer discipline.

A: What is the likelihood that Wilma can succeed on each of the claims she has asserted in her civil suit against Ann? Discuss.

B: Did Ann's conduct violate any rules of professional ethics? Discuss.

ANSWER A TO QUESTION 5

I. **What is the likelihood that Wilma (W) can succeed on the following claims against Ann (A)?**-

A. **Malicious Prosecution-**

Malicious prosecution requires (1) filing of a claim against a party for a purpose other than seeking justice, (2) the claim being dismissed in the defendant's favor (3) that there was a not sufficient probable cause to bring the claim, and (4) damages.

On the first element, W will likely argue that A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, W may assert that the fact A filed the claim right before the custody hearing suggests that A's intent was to use the claim against W in the custody hearing. Because A did use the information of the claim in the custody hearing, W will likely meet the requirements of this element (additionally, that A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it).

On the Second Element, the claim was dismissed with prejudice in favor of W because A failed to prosecute the claim prior to filing. Therefore, this element is satisfied.

On the Third Element, W will argue that because the event did not occur, that it was impossible for A to have sufficient probable cause that the event occurred. W will further argue that A failed to make a reasonable investigation to determine whether there was any substance to H's claims (such as inspecting the car, arranging to depose W to determine if W was the driver . . . etc . . . . .). While A may assert that she had probable cause due to H's injuries, such a line of argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there was insufficient probable cause to bring the claim for either battery or assault, W will win on this element.

On the Fourth Element, W must establish some form of pecuniary loss. Because W was required to undergo the expense of preparing to defend the claim against her, W has suffered loss.

Because W has met her burden on all of the elements, she will likely win here.

B. Intentional Infliction of Emotional Distress-

Further, W may seek damages for emotional distress under IIED. Because A's conduct was beyond the scope of social tolerance, and A had demonstrated recklessness by not pursuing an investigation, if W has suffered severe emotional distress, W may recover here.

C. Abuse of Process-

To establish abuse of process, a party must show (1) that a claim was brought to further an improper purpose, (2) that there was a sufficient act or threat used to accomplish that purpose, and (3) damages.

With regard to the first element, W may argue that the claim was not brought to adjudicate H's injuries, but rather to create false evidence to use against W in the child custody hearing. W may demonstrate that there was no proper purpose by showing that the claim was brought immediately before the child custody hearing even though the claim was not ready to file due to an insufficient investigation. Further, W may assert that the claim was raised as evidence in the hearing, and that after its usefulness had been served, A left the claim to wither by failing to even try and prosecute it. (Additionally, A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it.) While A may assert that she had a justification to file the claim due to H's injuries, such an argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there is sufficient evidence that the claim was brought to further H's interests in the custody hearing and not to adjudicate the alleged battery or assault, W will win on this element.

On the second element, W may assert that the act of filing the claim was intended to place pressure on the judge to award H custody by discrediting W's character. Because A filed a frivolous tort claim against W to achieve those purposes, A has engaged in a sufficient act under this element.

Because W has undergone damages, both emotionally (from the claim itself, and its effect in causing W to lose custody of her children) and economically (expenses in fighting the claim), there is sufficient damage here. Therefore, because W has satisfied all of the elements of the claim, she will likely win here.

D. Defamation- To establish a claim for defamation, the plaintiff must prove the following elements:

1. Defamatory Statement-

A statement satisfies the defamatory element if the statement causes harm to a person's reputation. W will argue that a charge of assault and battery ruined her reputation (as evidenced by the judge's decision not to grant W custody of the children). Unless A can show evidence that W had a reputation for being violent, W will win this element.

2. Of or Concerning the Plaintiff-

A statement can be said to be "of or concerning the plaintiff" if a reasonable person would know that the statement was about the plaintiff. Here, the claim was filed in W's name. Therefore, a reasonable person would be able to determine that the statement was concerning W.

3. Publication-

The publication element requires that the statement be memorialized in some medium, or communicated to a 3rd party. Here, the statement that W had assaulted H was not only written in a claim that is public record, the claim was raised in the presence of several persons in the courtroom. Therefore, this element is satisfied.

4. Damages-

As a general rule, a plaintiff does not need to establish damages if the statement was either libel or slander per se. Because the statement was recorded in writing and became public information, the statement is libel. However, W may assert that the statement was slander per se as well. A statement that reflects a crime of moral turpitude will fall under slander per se. W may argue that the battery against a spouse carries a high stigma in our society (and may use the judge's reaction as evidence). Because there is libel and slander per se, W will win on this element.

5. Are there any defenses?-

a **Absolute Privilege**-

A may assert that absolute privilege applies here. Although A is not a state actor, she is an officer of the court and the statements made against W were in furtherance of her duty to her client as an officer of the court. However, A may assert that A's intention in bringing the claim was not to further H's interests with regard to the assault and battery and that A failed her duty to the court by bringing frivolous claim and should not be entitled to immunity. Because A did not know that H was fabricating his story at the time A filed the claim (even if filed for improper purposes), A should be entitled to privilege here and should not be held liable for defamation.

b. **Qualified Privilege**-

Does not apply.

II. **Did Ann's conduct violate any rules of professional ethics?**-

A. **Duties to the Court-**

1. Filing Frivolous Claims (Rule 11 FRCP)-

Under Rule 11, an attorney, by signing the pleading, agrees that: (1) attorney has brought an action for a proper purpose, (2) the attorney has not brought a frivolous claim, (3) the claim is supported by admissible evidence, and (4) a reasonable investigation have [sic] been conducted to ensure the above.

Here, A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, prior to filing the claim A was required to ensure that the claim was supported by admissible evidence. Because A failed to conduct a reasonable investigation to determine whether the evidence was valid, and the claim was meritorious prior to filing the claim, A has violated the rules of ethics.

2. Duty to not allow client to commit perjury-

Under the model rules, if a client admits that he/she has committed perjury, the attorney must advise the client to inform the court. If the client refuses, the attorney must attempt to withdraw from representation, and if withdrawal is not possible, the attorney must disclose the perjury to the court. However, under the CA rules, once an attorney has advised the client to disclose the perjury to the court, and the client refuses, the attorney cannot disclose the perjury.

Here, A discovered that H had lied about W trying to hit H with the car, and that H had feigned his injury. Under either of the above stated rules, A had a duty to advise her client to disclose the perjury to the court. However, A did not advise H to disclose the fabrication, but instead chose to allow the case to die without prosecution. Because A failed to take the critical step of advising H to disclose the lie, A has violated the rules of ethics under both the model rules and the CA rules.

3. Duty to Withdraw-

Under the model rules, an attorney cannot assist her client to commit fraud or a crime and must withdraw if the client insists that the attorney pursue these ends. In CA, an attorney's duty to withdraw is permissive, but not required. Here, although H did not ask A to commit fraud, A's failure to withdraw from representing H after learning that H had created his claim against W is questionable. That A failed to at least request H to drop the claim she knew was frivolous may rise to the level of participating in H's fraud.

B. **Duties to Client-**

1. Breach of Client's Authority-

While an attorney has the right to control the arguments and claims put forth, the client (in civil cases) has the right to determine the objectives of the case. Here, A has asked Harry (H) to file a claim against W for assault and battery. However, H did not consent to filing the claim prior to A's filing. However, because H did not challenge A's filing, H will likely be held to have implicitly ratified A's filing of the claim.

ANSWER B TO QUESTION 5

1. Wilma v. Ann

a. Malicious Prosecution

Malicious prosecution in a civil setting is usually referred to as malicious institution of civil proceedings. It occurs when: 1) a plaintiff institutes civil proceedings against a defendant; 2) the proceedings are instituted for an improper purpose; 3) the proceedings are resolved in favor of the defendant; 4) the proceedings were instituted without probable cause or a reasonable basis for believing their merit; 5) harm.

First, Ann instituted the tort action against Wilma for assault and battery of Harry.

Second, the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle. Additionally, Ann failed to investigate the facts involved in this situation before bringing the case. When a lawyer brings an action for any reason other than to vindicate the rights of the plaintiff, the purpose is improper. Therefore, Ann acted improperly when she instituted the proceedings against Wilma.

Third, the tort action was dismissed with prejudice when Ann failed to litigate it. Dismissal with prejudice means that Harry is precluded from bringing the action in the future. Therefore, this designation suggests that Wilma is "off the hook" for this tort action and the proceedings were, in fact, resolved in her favor.

Fourth, the facts suggest that Ann brought the action without a reasonable factual basis for believing in its merit. Ann suggested that Harry would have an advantage if he could show that Wilma had engaged in improper behavior. The fact that Harry came into Ann's office just 2 days after hearing this, claiming that Wilma had attempted to run him over with the car, creates a suspicious causal connection between the advice and the claim. Additionally, the facts indicate that this was "the first suggestion of any violence between Harry and Wilma" and should have put Ann on notice that the claim needed more investigation before bringing suit.

Ann will argue that she is entitled to believe in Harry's account, and the fact that he had a noticeably bandaged hand gave her a reasonable basis for bringing the suit. Since the judge in the custody hearing believed Harry, he must have been quite convincing. However, as discussed above, this probably is not enough basis to bring the suit, given the circumstances between Harry and Wilma's acrimonious custody battle.

Fifth, Wilma will certainly be able to show harm because the judge awarded full custody to Harry and she has no custody of her children.

Therefore, because all of these requirements indicate that Ann acted improperly, Wilma will likely be successful on her claim of malicious institution of civil proceedings.

b. Abuse of Process

Abuse of process occurs when a legal process or proceeding is used to gain an improper advantage and such advantage results in harm to the plaintiff. Here, Ann used the legal process of a civil claim in tort against Wilma for allegedly assaulting and battering Ann's client, Harry.

As discussed above, Ann used this process to gain an improper advantage in the custody hearing between Harry and Wilma. Her advantage was improper because the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle.

Wilma was also likely disadvantaged by Ann's use of the tort action against her. The facts indicate that the judge believed Harry's version of the story over Wilma's and awarded him sole custody of their children. Therefore, Wilma suffered harm and will be successful in showing that Ann abused process by bringing the tort action against her.

c. Defamation

Defamation is the: 1) publication 2) to a third party 3) of a statement about the plaintiff 4) that tends to adversely affect the reputation of the plaintiff. Here, Ann instituted a tort action for assault and battery against Wilma. By filing this complaint, she published in writing the accusations that Wilma acted violently with her husband. This publication is a form of libel. The publication was to a third party because it was filed with the court. Ann published the statements a second time by arguing about them before the judge in the custody hearing. This oral publication is a form of slander.

Because Wilma is not a public figure and the matter is not one of public concern, Wilma does not need to prove that the statement was false.

The statements were clearly about Wilma as the complaint had to name her as defendant and the statements in court must have expressly indicated Wilma as the tortious batterer. These accusations probably tend to adversely affect Wilma's reputation. The accusations suggest that Wilma has violent tendencies against her ex-husband. While some listeners might readily forgive such tendencies, a judge considering whether Wilma is a proper parent certainly would not. Therefore, the accusations not only tend to adversely affect Wilma's reputation but, in fact, hurt her reputation with the judge presiding over the custody hearing.

Defenses

No adequate defenses exist for the malicious prosecution or abuse of process actions.

Common Interest

Ann will try to argue that she had a defense to the defamation action because she made the statements to parties with a common interest. However, this privilege is only a qualified privilege that can be extinguished with abuse. Even though Ann's publication to the judge and the court were to interested parties, Ann did not make any efforts to investigate the truth of the accusation and therefore she abused her privilege of spreading the accusations about Wilma.

Absolute Litigation Privilege

Ann will argue that her comments to the court were privileged because comments in a courtroom have an absolute privilege. Because Ann's publications were to a judge and were in a tort complaint, they do qualify as protected under the absolute privilege for statements made in a courtroom. Therefore, Wilma's defamation action against Ann will fail.

2. Professional Conduct

Duty of Candor to the Court

As an officer of the court, lawyers owe the court a duty of candor. This requires that lawyers do nothing to promote fraud on the court. Ann may have violated this duty by instituting a tort action against Ann without fully investigating the facts first and for the improper purpose of gaining an advantage in the custody battle. Furthermore, she planted the idea in Harry's mind to fabricate conduct about Wilma, thus aiding a client to defraud the court.

When a client seeks representation that would require the attorney to engage in conduct that violates a law or ethical standard, the attorney must withdraw from the representation. Ann should not have represented Harry in this action and should not have counseled her client to improperly gain an advantage by claiming a tort injury. Therefore, Ann will be subject to discipline for this conduct.

Additionally, Ann may have violated her duty of candor to the court when she learned that Harry's story about Wilma was fabricated and merely failed to prosecute the tort action against Wilma.

The ABA Model Rules require that lawyers may not assist their clients in lying to the court. The ABA and California rules say that lawyers may withdraw if they learn that a client has used the lawyer to assist them in a past crime or fraud. California rules of conduct say that lawyers must do nothing to further the deception.

Here, when Ann found out about Harry's lies, she merely failed to prosecute the action against Wilma rather than withdrawing the action. This may have violated her duty of candor to the court because she allowed the case to remain on the docket even after finding out about the lie. Therefore, Ann may be subject to discipline for this action.

Duty Not to Suborn Perjury

Lawyers must not aid clients in suborning perjury. Here, Harry lied to the judge during the custody hearing by claiming that Wilma had engaged in tortious conduct. The ABA would allow Ann to withdraw. California does not allow Ann to do so but she must do nothing to further the deception. In either case, Ann should have counseled Harry to retract his lies to the judge so that the judge would be able to properly rule on the custody matter with truthful facts.

Duty of Fairness to the Adversary

Lawyers owe a duty of fairness to their adversaries. This duty precludes lawyers from engaging in conduct that obstructs the truth-seeking process. By filing a suit to gain an advantage in the custody battle, Ann violated her duty of fairness to Wilma as the adversary. Therefore, Ann is subject to discipline for this violation as well.

Duty of Competence

The rules of professional conduct require that lawyers competently serve their clients. The duty of competence requires lawyers to possess all of the knowledge, skill, thoroughness and preparation necessary for the representation.

Here, Ann may have violated her duty of competence by suggesting that Harry find some improper behavior in Wilma and by urging Harry to file a tort claim for assault and battery without first investigating all of the facts. When Harry came to Ann just two days after Ann's suggesting that Wilma's improper behavior would advantage [sic] Harry in the custody battle, Ann failed to prepare for tort litigation by investigating the facts of the incident. She merely accepted Harry's word.

Additionally, because this was the first suggestion of violence between Harry and Wilma, Ann should have been on notice that investigation was necessary. Therefore, Ann is also probably subject to discipline for violating her duty of competence in failing to adequately prepare for the tort claim against Wilma.

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QUESTION 5

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as "the modern, safe means of controlling allergy symptoms." Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her Doc (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because "this pill is the best-known method of controlling allergy symptoms."

Bud, Sally's brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally's eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally's medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

ANSWER A TO ESSAY QUESTION 5

Sally will bring products liability actions against Mfr. based on strict liability, negligence, intentional torts and warranty theories.

Strict Products Liability

A strict products liability prima facie case requires a manufacturer or (dealer) of the goods, an unreasonably dangerous product that could have been made safer with adequate warning, a foreseeable user of the product and a foreseeable use of the product that results in injury.

Mfr. is the manufacturer of the prescription allergy pills. The pills were rendered unreasonably dangerous by Mfr's failure to include a warranty that there was a remote risk of permanent loss of eyesight associated with the use. Sally was a foreseeable user because she was an allergy sufferer who read the Mfr's advertisement. Sally was injured because she suffered a substantial loss of eyesight as a result of using the pills, with eventual, total loss of eyesight.

Mfr's Defenses

Mfr. will first assert that the allergy pills are available by prescription only and they had informed doctors of the remote risk (Doc here was aware of the risk), and they were entitled to rely on Doc as a learned intermediary that would adequately warn patients as part of his prescription analysis and treatment.

This will not succeed as Mfr. directly advertised the availability of the allergy pills as "the modern, safe means of controlling allergy symptoms" directly to Sally. Sally relied on the advertisement in requesting Doc to prescribe the pills.

Next Mfr. will assert Sally assumed the risk by taking the prescription pills. This will surely fail. Sally was not aware of the risk, much less willing to take it.

Finally, Mfr. will assert Sally had a duty to mitigate her damages. If a person unreasonably fails to seek medical care that could prevent or lessen damages, the defendant will not be liable for that preventable danger.

Here Sally had the opportunity to undergo surgery to replace a cornea. Her brother Bud was a willing and compatible donor and the surgery would likely

have been a complete success. Additionally, Sally's insurance would have paid all expenses.

Because Sally was fearful she was unwilling to undergo the surgery. The issue is whether Sally was reasonable in that fear and whether Mfr. should be liable for her resulting complete loss of eyesight.

Normally a defendant is liable for all a plaintiff's injuries caused by the defendant even if the extent is more serious than expected. It is likely though that a jury would find Sally unreasonable under the circumstances here because of the low risk, the likelihood of success and the full coverage by insurance. Mfr. will be liable for some damages for Sally's loss of eyesight but not for permanent and total loss.

Mfr. Negligence Products Liability

Sally must establish Mfr. owed her a duty of care, that they breached that duty and the breach is the actual and legal cause of her damages.

Duty

Mfr. owes a duty of care to all foreseeable users of its product. All allergy sufferers are foreseeable users; Sally is owed a duty.

Standard of Care

Mfr. owes Sally a standard of care of the reasonably prudent manufacturer of prescription drugs.

Breach

Mfr. breached its duty to Sally by failing to provide a warning with the allergy pills Mfr. was aware of a remote possibility of risk of permanent loss. The burden of providing a warning is minor compared with the magnitude of potential harm. Mfr.'s failure to provide this warning was a duty breach and resulted in Sally's injury.

Actual Cause

The facts state that the allergy pills were a direct cause of Sally's loss of eyesight.

Legal/Prox Cause

It is foreseeable that a failure to include a warning could result in injury. Sally is entitled to rely on the presumption that she would have heeded the warning had she been informed.

Damages

Sally suffered permanent total loss of eyesight in both eyes.

Defenses

In addition to those described above under strict liability, Mfr. will assert contributory negligence. They will assert that Sally failed to use a reasonable standard of care to prevent injury to herself. This defense will not succeed. Sally was not aware of the risk of danger and this defense is not successful if her only negligence is in failing to discover the defect, here the lack of warning.

Intentional Tort Battery

Sally will assert that Mfr. acted to cause a harmful or offensive contact.

Mfr.'s act was intentional in that they knew with substantial certainty that there was a remote risk of eye damage. They intentionally did not include a warning. The harmful or offensive contact was Sally's loss of eyesight.

Damages as discussed above.

Mfr. will assert the defense of consent. Sally will argue Mfr. exceeded the scope of her consent by failing to include the warning that eye damage could result.

Because Mfr. knew of the risk and intentionally failed to warn Sally may prevail here as well.

Additionally Sally will assert warranty theories.

Express Warranty

Mfr. advertised "modern safe means of controlling allergy symptoms." No disclaimers are given in the facts, but disclaimers not valid as to express warranties anyway.

Sally will be entitled to recover here as well.

Implied Warranty of Merchantability

Implied in all sales of goods is the warranty by a merchant seller – here Mfr. – that the goods conform to reasonable standards of the use for which they are designed. While remedies could be limited here, they couldn't be eliminated and disclaimers are deemed unconscionable when personal injury results.

Implied Warranty of Fitness for Particular Purpose

Sally may bring this action against Mfr. or Doc or both. Sally was seeking relief from allergy symptoms. While there is no evidence she did get relief for allergy, it isn't reasonable that the loss of eyesight accompanies such relief. Sally will seek damages from Doc for negligence in prescribing the pills. Sally must show duty, breach, causation and damages.

Doc's Duty to Care and Standard of Care

Doc owes Sally the duty of a member of good standing practicing medicine in a similar area. It is minimally the duty of a reasonably prudent professional. If Doc is an allergy specialist he will be held to a higher standard.

Sally is owed a duty as a reasonably foreseeable plaintiff. As Doc's patient, Sally is clearly owed a duty.

Breach

Doc breached his duty to Sally by failing to give her informed consent about the allergy pills he was prescribing.

The standard of breach here is judged two ways:

1) What a reasonable person would have wanted to know about the risk;

2) What Sally would have wanted to know.

Causation

If a reasonable person wouldn't have consented or Sally wouldn't have consented if the risks were known and if the risks did in fact occur, Doc's breach was the actual and prox cause of injury.

Sally said she had not been warned and would not have consented to take the pills if she had known of the risk. Perhaps Sally had a[n] unusually high sensitivity to concern over eyesight. It doesn't really matter why she wouldn't have consented.

The lack of warning was the actual cause and prox cause of breach.

Damages are discussed above.

Doc will raise same defenses as above.

Doc and Mfr. will each seek contribution on the negligence claims.

ANSWER B TO ESSAY QUESTION 5

Sally v. MFR – Strict Products Liability

Sally may assert a claim of strict products liability against manufacturer. Manufacturers are held strictly liable for products they put into the market in a defective condition creating an unreasonable risk of injury or danger to the consumer. In this case, Sally has the burden of showing that the allergy medication produced by Manufacturer (Mfr) were [sic] defective when it left Mfr's control and the defect created an unreasonable risk of danger or injury to the consumer.

Failure to Warn

A product may be properly deemed "defective" for the purpose of strict liability if the manufacturer fails to place proper warnings on the product. If consumer warnings may be affixed to the product at relatively low cost to the manufacturer, it may be held liable on a products liability for failure to do so.

Here, Mfr will assert that its medication presented a remote risk of permanent eyesight. Inherent in almost all medication is the risk of some sort of unwanted side effect. Mfr will claim that the "remote" nature of the risk means that the product did not pose an unreasonable risk of danger or injury. However, the degree of harm that may be incurred by takers of Mfr's allergy medication is significant. Permanent blindness is a serious debilitating condition. As such even a remote risk may be something a reasonable person may not be willing to assume. As such, it is likely the court will find that the allergy medication produced by Mfr posed an unreasonable risk of danger or injury due to the fact that Mfr failed to place in warnings in its advertisements or on its packaging. Although the facts do not indicate the cost involved in making such warnings, it is unlikely that a label on a package or a statement in advertising is so cost prohibitive to warrant excuse from its duty to warn. As such, Sally will be able to prove that the allergy medication produced by Mfr is defective for failure to make adequate warnings.

Duty

As mentioned above, Mfr had a duty to warn of the damages inherent in its product.

It breached that duty when it failed to make such warnings. In order to recover, Sally must show that she is a foreseeable plaintiff to whom that duty was owed.

Under the majority test, a plaintiff is foreseeable if she is in the "zone of danger" created by defendant's conduct. Here, any person who received a prescription for the allergy medication produced by Mfr was within the zone of danger created by the risk involved in taking the pills. As such, Sally is a foreseeable plaintiff within the zone of danger under the majority approach.

A minority of jurisdictions follow the Andrews approach which holds that all plaintiffs are "foreseeable." As such, Sally would be a foreseeable plaintiff under this approach as well.

Causation

Once Sally has shown that the allergy medication was defective when it left the control of Mfr and Mfr breached a duty owed to her, she must then establish that the defect was the actual and proximate cause of her injuries.

Actual Cause – But for Test

Sally should have no problem proving the defect caused by failing to adequately warn caused her injury. The facts state that Sally would never have taken the pills if she had been warned of the possible side effect of blindness. Therefore, but for Mfr's failure to warn, Sally would not have ingested the pills and subsequently lost her eyesight.

Proximate Cause – Foreseeability Test

Even though Mfr is the "but for" cause of Sally's injury, Sally must also prove that her injury was foreseeable. Here, Mfr was well aware of the risk presented by its allergy medication. Mfr should have been aware of the fact that its failure to warn would cause users of the medication to unwittingly subject themselves to the risk and some of them would in turn suffer blindness. Here, Sally actively sought a prescription for the pills. There was no warning in the advertisements nor on the package and therefore Sally took the medication unaware of its incumbent risks. As a result, Sally lost her sight. Her injuries were foreseeable and therefore proximately caused by Mfr's breach of duty in failing to warn.

Mfr may assert that Doc's failure to inform Sally of the risks involved in the use of the medication was a supervening factor operating to relieve it of liability. A supervening factor is one that is unforeseeable and extraordinary. It is well established that ordinary negligence in the world is foreseeable and not extraordinary. Consequently, Doc's failure to warn is not a supervening factor because his conduct amounts to negligence and is not so extraordinary or unforeseeable as to amount to a supervening factor. As such, Mfr's conduct survives proximate cause analysis.

Damages

Lastly, Sally must prove that Mfr's failure to warn resulted in damages to her. As mentioned, Sally went blind and so damages are easily established.

Sally v. Mfr – Products Liability – Negligence

In the alternative to strict products liability, Sally may also pursue under a negligence theory. The analysis would be the same as for products liability; however, Sally's burden with respect to breach of duty would be different. In pursuing a negligence claim, Sally must show that Mfr was negligent in its production of the allergy medication or failure to include a warning. In other words, Sally must show that Mfr could have taken reasonable steps to prevent the harm caused. Once shown, the analysis would proceed for causation and damages as stated above. Here the facts support equally a theory of negligence and strict liability. Because strict liability is an easier approach to pursue, Sally will likely proceed under this theory.

Breach of Warranty

Express Warranty

Sally may also assert that Mfr breached an express warranty made in its advertisement claims that the allergy medication was the "modern, safe means of controlling allergy symptoms." Sally may assert that the risk imposed means that the medication is not in fact "safe," and therefore Mfr's representations otherwise are unfounded.

Misrepresentation

In addition, Sally may assert that Mfr engaged in intentional misrepresentation. Sally will claim that Mfr's omission with regarding to the risks amounts to a misrepresentation of safety with knowledge of the falsity of the communication. In addition, Sally will claim such communication was made with the intent that consumers rely. Sally, as a consumer, relied on the representation of product safety and was injured. As such, she can proceed under this claim as well.

Defenses

Contributory Negligence and Comparative Fault are NO DEFENSE to Strict Liability and Intentional Misrepresentation

Mfr cannot assert any contributory negligence or comparative fault of Sally as a defense to her strict liability and intentional misrepresentation claims.

Contributory Negligence and Comparative Fault Available for Negligence

Although contributory negligence and comparative fault are available defenses under negligence, the facts do not indicate that Sally was negligent in taking the medication and so Mfr will not be able to assert these claims.

Assumption of Risk

Assumption of risk is a defense to strict liability if defendant can show that plaintiff went forward in face of a known risk. Mfr may try to assert assumption of risk in that Sally actively sought and procured a prescription for the allergy medication and thereby assumed the risk involved in taking the new medication. However, Sally's conduct was in response to Mfr's advertisements and as mentioned above, such advertisements did not contain any warnings of the risks. In addition, the packaging did not contain any warnings. Crucial to the defense of assumption of risk is the element of "knowledge" on the part of the plaintiff. Here, Sally clearly did not have knowledge of the risk of blindness and therefore cannot be said to have assumed the risk.

Duty to Mitigate

A plaintiff has a duty to mitigate her damages. In other words, plaintiff must act to minimize her loss. Failure to do [so] limits the liability of a defendant for any

aggravation of injury caused by the failure to mitigate. Here, Mfr may attempt to limit its liability for Sally's blindness by pointing to her refusal to engage in the cornea transplant operation that could have been accomplished with minimal risk and no cost to her. Sally opted not to go through with the surgery out of her fear of the operation. Plaintiff's duty to mitigate is judged by the reasonable person standard. If the court determines that Sally's decision not to undergo the surgery was not reasonable, Mfr's liability for damages will be seriously curtailed. However, because the mitigation at bar involves major surgery, it may will be likely that a reasonable person would not choose to undergo the risk involved. Even though the risk is stated to be minimal, this is not the same as involving not the same as involving no risk at all. In fact, Sally may well point to the "remote" risk realized by taking Mfr's medication as grounds for her decision not to undertake any further risks with her health and well-being. Depending on the court's determination of the reasonableness of Sally's decision, Mfr's responsibility for damages may or may not be reduced.

Sally v. Doc – Negligence

Sally may assert a claim against Doc in negligence for his failure to warn Sally of the risks involved in taking the allergy medication.

Duty

Here, Doc had a duty to conform his conduct to the reasonable doctor in good standing in the professional community in which he is situated. This means that if Doc fails to act as a reasonable doctor in good standing in his community, he will be held to have breached his duty of care.

Breach of Duty – Failure to Inform

Doctors have a duty to obtain informed consent of their patients with respect to medical treatment. The duty to "inform" is judged by what a reasonable patient would want to know in making health care decisions. This standard is judged from the patient's perspective, not the doctor's. It is irrelevant that the average doctor would not make a disclosure if the court finds that a reasonable patient would want to know the relevant information at bar.

Here, the risk of blindness is information that a reasonable patient would want to know in deciding whether or not to take medication. This is supported by the fact

that Sally states that she would never have taken the medication had she known of the risks. Therefore, Doc's failure to advise is a breach of duty.

Causation

Here, the facts indicate that Doc's failure to warn was both the actual and proximate cause of Sally's injury. Similar to Mfr, Doc cannot point to Mfr's failure to provide a warning as a supervening cause that relieves him of proximate liability. Doc was aware of the risk and therefore had a duty in his own righ[t] to warn Sally. His failure to do so caused Sally to take the medication uninformed and she suffered injury because of it.

Damages

As mentioned above, Sally's blindness amounts to sufficient damages for recovery.

Defenses

Contributory Negligence & Comparative Fault

As mentioned above, the facts do not support a defense on grounds of contributory negligence or comparative fault as Sally manifested no signs of her own negligence in taking the medication.

Assumption of Risk

Doc's claim of Sally's assumption of risk will fail for the same reasons stated above with respect to Mfr.

Duty to Mitigate

The analysis with respect to Doc's liability for damages and any claim based upon Sally's failure to mitigate will proceed in the same manner as discussed above with respect to Mfr.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 4

Paula is the president and Stan is the secretary of a labor union that was involved in a bitter and highly-publicized labor dispute with City and Mayor. An unknown person surreptitiously recorded a conversation between Paula and Stan, which took place in the corner booth of a coffee shop during a break in the contract negotiations with City. During the conversation, Paula whispered to Stan, "Mayor is a crook who voted against allowing us to build our new union headquarters because we wouldn't pay him off."

The unknown person anonymously sent the recorded conversation to KXYZ radio station in City. Knowing that the conversation had been surreptitiously recorded, KXYZ broadcast the conversation immediately after it received the tape.

After the broadcast, Paula sued KXYZ for invasion of privacy in publishing her conversation with Stan. Mayor sued Paula and KXYZ for defamation.

1. Is Paula likely to succeed in her suit against KXYZ? Discuss.

2. Is Mayor likely to succeed in his suit against Paula and KXYZ? Discuss.

Answer A to Question 4

1. Paula v. KXYZ

Paula can attempt to bring a suit against KXYZ for invasion of her privacy on several theories including false light publication, intrus[t]ion upon seclusion, and public disclosure of private facts. The question asks how likely she is to succeed in these suits and each is treated separately below.

A preliminary first amendment concern is appropriate. The Supreme Court has recently held that a broadcaster cannot be held liable for the broadcast of illegally obtained information even if it is aware of the illegality of the recording so long as the broadcaster was not a party to the illegality and the information involves a matter of public concern. Here, the facts suggest that KXYZ was not a party to the illegality which was the surreptitious recorder's acts, and even though it could be aware that the information was not legally obtained, because the subject matter of the statement involves the Mayor as well as the highly publicized labor disputes that Paula was involved in, KXYZ will argue that this is a matter of a public concern and they are protected by the First Amendment in making their broadcasts. Now, special attention will be paid to each of the causes of action.

FALSE LIGHT

An action for false light publication can be brought where the plaintiff shows that there has been widespread dissemination of information that places plaintiff's beliefs, thoughts, actions in false light that would be objectionable to a reasonable person. Here, Paula would claim that KXYZ's actions in immediately playing the recording of her private conversation with Stan placed her in false light because it imputed to her the belief that Mayor was a crook.

The widespread dissemination element is met in this case because KXYZ broadcast the information over the airwaves.

There is an issue as to whether the dissemination of the information placed Paula's beliefs, thoughts, or actions in a false light in such a way that would be objectionable to a reasonable person. KXYZ would argue that a reasonable person would not object to having their claim that the mayor is a crook be publicized because the corruption of the mayor is something that Paula herself wanted to correct. Paula will argue that taking the statement out of context and publishing it makes it seem like she is making a very broad accusation of the mayor. Moreover, Paula would argue that publishing such a statement puts her in jeopardy of potential tort liability, which is the case here, as Mayor has sued her. Upon hearing the arguments of both sides, a court would probably consider the statements disseminated by KXYZ as not being objectionable to a reasonable person because they do not distort Paula's opinion of the mayor but rather accurately represent them because they played the taping of her speaking.

As a defense, KXYZ would argue that the publication of this information is protected by the First Amendment to the Constitution. The First Amendment is incorporated through the due process clause of the Fourteenth Amendment and binds the states as well. Therefore, a state - - as a state actor - - cannot enforce a cause of action where the underlying conduct being adjudicated is protected by the First Amendment unless certain standards are satisfied. In a false light case, KXYZ would argue that because the corruption of the mayor is a matter of public concern and also because the labor dispute between the labor union and the city has been highly publicized, the public has a right to be informed about both the mayor and the labor union's interactions. If the court finds that the subject matter of the broadcast implicating the mayor in corruption and involving negotiations between the Labor Union and Mayor indeed involves a matter of public concern, the court will require Paula to show actual malice on the part of KXYZ to recover. Here, Paula would emphasize their immediate broadcast of the information and claim that such highly reckless broadcast without checking the accuracy of the recording or ensuring that there might be some basis to it constitutes reckless disregard for the consequences of their broadcast. This is a close question, but a court would probably ultimately decide that the broadcasting of the information was short of reckless for false light purposes.

In conclusion, because there was not a material misrepresentation of Paula's views in the broadcast, a court will probably find that the broadcast did not place her views in a false light and Paula will not recover on this theory.

INTRUSION UPON SECLUSION

An action for intrusion can be brought where a plaintiff can show that a defendant intruded, by an act of prying or intrusion objectionable to a reasonable person, into a space where the plaintiff had a reasonable expectation of privacy. The tort provides a remedy for the privacy of the plaintiff, so therefore the truthfulness of any information gained as a result of the intrusion does not exonerate the defendant. Here, Paula will have to show that KXYZ intruded upon her by taking a private conversation she had with Stan and that the information that KXYZ broadcast was taken from a place where Paula had a reasonable expectation of privacy. Because KXYZ did not itself intrude upon Paula, Paula will have to pursue KXYZ on an agency theory. If Paul is not successful in linking KXYZ to the intrusion, then she cannot hold them liable for this tort.

The primary obstacle for Paula is in asserting that KXYZ is the party responsible for intrusion in this case. The tort does not protect the plaintiff's privacy interest as a result of the broadcast of the information, which KXYZ clearly did; rather, the tort provides relief for intrusion upon the privacy interest of the plaintiff. Paula will argue that KXYZ is vicariously liable for the surreptitious recording made by the unknown recorder of the information, the party most appropriately liable for intrusion. Here, Paula would have to draw a connection between KXYZ and the recorded [sic], perhaps by showing evidence that the recorded [sic] was an employee of KXYZ. If, for example, KXYZ by prearranged agreement paid the person to stakeout and follow Paula and record her conversation, Paula might be able to claim that there was an employer-employee relationship upon which vicarious liability could

be grounded. However, the facts suggest that the recorder acted on his own and sent the conversation anonymously to KXYZ. If the court believes that there is no relationship between KXYZ and the recorder, then KXYZ cannot be found liable for intrusion because it was not the party responsible for the intrusion.

Whether or not KXYZ is found to be vicariously liable, it is helpful to discuss the remaining elements of the tort. The first element of intrusion will be difficult to satisfy for Paula. Under the law of intrusion, an intrusion occurs by some act of prying or meddling that is objectionable to a reasonable person. For example, someone using binoculars or high powered camera lens from across the street to spy on or take photographs of someone in a private place is a sufficient act of intrusion. Here, Paula will claim that the "surreptitious" recording of her conversation constitutes an act of intrusion. Paula will argue that a reasonable person would object to other people prying into their conversations. On the question of intrusion, KXYZ will emphasize that there is no intrusion where someone speaks in public. KXYZ will claim that it is not reasonable for a person to object that someone is listening to them when they speak in public, rather, KXYZ will argue, the speaker assumes the risk of an "uninvited ear" whenever they speak in public. This is a close question on intrusion, but because the facts suggest that the recording is surreptitious, a court will probably find that such secretive and intrusive recording of a conversation is sufficient to satisfy the first element of the tort.

On the question of whether Paula had a reasonable expectation of privacy in her place of seclusion, there will be difficulty. The tort of intrusion only protects the privacy interest of the plaintiff where they have a legitimate expectation of privacy in the place upon which their privacy was intruded. Here, Paula was in a coffee shop directly across the street from where contract negotiations were taking place. Paula will emphasize that she was in "the corner booth" of the coffee shop and that she was "whispering" to Stan when she made the statement, all suggesting that she subjectively intended, and that a reasonable person would objectively act that way, to keep the subject matter of her conversation private. KXYZ would argue, like on the intrusion element, that statements made in public, even if the speaker subjectively intends to keep them relatively secret, are not objectively reasonably private. KXYZ will emphasize that a speaker assumes the risk of "an unreliable ear" when they make statements in public. Paula will counter that she took reasonable precautions to keep her statement private despite being in public by being in a corner booth and by whispering. Again, this is a close question, but because the facts suggest that Paula made an effort to keep her statement quiet and between her and Stan, a court could find that she had a reasonable expectation of privacy in the corner booth and in her statement.

PUBLIC DISCLOSURE OF PRIVATE FACTS

An action for disclosure can be brought where a plaintiff can show that a defendant caused widespread dissemination of information in which plaintiff had a reasonable expectation of privacy and which a reasonable person would object to. Because the interest protected by this tort is the privacy of the plaintiff and not the subject matter of the information

disseminated, truth is not a defense to the tort because even if the information is truthful, the injury to the plaintiff's privacy is still unremedied. Here, as discussed above, the primary obstacle for Paula is showing that she had a reasonable expectation of privacy in the contents of her statement.

Here, KXYZ clearly caused widespread public dissemination of the statements Paula made about the mayor. By broadcasting it over the airwaves, this element is met if the dissemination would be objectionable to a reasonable person. Here, KXYZ would argue that Paula was a public figure trying to settle the labor dispute with the city in the favor of her union. KXYZ would emphasize that the labor dispute has been highly publicized already and that it is a matter of public concern. These arguments, however, emphasize the subjective feelings of Paula regarding the information rather than what would be objectionable to a reasonable person. Nevertheless, a reasonable person attempting to put forward a cause, KXYZ would argue, would not object to the disclosure of information pushing for that cause. Paula will counter that the information disclosed would certainly be objectionable to a reasonable person because of the potential tort liability that could arise to the speaker if such information were widely disseminated. Here, in particular, Paula can show that she is being sued by Mayor for defamation and without KXYZ's disclosure of the statement, she would probably not be sued. This, again, is a close question but a court could reasonably find that the disclosure of the information here would be objectionable to a reasonable person because of the potential tort liability the speaker assumes and thus Paula will have satisfied the first element.

The second element is more problematic for Paula because she must show that the facts were private to her and that a reasonable person would consider them private. Here, Paula is a labor union leader and she ardently pushes for the positions of her union through publicity and in her negotiations with the City. The alleged disclosure even concerns a contract to build the new union headquarters, something directly related to the public nature of Paula's position. KXYZ would emphasize this and say that the content of the statement is not private because it has to do with Paula's public actions, negotiating with the city and acting as president of the labor union. A court could find that, despite the private nature of the conversation in the coffee booth corner, the subject matter of the statement here is not private but rather a public matter because it involves the City and the labor union which is currently publicized a great deal. Only if the court finds that the statements contained private information to Paula, would an action for disclosure lie.

2. Mayor v. Paula & KXYZ

As a public figure, the mayor must prove additional elements in his case in order to recover for the tort of defamation. As the actions between the Mayor and Paula and the Mayor and KXYZ are of a different nature and have different defenses, they will be treated separately.

The common law elements for defamation include: (1) a defamatory statement, meaning a statement which a reasonable person would take as being harmful to a person's reputation, (2) that the statement be "of or concerning" the plaintiff, meaning a reasonable

person would understand it to refer to the plaintiff, (3) that the statement be "published," which requires only communication to a third person but may also include more widespread dissemination, and (4) damages, which may be presumed under certain circumstances.

When the plaintiff is a public figure, he must allow show [sic] (1) falsity of the statement as well as (2) some degree of fault on the part of the alleged defamer.

Mayor v. Paula

In Mayor's case v. Paula, he would focus on the actual conversation she had with Stan in the coffee shop. The allegation that Mayor is a "crook" is clearly defamatory particularly in the context of alleging that the Mayor required a payoff as a condition for allowing the union to build a new headquarters. A reasonable person would surely find that such a statement of alleged fact would be considered harmful to the reputation of the target of the speech. Moreover, it is clear from the content of the statement that it concerns the Mayor, a reasonable person hearing the statement would know that it refers to Mayor because it specifically calls him a "crook." Third, the statement was published because Paula made the statement to Stan. Regardless of the subsequent broadcast of the information by KXYZ, Paula's making the statement to Stan is sufficient publication for a tort to lie as between Mayor and Paul. There might be an issue as to whether Paula can be held liable for subsequent damage which occurs to Mayor as a result of the broadcast because Paula is not responsible for that part of the injury to Mayor's reputation.

Because this is spoken defamation, it is considered slander. In particular, Paula's statement would be considered slander per se because it was a statement relating to the Mayor's profession and it was also a statement involving the moral turpitude of the Mayor. Slander per se exists where the alleged defamatory statement concerns a loathsome disease, the unchastity of a woman, the moral turpitude of the defamed person, or the defamed person's business or professional capacity. The effect of slander per se is that damages are presumed and need not be pled, although plaintiffs often will anyway. Here, Mayor need not prove special economic damages from the tort although he almost certainly will want to, particularly to avoid damages being called too speculative because of the problem of KXYZ's broadcast which enlarged the damage to Mayor. This would not be a problem if Paula and KXYZ were found jointly & severally liable for the entire undivided injury to Mayor, although it is not clear that they would be jointly & severally liable because two distinct acts of defamation could be argued to have occurred, one in the coffee shop and then the second on the airwaves. Only if it can be shown that Paula created a foreseeable risk that the information would be let out and that the broadcast was within that scope of risk created by Paula's statement, then the limiting principle of proximate cause would not cut short Paula's liability and allow her to be held responsible for the entire injury.

Having established the basic elements of the tort, Mayor will still have to argue falsity and, because he is a public figure, actual malice on the part of Paula. He will almost certainly not be able to do so, although more facts are necessary to reach a determination. Under New York Times v. Sullivan, a public figure tying to collect damages for defamation must

prove the falsity of the information claimed to be defamatory. It is unclear whether the mayor is in fact a crook, but if he did require a payoff for the permission to build new labor headquarters, then he could not collect damages in this case. Moreover, Mayor will have to show that Paula acted with malice in making the statement, either reckless disregard for the truthfulness of the information itself or reckless disregard as to the consequences of making the statement. Here, because Paula can show that she was taking pains to keep the information between her and Stan private, a court will probably not find her statement to be malicious. If she had used a bullhorn, for example, and made the statements in front of City Hall, then malice might be more appropriately found, but liability would still only lie if the statements were false because Mayor is a public figure. The idea behind the heightened requirements is that the First Amendment protects rigorous debate and exchange of ideas over public issues.

Mayor v. KXYZ

As discussed above, Mayor would have to make the same showing as to KXYZ to recover. Because the broadcast involved the Mayor and defamed him, he has satisfied the basic requirements for defamation. However, special First Amendment concerns arise that further protect KXYZ.

First, KXYZ under the Constitution may broadcast even illegally obtained information if it is truthful so long as KXYZ was not a party to the illegality and the information conveyed was a matter of public concern. Here, the facts take special pains to say the recorder, although surreptitious, was not related to KXYZ. Unless Mayor could connect KXYZ to the taping, they cannot be held liable for the publication of the information.

Second, the falsity of the information might not be able to [be] proven by the Mayor, which alone would relieve KXYZ of liability.

Third, the Mayor may be able to show malice on the part of KXYZ because they broadcast the information so quickly upon receiving the recording. This might be interpreted as reckless disregard for the consequences of broadcasting the defamatory material and if Mayor can show the other [e]lements as well as the falsity of the statement, he might be able to recover by showing this level of actual malice. KXYZ would of course counter that at worst such behavior was merely negligent and should not expose them to liability given the First Amendment protections.

Answer B to Question 4

1. Paula v. KXYZ

Invasion of Privacy – Generally

Paula is suing KXYZ for invasion of privacy for publishing her conversation with Stan. This tort consists of four branches of causes of action. They include: (1) misappropriation, (2) intrusion, (3) false light, and (4) disclosure of private facts. These four causes of action are discussed next.

Misappropriation

To prove a prima facie case of misappropriation, plaintiff must show that the defendant used plaintiff's name or likeness for plaintiff's commercial advantage. Misappropriation is considered an invasion of privacy tort because a person's name or likeness is a matter within plaintiff's control. When another person takes that name or likeness and uses it for their own gain, an invasion into plaintiff's private affairs occurs.

Here, Paula could claim that KXYZ's publishing of the tape misappropriated her name or likeness. Paula is the president of a labor union. Stan is the secretary of the same union. These are–or potentially are–high profile positions in any community. Thus, KXYZ could use a salacious scandal involving these two figures to help boost its ratings. In this case, Paula would argue that KXYZ replayed the tape for precisely that reason. The fact that the conversation had been surreptitiously recorded made the dialogue even more intriguing, which would also help KXYZ's attempts to publicize itself and draw attention to its station. For this reason, Paula would argue that the station used her name and reputation (and even Stan's, if he pled this cause of action) for its own commercial advantage.

Thus, Paula's misappropriation claim has some merit because KXYZ's likely intent was to use this conversation–and its participants – to boost its audience.

Defense to Misappropriation – Newsworthiness

Newsworthiness is a defense to misappropriation. The newsworthiness doctrine states that a person's name or likeness can be appropriated for public consumption if it involves a matter of public concern.

Here, because the union was involved with a bitter and highly-publicized labor dispute with the Mayor and because the conversation involved a discussion about the Mayor, KXYZ would likely claim that it was privileged to replay the tape for those reasons.

Thus, because the tape did involve a matter of public interest, KXYZ's defense in this situation is likely valid.

Defense to Misappropriation – Freedom of Speech

A radio station also possesses a First Amendment right to broadcast issues involving a public matter. The courts have ruled that a radio station may replay a tape that was surreptitiously recorded and not violate a person's rights to privacy. This defense is related–and often intimately commingled with–the newsworthiness defense, but it should be noted here for the sake of thoroughness because of the importance of the First Amendment in American constitutional jurisprudence. This defense also arises in the defamation context, but it might be applied here as well.

Here, KXYZ will argue that beyond mere "newsworthiness," the courts have previously ruled that a radio station may replay surreptiously recorded conversations and not be liable for the airing. While this has been handed down in a defamation context, KXYZ might argue that it should apply here as well.

Thus, KXYZ might have a pure freedom of speech defense based on court precedent in a related area.

Intrusion

To prove a prima facie case of intrusion, plaintiff must show that the defendant invaded a space within which plaintiff had a reasonable expectation of privacy. This tort typically involves cameramen taking pictures of persons in their private homes or even Peeping Toms. However, it can be applied to surreptitiously recorded conversations as well. But the issue is whether KXYZ did the intrusion, or whether the anonymous person was the tortfeasor.

Here, KXYZ did not actually physically intrude on an area where Paula had a reasonable expectation of privacy. KXYZ is not the entity or person that recorded the tape. KXYZ mere[ly] replayed the tape, which was recorded by an anonymous individual. Certainly, the anonymous person may be liable. However, even the anonymous person would argue that because the conversation took place in a corner booth of a coffee shop, it was in a public place where neither Paula nor Stan had a reasonable expectation of privacy. Paula would respond that she "whispered" her comments. However, courts have held that whispered comments in a public area are not afforded a reasonable expectation of privacy (though they have done this in a Fourth Amendment search and seizure context). Even if KXYZ could be held liable under an "agency" theory for the intrusion of the anonymous individual, this argument concerning the public place would prevail in KXYZ's favor.

Thus, KXYZ would prevail on Paula's intrusion claim.

Defense to Intrusion – Public Place with No Reasonable Expectation of Privacy

As discussed immediately above, KXYZ would defend that even if it could be held liable under an "agency" theory for the anonymous person's actions (which may not be possible

under these facts), that Paula's comments in a public restaurant, even if whispered, were not private. The Court had held that "whispered" comments in a public area are not afforded a reasonable expectation of privacy, though it has done this in a Fourth Amendment context.

False Light

To prove a case of false light, plaintiff must show that defendant attributed to plaintiff actions she didn't take, views she doesn't hold, or even comments she didn't make. False light is a watered down version of defamation because it includes material that doesn't necessarily harm plaintiff's reputation, but it merely misportrays her beliefs or actions.

Here, Paula was not portrayed in a false light. Her conversation with Stan was accurately recorded. Her view[s] regarding the Mayor are her views and were not portrayed falsely.

Thus, Paula's false light cause of action is lacking.

False Light – Constitutional Considerations

It should also be noted that false light is likely subject to the same constitutional considerations as defamation. Meaning that plaintiff, if she were a public official or figure and the issue involved a matter of public concern, would have to demonstrate falsity (a prerequisite for false light in the first place) and fault, which would include actual malice if plaintiff were a public figure.

Here, Paula is most certainly a public figure. She is the president of the labor union and is involved in a highly publicized dispute with the Mayor. Paula may very well be an all-purpose public figure because of her position as president of the union, but at the very least, she is a limited-purpose public figure because of the controversy between the union and the Mayor. Thus, Paula might likely need to prove actual malice, which is clear and convincing evidence that KXYZ knew or had a reckless disregard for the falsity of the information. However, here, the conversation recorded truthful information.

Thus, Paula would likely not be able to prove falsity, as discussed, or fault.

Defense to False Light – Truth

As discussed above, Paula's views regarding the Mayor were accurately recorded. There is no false light here.

Private Fact

To prove revelation of private fact, plaintiff must demonstrate that defendant revealed private facts about plaintiff that were facts that a reasonable person would object to being revealed in a public fashion.

Here, Paula would argue that her views regarding the major [sic] were private views that she did not want exposed to the rest of the world. This argument is somewhat diminished by the fact that Paula and Stan (and the union) were in a bitter and highly-publicized dispute with the Mayor. However, Paula would respond that even in bitter disputes a reasonable person would not want their private views toward the other person revealed to the world-at-large. Paula has a good argument in this regard. However, KXYZ might contend this was a newsworthy event and, additionally, that Paula's dislike for the Mayor is likely well-known. This would be a reasonable argument, if KXYZ could prove it.

Thus, Paula may have a cause of action under the private fact doctrine.

Private Fact – Constitutional Considerations

Again, it should be noted, as per the discussion above, that constitutional considerations are likely applied to the private fact cause of action (or at least some commentators and courts have so held). However, where – as here – there is not fault on KXYZ's behalf involving actual malice and because the material recorded was ostensibly truthful, Paula's cause of action suffers in this regard.

Defense – Truth

It should be noted that truth is no defense to private fact causes of action. In fact, what makes the private fact cause of action so unique is that the private facts may very well be truthful (in fact, they almost always are, which separates private fact from false light).

2. Mayor v. Paula

Defamation – Generally

To prove a prima facie case of defamation, plaintiff must demonstrate that defendant (1) made defamatory comments, (2) of or concerning the plaintiff, (3) published, (4) to third persons, and (5) that plaintiff suffered damage to her reputation. These issues are discussed next. Also, when the issue involves a public official, then the official must prove (6) falsity and (7) fault under a constitutional standard.

Defamatory Material

Defamatory material is material that harms plaintiff's reputation when it is published to the outside world.

Here, Paula was quoted as saying that the "[M]ayor is a crook who voted against us allowing us to build our new union headquarters because we wouldn't pay him off." Certainly, such comments are harmful to the Mayor's reputation, especially when they are released over a radio station.

Thus, in and of itself, the material here is certainly "defamatory" in the limited sense of how this term is defined.

Of or Concerning Plaintiff

The defamatory material must be of or concerning the plaintiff, or be reasonably construed to be of or concerning the plaintiff if the plaintiff's name is not explicitly mentioned.

Here, Paula refers directly to the "mayor." However, there may be other communities in the area with mayors. However, Mayor will likely be able to show that because of the controversy between the union and himself, that a reasonable person would construe the comments as being about him.

Thus, this element is satisfied.

Published

The defamatory material must be published to a third person.

Here, Paula "published" her comments to Stan, the secretary of her labor union. Paula might claim that this conversation was privileged between two officers of a union and that, thus, it was not "published" in the normal sense of the term. However, this is likely not an adequate defense. Since Paul revealed her comments to a third person capable of understanding those comments, she "published" the material. Also, it should be noted that Paula ran the risk of others hearing her comments in a public restaurant as well.

Thus, Paula published her comments.

To Third Persons

The comments must be published to a third person, not just to herself.

Here, as discussed, Paula published to Stan (and ran the risk of publishing to others in a public restaurant).

Thus, this element is satisfied.

Damage to Reputation

General damages are presumed when the comments involve libel, which are written statements. However, they are not presumed when it involves slander, which are oral comments. However, damages for slander per se are presumed when the comments involving [sic] the plaintiff's professional reputation.

Here, Paula's comments to Stan were oral. However, they also involved the Mayor's

professional competence and integrity, which would likely fall under a slander per se exception, which would then make damages presumed.

Thus, damages based on slander per se would likely be shown here.

Falsity

The Mayor would need to prove falsity as part of his prima facie case against Paula.

Here, the Mayor may have a problem showing falsity if in fact the comments are true (of course, this goes without saying). But, if the facts later demonstrate that this was a false accusation and that Paul was saying this to spite the Mayor, he can win this element.

Thus, we would need more facts here to satisfy the Mayor's burden on this element.

Fault

Because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, again, the issue depends on whether Mayor can show that Paula's statements were false and, if so, whether she acted in knowledge of that fact or in reckless disregard of the fact when conveying her comments to Stan.

Thus, again, more facts are needed here.

Conclusion

The Mayor may not have a problem showing the traditional common law elements of defamation, but more information is needed to determine whether he satisfies the constitutional elements. If he can show falsity (perhaps not!) and fault on Paula's behalf (again, perhaps not, but more facts are needed), then he has a cause of action. Otherwise, his case may be weak.

Mayor v. KXYZ

Defamatory Material

As per above, the material here is defamatory insofar as it hurts the Mayor's reputation when it was revealed. A similar analysis as applied to Paul applies here.

Of or Concerning Plaintiff

Again, as per above, the material here likely concerns the Mayor. Although he is not mentioned by name, because of his dispute with the union, Paula's comments could reasonably be attributed as being about him.

Published

Here, most certainly, the comments were published by KXYZ over its airwaves.

To Third Persons

Again, here, using the same rule discussed above with regards to Paula, the tape was replayed over the airwaves and played to KXYZ's listening audience. This most certainly qualifies.

Damage to Reputation

Unlike the situation with Paula, the issue here is whether the tape, when replayed over the air, is slander or libel. The courts have held that such tapes replayed over the air (along with other planned comments over the radio or comments over television) are generally libel. Thus, here, damages would be presumed, assuming the other elements are true. However, because this is also slander per se, proving that this qualifies as libel is not essential. General damages would likely be presumed either way.

Falsity

Again, Mayor would have to prove falsity as part of his prima facie case. The same problems arise here as arise above in the discussion regarding Paula.

Fault

Again, because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, the same problems arise with respect to the radio station as applied to Paula. The Mayor must show that KXYZ knew or had a reckless disregard for the truth regarding the tape-recorded comments.

Thus, more facts are needed for Mayor to prove his case.

Defense – Privilege and Newsworthiness

The courts have held that a radio station is privileged to replay tapes secretly recorded over its airwaves involving matters of public concern. These holdings are most likely premised on the fact that some comments are generally newsworthy and of public importance. Thus, KXYZ can claim this privilege in its defense.

Defense – Truth

It should be noted that because Mayor is a public figure, as discussed, he must prove falsity. This burden [sic] removes the burden of KXYZ proving truth as a defense.

Conclusion

Due to the absence of some critical facts that would help Mayor's case, along with the privilege and newsworthiness defense discussed above, KXYZ may likely win this suit, if for no other reason than Mayor may not meet his prima facie case.

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

Jack owned the world's largest uncut diamond, the "Star," worth $1 million uncut, but $3 million if cut into finished gems. Of the 20 master diamond cutters in the world, 19 declined to undertake the task because of the degree of difficulty. One mistake would shatter the Star into worthless fragments.

One master diamond cutter, Chip, studied the Star and agreed with Jack in writing to cut the Star for $100,000, payable upon successful completion. As Chip was crossing the street to enter Jack's premises to cut the Star, Chip was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though an ordinary person would have recovered easily, Chip was a hemophiliac (uncontrollable bleeder) and died as a result of the injury. Chip left a widow, Melinda.

Jack, who still has the uncut Star, engaged Lawyer to sue Wilbur in negligence for the $2 million difference between the value of the diamond as cut and as uncut. Lawyer allowed the applicable statute of limitations to expire without filing suit.

1. What claims, if any, may Melinda assert against Wilbur, and what damages, if any, may she recover? Discuss.

2. What claims, if any, may Jack assert against Lawyer, and what damages, if any, may he recover? Discuss.

Answer A to Question 6

6)

WHAT CLAIMS, IF ANY, MAY MELINDA ASSERT AGAINST WILBUR, AND WHAT DAMAGES, IF ANY, MAY SHE RECOVER?

Standing - Melinda, the widow of Chip, will sue Wilbur either as his representative under a survival action or for wrongful death as his widow.

Melinda v. Wilbur

Negligence - a breach of duty which is the actual and proximate cause of damage to the plaintiff.

Duty - as the driver of a car, Wilbur owed a duty of reasonable care to the people who were within the zone of danger (Cardozo) or the entire world (Andrews view). Chip, as a person crossing the street in front of Wilbur, was within the zone of danger and therefore owed a duty by Wilbur.

Breach - Wilbur drove through a red light and hit Chip because he did not see him. In driving through the red light, Wilbur was probably negligent. Negligence per se may be implied if driving through a red light is a violation of an applicable law, since Chip would be the kind of person that such a law would be designed to protect.

Causation - actual - but for Wilbur driving through the light and striking Chip, Chip would not have died.

Causation - proximate - it was foreseeable on Wilbur's part that driving through a red light would injure someone. The fact that Wilbur did not see Chip would not relieve him of liability. Wilbur may argue that the fact that Chip actually died was the result of his hemophilia, which caused him to bleed to death when another person would have easily recovered from the gash in his leg. Wilbur may argue that it was not foreseeable that Chip had this condition and that therefore the cause of Chip's death was not caused by Wilbur.

However, hemophilia is a pre-existing condition, and the rule in negligence cases is that the defendant takes his victim as he finds him. This is analogous to the "soft skull" cases where a particular plaintiff was particularly susceptible to injury. Therefore, the hemophilia defense will not work.

Damages:

. **Lost earnings** - future earnings are allowed in negligence actions. The court would compute the amount of time that Chip probably would have lived, using some form of

actuary table. The fact that Chip was a hemophiliac would be relevant to possibly reducing the amount of future earnings allowed by discovering what the expected lifespan of a hemophiliac of Chip's age and general heath is. The amount of future ear[n]ings would be reduced to present-day value, because only one recovery is allowed. However, no reduction would be allowed for the fact that Chip is engaged in an especially lucrative profession; again, Wilbur has to take his victim as he finds him.

. .

. **Particular earnings** - the $100,000 under the contract is not going to be earned at this point, because the contract between Jack and Chip said that the $100,000 would only be paid upon successful completion. Completion will never take place, because Chip is now dead, and Chip's performance was a condition precedent to Jack's obligation to pay. This money would have gone to Chip, but Melinda can bring the suit as the representative of his estate. She does not need to show that she is a third party beneficiary because she is not attempting to enforce the contract itself, but to show that Chip would have recovered under the contract if he had not been injured. However, if forced to rely on a third-party beneficiary claim she would probably fail because she was not an intended beneficiary of the contract between Chip and Jack, but merely an incidental beneficiary.

. .

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this $100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the $100,000 would have been recovered had Wilbur not knocked down Chip.

Melinda will probably not recover the $100,000.

. **Loss of consortium** - as Chip's wife, Melinda can get damages for loss of companionship.

. .

. **Punitive damages** - not usually available in negligence cases unless the action of Wilbur in driving through the red light was gross negligence. We have no evidence of gross negligence here, however, since Wilbur was moving slowly at the time he struck Chip.

. .

WHAT CLAIMS, IF ANY, MAY JACK ASSERT AGAINST LAWYER, AND WHAT DAMAGES, IF ANY, MAY HE RECOVER?

Jack v. Lawyer

Jack will sue Lawyer for malpractice.

Duty - Lawyer had a duty to act in a competent manner and as a reasonable attorney under the circumstances. There was a client-lawyer relationship between Jack and Lawyer, and so the duty was owed to Jack.

Breach - Lawyer breached this duty by not filing the lawsuit until the statute had run. This was something that a competent attorney would not have done.

Causation - actual - but for Lawyer failing to file the suit, the statute would not have run and Jack would still have a cause of action against Chip.

Causation - proximate - it was foreseeable that failing to file the suit would result in the suit being barred by the statute.

Damages - Jack will claim that he should recover from Lawyer the same thing he would have recovered had Lawyer not been incompetent and failed to file the suit. This means we must look to Wilbur's liability to Jack, because the mere fact that Lawyer was incompetent does not mean that Jack is immediately entitled to a recovery; the lawyer is not the insurer of the validity of the client's claim such that a client can get an automatic recovery from the lawyer if the lawyer breaches some duty of care in regards to the client where the claim was one which had a low chance of success.

Hypothetical lawsuit - Jack v. Wilbur
Negligence - supra.

Duty - Jack will have a very difficult time proving that Wilbur owed him a duty. Wilbur was driving down the street and ran a red light. It is difficult to argue that Wilbur owes a duty to Jack, who was probably in his house across the street and was not physically harmed by Wilbur's actions. Jack was probably well outside the zone of danger which resulted from driving a car down the street.

Jack can probably not show that he was owed a duty by Wilbur. If he can, then he will attempt to show breach, causation, and damages.

Breach - If Jack can show a duty owed by Wilbur, then driving through the light probably breached this duty.

Causation - but for Wilbur driving through the light, Chip would not have been injured.

Causation - proximate - it was probably not foreseeable that driving through the light and hitting someone would cause damages to Jack, who was not at the scene; furthermore, these are only economic damages without physical damages[,] which are not the kind of harm anticipated by the breach of duty.

Damages - Jack would have had the same problem showing that the job would have been completed as Melinda: the chance of the job actually being finished is so low and difficult to prove that a court would almost certainly not allow a recovery in this case.

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this $100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the $100,000 would have been recovered had Wilbur not knocked down Chip.

Furthermore, Jack only has economic damages under a contract to which Wilbur was not a party.

Contract - because Wilbur was not a party to the contract and did not intentionally interfere with the contractual relations of Wilbur and Jack, it is unlikely that Wilbur can be sued for interference with this contract.

Jack will probably not recover from Lawyer, due to the fact that Chip actually cutting the Star properly was extremely unlikely to occur.

Answer B to Question 6

6)

1. Melinda v. Wilbur

The issue is what claims if any may Melinda, Chip's widow, assert against Wilbur, and what damages, if any, may she recover?

Survival/Wrongful Death

The executor of a decedent's estate or certain other individuals (spouses, children) enumerated by the state's wrongful death statute may assert a claim against a tortfeasor for damages caused by the tortfeasor's negligence through a wrongful death claim. In a wrongful death action, the executor or other specifically enumerated individual steps into the shoes of the decedent for purposes of asserting the claim on the decedent's estate's behalf. If the decedent survived for even a brief period of time, a claim for survival is also permissible. In both actions, the party asserting the claim is required to prove the underlying tort she alleges lead [sic] to the decedent's death. Thus, Melinda may assert a wrongful death and survivorship claim against Wilbur because Chip survived long enough to bleed to death after the accident before dying.

Negligence

Melinda should claim that Wilbur's negligence in running through a red light caused Chip's death. To assert a successful negligence claim, the plaintiff must demonstrate: (1) a duty owed to her by the defendant; (2) a breach of that duty by the defendant; (3) causation; and (4) damages. As explained below, she can establish each element.

An individual owes a duty to others to act as a reasonably prudent person would in similar circumstances. A reasonably prudent person does not drive through red lights. Thus, Wilbur owed a duty to Chip to not drive through a red light.

A breach is demonstrated by showing that the defendant failed to act as a reasonably prudent person would've acted in similar circumstances. Here, Wilbur breached that duty by driving through a red light. This action also likely constitutes negligence per se. Negligence per se arises when a statute prohibits behavior engaged in by the defendant (here, running through a red light) to protect individuals (like Chip) from harm (injury by failure to stop at a red light). In the presence of such facts, a duty and breach is presumed.

Causation is divided into two parts: (1) factual causation and (2) proximate causation. Factual causation is typically referred to as the "but-for-test," i.e., but for the defendant's negligent conduct the plaintiff would not have been harmed. Here, but for Wilbur's failure to stop at the red light, Chip[,] who was crossing with the light[,] would not

have been injured and then died.

Proximate causation relates to issues of foreseeability. The question is whether the harmed [sic] suffered by plaintiff is foreseeable or rather if some intervening act cuts off the defendant's liability. Wilbur will likely claim that Chip's injuries were not foreseeable because an ordinary person would not have died from a gash on his leg. Here, Chip was a hemophiliac and died as a result of this condition[,] not because of a gash. Running a red light, however, may result in injury to another which could include death, thus proximate causation is clearly present.

Wilbur may also attempt to argue that a defense exists because Chip was comparatively negligent and had the last clear chance to avoid the accident. Defenses to negligence include contributory negligence, which cuts off a plaintiff's right to damages if he shares in the negligence in any way, comparative fault[,] which apportions damages based upon the plaintiff's negligent acts (and in some states limits recovery all together if the plaintiff is more negligent than the defendant), and the last clear chance doctrine, which denies a plaintiff recovery if he had the last opportunity to avoid the accident.

Contributory negligence has been abolished in almost all states and should not come into play here. But what about comparative fault? Wilbur was in a slow moving car so that Chip might have avoided the accident by merely stepping out of the way. This defense seems likely to fail since the facts indicate Chip was crossing with the light. Even if Chip is somewhat negligent for failing to avoid the accident, it is doubtful that his negligence is enough to deny him recovery.

Negligence Damages

A successful negligence plaintiff may recover compensatory damages. Compensatory damages must be certain, foreseeable, and unavoidable. These damages can be divided into economic and non-economic damages which include medical bills, lost wages, and pain and suffering. Chip's estate is entitled to medical bills, funeral expenses, lost wages, and pain and suffering damages. These damages must be reduced to present value after inflation is taken into account.

Here, Wilbur will attempt to argue that some if not all of the damages were not foreseeable. Specifically, he will claim that Chip's death was unforeseeable because an ordinary person would not have bleed [sic] to death after suffering a minor gash to the leg. This claim will fail because of the eggshell-skull doctrine which requires the defendant to take the plaintiff as he finds him. This plaintiff, unfortunately for Wilbur, was a hemophiliac and dies. It sucks to be Wilbur.

Wilbur may also attempt to argue that some if not all of the damages were unavoidable because his car was moving slow and Chip could've avoided the accident. As explained above, this factor may limit damages but not preclude them completely.

Finally, Wilbur may argue that some damages like lost wages (for instance the $100,000 Chip would've made to cut the Star) are not certain. This may work as to this claim since 19 expert diamond cutters refused to take the job. But again it will simply limit recovery, not result in a denial altogether.

Loss of Consortium

A spouse may also assert a claim for loss of consortium if her spouse is injured by a tortfeasor. Here, Melinda may assert her own claim based on the fact that the she lost certain benefits because of Chip's death. She will lose companionship; she will lose his assistance around the house and may have to hire someone to come in and take care of the chores he performed; and she may lose sex.

Since Wilbur caused Chip's death because of his negligence, Melinda should prevail on this claim. She can recover damages based on the amounts if any she paid for substitute services as well as for any other damages she can demonstrate based on the foregoing test.

Negligent Infliction of Emotional Distress

A family member may assert a claim for negligent infliction of emotion[al] distress by demonstrating that she was within the zone of danger when the defendant's extreme and outrageous actions resulted in harm to a fellow family member. Although Melinda may assert the claim, Wilbur's actions do not appear to be extreme and outrageous and it is unlikely that she will recover on this claim.

Jack v. Lawyer

The next issue is what claims if any may Jack assert against Lawyer for failing to file his negligence claim against Wilbur within the applicable statute of limitations, and what damages may he recover if any.

Malpractice

A lawyer may be sued for malpractice if she breach[e]s a duty to her client and this breach results in a harm to the client. To assert a successful claim against Lawyer, Jack must show the Lawyer's conduct fell below that of any other attorney practicing in the locale and that but for this breach of duty he would have not been harmed. Specifically, Jack must show the Lawyer (1) breached a duty to him; (2) causing damages.

A lawyer owes her client a duty to act as a reasonably prudent lawyer would while representing a client under similar circumstances. Here, a reasonable lawyer does not blow a statute of limitations. Lawyer's failure to file a negligence claim against Wilbur on Jack's behalf within the applicable statute of limitations is a breach of that duty. To demonstrate causation, Jack must show that but for the plaintiff's failure he would've

succeeded on his claim against Wilbur.

This requires a brief analysis of Jack's potential negligence claim against Wilbur. The elements of a successful negligence claim have been stated above. First, Jack must show that Wilbur owed him a duty. A person owes a duty to act as reasonable person would [sic] in similar circumstances. But the duty extends only to all foreseeable plaintiffs per Pfalsgraf. Here, Wilbur didn't owe a duty to Jack because Jack was not a foreseeable victim to Wilbur's failure to stop at a red light. Accordingly, Jack cannot show that but for the Lawyer's failure to file a claim within the applicable statute of limitations his claim would've succeeded. Even if the Lawyer had filed the claim, which seems a bit frivolous, Jack still loses.

Accordingly, Jack cannot succeed on his claim against the Lawyer for failing to file that claim. Since his claim will not be meritorious, he cannot recover the damages ordinarily available to a successful claimant in a malpractice action, which include compensatory damages and might well have included damages resulting from his failure to be able to have the "Star" cut since no other master diamond cutter is willing to do it.

Breach of Contract

A contract is a legally enforceable agreement between two people. The facts only indicate that Jack hired Lawyer to file this lawsuit. In California, however, a Lawyer is generally required to enter into a written agreement with a client relating to her representation of him. Assuming the presence of such an agreement, it was likely valid as a bilateral contract (mutual assent plus consideration based on the promises between both parties).

A breach occurs where no conditions exist to performance and the party required to perform fails to do so. Here, the Lawyer failed to file a claim even though she was required to do so. Accordingly, a breach occurred.

When a breach of contract occurs, several remedies are available to a successful party including compensatory damages (those necessary to place the non-breaching party in the same position he would've been in but for the breach), consequential damages (all damages foreseeable as a result [o]f the breach), perhaps liquidated damages. Restitutionary damages are permitted when the defendant confers a benefit on the plaintiff and it would be unjust for her to retain it. In the appropriate situation, injunctive relief, specific performance, recission or reformation might also be appropriate.

Here, if the Lawyer breached a contract, then she owes Jack compensatory damages - - those necessary to place him in the same position he would've been in but for the breach. As explained above, he would still have lost so this is probably nothing. He is also not likely to recover consequential damages for the same reason. However, if he paid the Lawyer any money for her services she may be requi[r]ed to return any amounts that were not used to institute this action

Jack might also consider contacting the local bar association to report Lawyer's actions.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Autos, Inc. manufactures a two-seater convertible, the Roadster. The Roadster has an airbag for each seat. Autos, Inc. was aware that airbags can be dangerous to children, so it considered installing either of two existing technologies: (1) a safety switch operated by a key that would allow the passenger airbag to be turned off manually, or (2) a sensor under the passenger seat that would turn off the airbag upon detection of a child's presence. Both technologies had drawbacks. The sensor technology was relatively new and untested, and the safety switch technology had the risk that people might forget to turn the airbag back on when an adult was in the seat. The safety switch would have increased the price per car by $5, and the sensor would have increased the price per car by $900. Research showed that most riders were adults and that the airbags rarely hurt children who were properly belted into the seat. No federal or state regulation required either a safety switch or a sensor. Autos, Inc. chose to install neither.

Oscar bought a Roadster. On his first day of ownership, he decided to take his 10-year-old daughter, Chloe, to a local ice cream shop. On the way home, Oscar accidentally ran the Roadster into a bridge abutment. The airbags inflated as designed and struck Chloe in the head, causing serious injury. Chloe was properly belted into the seat. She would not have been hurt if the airbag had not struck her.

What tort theories can reasonably be asserted on Chloe's behalf against Autos, Inc., what defenses can Autos, Inc. reasonably raise, and what is the likely outcome? Discuss.

Answer A to Question 1

4)

1)

Chloe v. Autos, Inc[.]

Products Liability

When a consumer is injured by a product, there are 5 theories the consumer can sue under in the area of products liability: battery; strict products liability; negligence; breach of warranties; and misrepresen[t]ation. The facts in the present case would give rise to three of the causes of action: strict products liability; negligence; and breach of warranties.

Strict Products Liability

A manufacturer or distributor of a product placing a product into the stream of commerce in a defective manner will be strictly liable for harm caused by the product. In order to recover under this theory, the following elements must be met: a proper defendant, i.e., a manufacturer or distributor of the product that left the plant in a defective condition; a proper plaintiff; a defective product; causation; damages; absent defenses.

Proper Defendant - Manufacturer or Distributor

To recover under strict products liability, the defendant must be a manufacturer or distributor of the product that left the plant in a defective condition. Here, the defendant is Auto[s], Inc[.], the manufacturer of the vehicle. This is a proper defendant for recover[y] under the theory. Additionally, the product must have left the manufacturer's plaint in a defective condition, which will be established under defective condition (see infra). The product here, the car, left the defendant's plant in the condition that was not subsequently changed and if found to be defective, was in that condition at the time it left the plant. This element is therefore met.

Proper Plaintiff - User or Consumer

Traditionally, the person injured was required to be the purchaser of the product, or at least a person in privity with the purchaser. Modernly, a proper plaintiff is any user, consumer, or foreseeable bystander who could be injured by the product. Here, the person injured was a passenger in the car, and the daughter of the purchaser. As a family member and rider in the vehicle, she is a proper plaintiff for recovery under this theory.

Defective Condition

A product can be defective by: manufacturing defect; design defect; or failure to adequately warn.

Manufacturing Defect

A manufacturing defect is present when a few of the products leave the plant in a condition different than the rest. The facts in the present case suggest that all the cars left the plant in the same condition. There was therefore no manufacturing defect.

Design Defect

A design defect can occur when all the products leave the plant in the same condition and there is a defect in the design of the product. There are two tests for design defects: the consumer expectation test and the reasonable alternative test.

Consumer Expectation Test

This test is met if the product leaves the plant in a condition more dangerous than the average consumer would reasonably expect. Here, a consumer might reasonably expect that a safety feature in a vehicle, such as an airbag, would make the car more safe, not less safe. Facts in the present case indicate that but for the airbag, Chloe would not have been injured. This product is therefore defective under this test.

Feasible Alternative Test

This test compares the design of the product with other reasonable alternatives available in the market. The test balances the availability of alternatives and their cost against the risk to users and the value of lives saved. Although there are no facts to indicate what other car producers did, it is evident that there were alternatives that were available. Even though there were no statutes to mandate their usage, this fact is not determinative in alternatives. Facts indicate that the company had considered implementing two separate safety measures. The fact that both the safety measures themselves had risks and drawbacks is also relevant. Chloe will first ague that the first alternative the defendant should have employed was the switch to manually disable the airbag. The cost of this product is very minimal at $5. However, the defendant will claim that there was a risk that people would fail to turn it back on, making the car more dangerous to the majority of passengers, according to research. The reason the airbag was designed in the first place is [sic] to make the car more safe for the majority of riders, which this device would prevent. In weighing these two arguments, the court would probably find that even though the cost of this is minimal, its risk might have outweighed its utility, making the car even more dangerous.

The plaintiff will next argue that the second device should have been employed, the sensor switch, as it would not be at risk to user misuse. However, defendant will assert

that this device, because it is new and untested, would malfunction, making the product more dangerous. They will argue that the cost of this device, at $900, is far too costly to be reasonable. In weighing utility, costs and risks, the outcome of this argument is highly depen[den]t upon the reliability of this device. If it is truly new and unreliable, the defendant will no doubt be successful in its argument. If, however, it is show[n] to be reliable, the defendant's argument will be weakened. The court will have to decide whether, if useful and reliable, $900 is reason[a]ble for this device, in light of its reliability and lives saved.

Failure to Warn

A product is defective if the defendant, knowing of a defect, fails to adequately warn the consumer. An adequate warning is one that tells the consumer of the risk, how it occurs, how to prevent such risk, and any mitigating factors to avoid further injury. Here, facts indicate that the D was aware of the danger of the airbags to children. There is no information on whether there was a warning as to this fact. If there was no warning about the risk of airbags to children, as it appears from the available facts, this product is defective.

Causation

Actual Causation

For strict liability, the injury to the P must have been actually caused by the defendant's product. The test is "but for" for the D's condu[c]t, the P would not have been injured. Here, the facts indicate that but for the airbags, the P would not have been injured.

Proximate Causation

Additionally, the P's injury must have been caused by the D's product. Here, P will argue that the injury was caused by the airbag and the D should be held strictly liable for all injury. The D will argue that Oscar crashing the car is a superceding intervening cause that should sever liability. Since airbags are installed to protect passengers in car accidents, this case is not superceding and the court will agree with the P here.

Damages

For strict liability, the P must have suffered physical injury. Here, the P was struck in the head, causing serous injury. This is a sufficient damage here.

Defenses

Contributory/Comparative Negligence

A P's recovery may be reduced or barred if found to be contributorily negligent. Although comparative neglig[e]nce is the majority view, under either comparative or contributory negligence, the P must be contributorily negligent. It is true here that Oscar ran the car into the bridge, but he is not the P. Even though Oscar may have been negligent, his conduct was not the conduct of the P, in order to trigger this defense. There are no facts present to indicate that P was at all negligent, since she had her seatbelt fastened.

Assumption of Risk

Assumption of risk is a defense when P proceeds in spite of a known risk. However, since D failed to warn of the risk, P could not have knowingly assumed it.

Since all elements have been met, P can recover under strict liability.

Negligence

Negligence cause of action is available when the D owed a duty of care to the P, which he breaches, causing damage to the P. A P can recover for injury caused by a manufacturer's negligence if P can establish: duty; breach; actual causation; proximate causation; damages; absent defenses.

Duty

A duty is owed by all persons to act in a way as to avoid harm to other[s]. The standard owed here is the duty to act as a reasonable prudent person to avoid harm to all for[e]seeable persons. Here, the D, as a car manufacturer (see supra), owed a duty to its consumers to produce a car in a safe way and to avoid all injury to purchasers and passengers. The amount of care owed is that of another reason[a]ble prudent car manufacturer.

Breach

The duty owed is breached when the D fails to act as another reasonable prudent person under the circumstances. Here, the P will argue that a reason[a]ble car producer would employ safety devices to protect riders and passengers, as were available. The D will argue that it acted reason[a]bly, since there were no statutes mandating conduct. Although presence of a statute may mandate conduct, absence of a statute is not a defense. The D still must act as a reasonable prudent car producer. Here, there is no indication of what other vehicle manufacturers do, but there are facts of other safety precautions. Since a reasonable car manufacturer would have at least warned of the danger, and facts indicate that the D did not, it appears as though D breached the duty owed when it failed to at least warn of the dangers.

Causation - Actual & Proximate

Actual Causation

See supra for actual cause. As discussed supra, the D was the actual cause of the D's [sic] injury.

Proximate Cause

See supra for proximate cause. As discussed supra, the D was the proximate cause of the D's [sic] injury.

Damages

The cause of action allows recovery for personal injury, which was incurred here (see supra).

Defenses

The same defenses are available here as under strict liability, and are not met (see supra). Therefore, P will be able to recover.

Warranties

Implied in every product are 2 implied warranties: Implied warranty of merchantability and implied warranty of fitness.

Implied Warranty of Merchantability

A product must be merchantable, meaning generally safe and fit for ordinary purposes. Here, the car was generally safe for general purposes. Although children could be injured by the car, this is a failure to warn not generally de[a]lt with by the warranty.

Answer B to Question 1

1)

CHLOE V. AUTOS, INC[.] ("AUTOS")

Chloe was injured while traveling as a passenger in her father, Oscar's, Roadster, which was manufactured by Autos. Oscar will bring a cause of action against Autos on Chloe's behalf ad litum because she is under eighteen years old. The following will examine and analyze the possible causes of action, the defenses Autos may raise, and the likely outcome.

1. CAUSE OF ACTION UNDER A STRICT PRODUCTS LIABILITY THEORY AGAINST AUTOS

STRICT PRODUCTS LIABILITY

A commercial seller who sells a defective, unreasonably dangerous product to an intended consumer or user will be held strictly liable for any harm caused as a result of the defective product.

Commercial Seller

In order to be held strictly liable, the defendant must be a commercial seller who purposefully injected the product into the stream of commerce.

Autos manufacturers the Roadster and is a corporation. Because Autos manufactures the Roadster and places it into the stream of commerce, Autos is a commercial seller.

Defective Product

A defect may be shown by plaintiff the following ways: 1) Defective Design, 2) Manufacturing Defect of that Particular Product Only, 3) Failure to Warn or Inadequate Warning.

1) Design Defect

Plaintiff may show that defendant's product had a design defect if there was a feasible alternative available at the time it was manufactured and if so, that the alternative would make the product safer and was economically reasonable.

Alternative Design Available

The facts state that at the time the Roadster was manufactured Autos itself was aware of two possible alternative designs to the Roadster that would possibly make the car's airbags safer for childre[n]. This included: (1) A safety switch operated by a key, or (2) A sensor under the seat that would detect the child's presence. The facts do not indicate that either product guaranteed the child's safety. However, they may have helped. Plaintiff will contend that the safety switch would have worked, but that Autos did not install it in fear that passengers would forget to turn it off and on. Thus, it appears that the safety switch, if operated correctly by the users, would have made the airbags safer for children. In regard to the sensor, its technology was relatively new and untested. Defendant will argue and thus there is no guarantee that it would have made the car safer. Plaintiff, however, will argue that while it might not have been tested and [was] relatively new, it was a feasible alternative design that could have indeed made the Roadster safer. Additionally, Plaintiff will assert that Autos was even "aware" of the danger to children, and even "considered installing either of the two existing technologies.["] Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. Because the safety switch and sensor were available technologies at the time that would likely have made the Roadster safer, there was an alternative design available to Autos.

Economic Feasibility of the Alternative Design

The alternative design must be one that is reasonable and economically feasible to the manufacturer.

The safety switch according to the facts would increase the Roadster's price by $5.00. The sensor would increase the Roadster's price by $900 per car. Plaintiff will first contend that for $5.00 extra per car, the safety switch was economically reasonable and that $5 would not have made a difference in the car's price and marketability, as the car is likely much more expensive already. Plaintiff will further assert that the sensor, while untested, was worth it to install for $900 extra per car. Defendant will contend that $900 was too much per car for an untested product and that $900 extra would hurt the Roadster's sales appeal and marketability. While this may be somewhat true, Plaintiff will argue that safety is priceless, and that $900 extra is relatively small in comparison to the overall price of a car such as the Roadster, and that saving a life or minimizing injury of a child or adult is worth every penny. For $5 more, the safety switch is economically feasible and Plaintiff has a valid argument that for $900 extra, the sensor is worth it if it has the chance of preventing injury or death while traveling in the Roadster.

<u>2) Manufacturing Defect</u>

Manufacturing defect may be asserted if the particular product that Plaintiff purchased was individually defective. Here, there is no evidence that Oscar's particular Roadster was individually defective, and thus Chloe cannot assert this theory.

3) Inadequate Warnings or Failure to Warn

Plaintiff may also show defect or that the product was unreasonably dangerous if Defendant failed to warn or gave inadequate warnings.

Chloe will contend that Autos failed to warn its purchasers of the risk to children by the airbags. As stated in the facts, "Autos Inc. was aware that airbags can be dangerous to children," and thus should have provided some warning to purchasers of the vehicle. Autos will contend that no warnings were necessary because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." Chloe will rebut this argument with the fact that children are everpresent and it should be obvious to Autos that children would ride in the Roadster as passengers and this is a fact that Autos should have considered, despite the research. Thus, because Autos knew of the risk to the children and the potential dangers, and failed to warn of them, they can be held accountable for failure to warn.

Conclusion: Chloe can show under a design defect theory that an alternative safer design existed. Additionally, Chloe can show that Autos failed to provide inadequate [sic] warnings as to the airbags' risk to children.

Foreseeable User

The consumer who was harmed by the alleged defect must be one that is foreseeable to the manufacturer.

Chloe, as a passenger in the Roadster, who was properly seated in the car, will contend that she was a foreseeable user, as it is foreseeable that the driver will have passengers in the vehicle from time to time. Autos will contend that Chloe, a ten-year old child was not a foreseeable user because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." However, this argument will fail for Autos because they were still aware that children would ride as passengers from time to time and thus Chloe was a foreseeable user.

Causation

Plaintiff must prove defendant was the legal and proximate cause of her injury.

Legal Causation

Under legal causation, plaintiff must show that "but for defendant's defective design, she would not have been harmed."

Thus, here we ask, but for the failure of Autos to install sensors or a safety switch or provide a warning to the users of the Roadster regarding the airbags and children, would Chloe have been hurt? The answer is no, because as the facts state, the airbags inflated as deigned and struck Chloe, "causing serious injury," and "she would not have been hurt if the airbag had not struck her." Autos is the legal cause of Chloe's harm.

Proximate Cause

Proximate cause examines whether the harm to plaintiff is foreseeable and whether there were any intervening forces.

Chloe was injured by the airbags as they [sic] inflated as designed as they [sic] struck her. Autos will contend that this was caused as a result of Oscar accidentally driving into a bridge. However, Chloe will successfully argue that accidents by drivers of the Roadster are foreseeable and frequent and that the whole purpose of airbags is to prevent or minimize injuries from such foreseeable accidents. Additionally, Chloe was properly belted in the seat, and because she was properly belted and the airbags operated as designed, Autos['] defect was the direct and proximate cause of Chloe's injury.

Damage/Harm

Plaintiff must prove damage. As discussed, as a result of the defect Chloe suffered serious injury to her head.

DEFENSES BY AUTO

Assumption of the Risk

Plaintiff assumes the risk of injury if he consciously and voluntarily assumes the risk and is aware of the danger, but still proceeds. This serves a complete defense to strict liability in most modern jurisdictions.

Autos will contend that Chloe and Oscar assumed the risk of harm by purchasing a two-seater convertible and because it was a convertible they knew or should have known that it was a dangerous vehicle. However, Chloe will rebut this claim by asserting that even if the car was a convertible, it should have and could have been designed safer and that she did not assume the risk of a defective airbag whatsoever. Autos['] defense is weak and will fail because Chloe never assumed the risk of injury by a defective airbag according to the facts.

2) NEGLIGENCE CLAIM AGAINST AUTOS

Chloe may also assert a claim of negligence against Autos. Negligence requires the showing of: 1) Duty, 2) Breach of Duty, 3) Actual Cause, 4) Proximate Cause, and 5) Damages.

Duty

A person is held to the duty of care to act as a reasonably prudent person under the circumstances.

Autos, a car manufacturer, will be held to act as the reasonably prudent auto manufacturer would in designing and manufacturing the Roadster.

Foreseeable Plaintiff - Chloe as a passenger was a foreseeable plaintiff under both the Cardozo and Andrews views as she was legitimately riding with Oscar in the vehicle at the time of the accident.

Breach of Duty

Breach of duty may be show[n to] be an actual breach or inferred via res ipsa loquitur.

Chloe will contend that Autos breached its duty of care to her by failing to make the Roadster safe and by failing to install the safety devices, such as the sensor and/or switch. Furthermore, Autos knew of the alternatives, as discussed above, and could have installed them. Autos will contend that doing so would be costly and that there were drawbacks to each. However, as discussed, the drawbacks and risks were worth it in comparison to the risk of harm and thus viable. Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. As a result, by failing to make Roadsters and its airbags safe for children, Autos breached its duty of care to Chloe, who was harmed by the defect.

Actual Cause/Legal Cause

Rule: see supra. As discussed above, Autos is the actual cause of Chloe's harm.

Proximate Cause

Rule: see supra. As discussed above, Autos is the proximate cause of Chloe's harm.

Damage

See supra.

DEFENSES

Assumption of the Risk

Rule: supra. As discussed above, an assumption of the risk defense will fail.

Comparative Negligence

Comparative negligence is shown by demonstrating that plaintiff was negligent in its actions. Depending on the jurisdiction (pure or partial), the damages will generally be reduced in proportion to plaintiff's negligence.

Autos will contend that because Oscar was negligent in causing the accident, as the Roadster ran into a bridge abatement [sic], he was contributorily negligent. While this is a valid argument, as the accident and release of [the] airbag was caused by Oscar, Chloe may contend that Oscar's negligence should not be imputed to her. This is true in most jurisdictions- that the driver's negligence is not imputed to a passenger's claim. However, if the jurisdiction imputes Oscar's negligence, his negligence will be reduced in proportion thereof and provide Autos with at least a partial defense.

Conclusion: Chloe has a valid negligence claim against Autos. Depending on the jurisdiction, however, Autos may reduce their damages via Oscar's comparative negligence.

3) IMPLIED WARRANTY OF MERCHANTABILITY

Under the implied warranty of merchantability, a product that is sold is impliedly warranted to be reasonably useful and safe for average use.

Chloe will contend under this theory that the Roadster, a two-passenger vehicle, should have been at least made safe for all that [sic] would be in the vehicle, including the driver and passenger. Because the airbags were not safe, and injured her, she will argue that the Roadster was not fit for regular use, as intended by its purchasers. Autos may try and contend that the Roadster was not designed to be safe for children because research showed that children were not regularly passengers in the Roadster. However, for reasons discussed above, this argument will fail. Chloe will be successful against Autos under an implied warranty of merchantability theory as well.

California
Bar
Examination

Essay Questions and Selected Answers

July 2006

Question 1

After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed $1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, "Come back here, thief!" Paul said, "I paid. Look on the counter." Clerk replied, "I've got your license number, and I'm going to call the cops." Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room to wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room.

Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. Mark attributed his forgetfulness to his medication, which is known to impair short-term memory.

Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning. He recalls that, while in the back room, he heard a running engine and felt ill before passing out.

A state statute provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing upon any perceptible grade, turning the front wheels to the curb or side of the highway."

1. Can Paul maintain tort claims against (a) Clerk for false imprisonment and (b) Mark for negligence? Discuss.

2. Is Delta Gas liable for the acts of (a) Clerk and (b) Mark? Discuss.

Answer A to Question 1

1)

1.

Paul v. Clerk

False Imprisonment of Paul

False imprisonment is an intentional tort. The elements for false imprisonment are that the tortfeasor must have intended to confine the victim in a bounded area and that the victim have no reasonable means of leaving the bounded area. The extent of the false imprisonment is usually not [of] importance[;] mere seconds can amount to false imprisonment. Courts often will forgo the intent requirement in regards to the tortfeasor if the victim suffered harm as [a] result of the confinement.

Here the facts indicate that Clerk intended to keep Paul in a bounded area until Mark, the store manager[,] was able to come back from his errand. Clerk had the requisite intent to confine Paul. Clerk will argue that the area was not bounded as he did not lock the door. Clerk will attempt to argue that Paul had a reasonable means of leaving the area[;] thus he cannot be guilty of false imprisonment.

Paul will reply that Clerk had the requisite intent and that it is not relevant whether the door was locked or not. The area was confined[;] Paul did not have a reasonable means of leaving as Clerk threatened to call the police on him. Paul will argue that even though the door was not locked, he was still confined for purposes of false imprisonment. Furthermore, Paul will argue that even with [sic] Paul did not have the requisite intent to confine him, the harm he suffered will be construed by the Courts as a substitute for intent.

Paul should succeed in his assertion of false imprisonment against Clerk barring any defense, discussed below.

Clerk's defense of Shopkeeper's Privilege

A defense to the tort of false imprisonment is that a storekeeper or his employees are allowed to detain an individual if they reasonably suspect that person of stealing. They are then allowed to detain that individual for a reasonable period of time in order for them to ascertain the validity of the theft. Courts have often held that reasonable usually cannot exceed 30 minutes, at time[s] have held 15 minutes was not reasonable, depending on the circumstances.

Clerk will argue that he was reasonable in his belief because he did not see actually see [sic] Paul pay for the candy, thus allowing him to assert the right. Clerk will also argue he

acted reasonably in taking Paul to the back room, and that leaving him for 25 minutes was not unreasonable. Clerk will argue the 25 minute stay was reasonable because he had to wait for the store manager to come back.

Paul will reply that Clerk's belief was unreasonable because Clerk was not paying attention in the first place, and that all Clerk had to do was look on the counter to see if the $1.50 was there. If nothing else, Clerk could have simply checked the register. Paul will then argue that the 25 minute detainment was unreasonable because of the type of room he was placed in. Paul will argue that putting him in a [room] that was full of carbon monoxide was unreasonable, even if it was only for one minute.

Paul should succeed in rebutting Clerk's defense of SP b/c it was not a reasonable suspicion and the time constraint was unreasonable.

Clerk's unlawful arrest of Paul

For purposes of demonstrating intent and unreasonable belief, Clerk's arrest of Paul can be analyzed. It has been held that when a citizen arrests another citizen, for purposes of a misdemeanor (which these facts indicate as the candy was only $1.50), require that the Clerk had been reasonable in his belief that the individual conducted the act, that act was done in his presence, and it had to be a breach of the peace.

Clerk may try to argue that it was done in his presence, and it technically was, but Clerk never actually saw it. Clerk may argue that regardless of [whether] he actually saw it, his belief was reasonable. Clerk may attempt to argue that a theft amounts to a breach of the peace and that he did not unlawfully arrest Paul.

Paul will argue that even if Clerk was reasonable in his belief, this was not a breach of the peace. Paul took $1.50 worth of candy from a gas station and threw the money on the counter. This simply cannot amount to a breach of the peace, no matter how strict a state's law might be.

Therefore, Clerk unlawfully arrested Paul.

Conclusion

Therefore, because Clerk intended to confine Paul, and did indeed confine Paul (and caused an injury[,] no less), that Clerk did not satisfy the elements of shopkeeper's privilege as the belief was unreasonable, as was the time constrained. Finally, Clerk's unlawful arrest of Paul also goes towards the intent of illegal confin[e]ment. Thus, Paul should succeed in a false imprisonment claim again[s]t Clerk.

Paul v. Mark

Negligence

Negligence is a tort that requires the following factors: Duty, Breach of Duty, Foreseeability (Actual/Proximate Causation), and Damages.

Negligence per se

Negligence per se occurs when there is a[n] ordinance that prohibits some type of conduct that occurred. If it's intended to cover the type of occurrence it speaks to, one may be guilty of it without demonstrating all the elements of negligence.

Here, the statute refers to stopping a car on the curb/highway, and turning the wheels. This would indicate it's to prevent cars from sliding if the parking brakes don't work. Thus, this statute was not intended to protect people from carbon monoxide poisoning.

Thus, negligence per se doesn't work.

Duty

Duty requires that the tortfeasor have some duty to victim. Generally speaking, we all have a duty not to act negligently. Essentially this is requiring that we act in a reasonable manner that does not put others in a[n] unnecessary state of harm. In order to make out a case for negligence, Paul needs to show that Mark owed him a duty.

Mark will argue that he has no general duty to everybody in the world. To hold him to such a high duty is improper. In addition, Mark will argue that the medicine he was taking made him forgetful, thus absolving [him] of his duty.

Paul will argue that nobody's asking Mark to have a duty toward the whole world, just those who enter his store[.] Paul will state that shopkeepers are held to a much higher degree than normal guys just walking on the street. Paul will also argue that Mark's tendency to forget while taking the medicine does not absolve him because he knows that the medicine makes him forgetful. Thus Mark must act in accordance with that knowledge.

In order to properly examine duty, it's necessary to look at the duties owed to a trespasser, licensee and invitee.

Trespasser

An undiscovered trespasser is owed no duty under the common law. Anticipated trespassers need to be warned of active operations and artificial conditions that are unreasonably dangerous.

Mark will try to argue that Paul was a trespasser because (b/c) Mark was being held for alleged shoplifting. Mark will argue that Paul was in an area that is not generally open to members of the public, thus his duties will amount to that owed to a trespasser only. Mark will argue that he was not aware of Paul's presence[;] therefore, he owned Paul no duty.

Paul will reply that holding him as an undiscovered or unanticipated trespasser makes no sense. He was discovered and most likely anticipated, although the facts do state the room was seldomly used. Paul will argue that he was owed, at worst, a duty that's granted to an anticipated/discovered trespasser. Thus, Mark will argue that he was entitled to a warning in regards to the carbon monoxide.

Licensee

A licensee is one who is invited onto the land of another as a social guest. They are owed to [sic] warnings regarding unreasonably dangerous conditions involving active operations, hidden but discovered dangers, artificial and natural conditions.

Because Paul was not invited as a social guest, whether into the gas station or the back room, the licensee standards do not apply to him and need not be discussed here.

Invitee

An invitee is one who has been invited onto the land of [sic] property of another for the property owner's benefit. The rule for invitees is that the property owner owes all the same duties that is [sic] owed to licensees, plus the owner needs to make reasonable inspections for unreasonable dangerous conditions existing on the premises.

Mark will argue that Paul was not an invitee because he had allegedly stole [sic]. Mark will argue that while Paul may have started off as an invitee, by stealing, he exceeded the scope of the invite and became a trespasser. Mark will argue that because of that, Paul is not entitled to the protections of an invitee.

Paul will argue that he was an invitee as he went to the station to buy gas. He was there for the benefit of Delta. Paul will argue that just because he allegedly stole, that does not change his status because he did not in fact steal, that Clerk false[ly] imprisoned him, and the false imprisonment cannot change the scope of duty owed to him.

Paul will then argue that because an invitee is entitled to have the owner inspect the premises for dangerous conditions, this means that there was a duty to inspect the back

room before sticking him in there. Paul will argue that carbon monoxide is an unreasonably dangerous condition.

Was there duty?

The duty owed to Paul was most likely that of a[n] invitee. He was there for Delta's benefit. The fact that Clerk thought he stole does not change that fact b/c Clerk's defenses do not work. Further, the medicine making Mark forgetful cannot be construed against Paul because Mark knew the medicine makes him forgetful[;] thus he had a duty to act extra carefully when on the medicine.

Breach of Duty

This examines whether the tortfeasor breached the duty that's was [sic] owed to the victim in this case.

Mark will argue no duty was breached because he had no duty in the first place. Mark will make the same arguments regarding duty as above. Mark will argue that if he had no duty, he cannot be guilty of breaching it.

Paul will argue that duty [existed] for the same reasons as above. Paul will argue that Mark owed him a duty because he was the store manager and further that Mark owed a duty b/c he knew the medicine made him forgetful.

Thus, there was breach of duty of [sic] Mark's part.

Foreseeability

There are two inquiries in regards to foreseeability/causation: 1) actual (but-for), and 2) legal (proximate cause). But-for cause can be quite broad and is usually easy to satisfy. Proximate cause is a bit more difficult as it requires that the victim be foreseeable. The most prominent test if [sic] the "zone of danger" (or Cardozo test), while the less used one is the Andrews test.

A but-for cause simply asks: but-for defendant's actions, would the injury have occurred? In this case, but-for is easy to satisfy. But-for Mark's actions of leaving the exhaust on, Paul would not have been injured. This test is extremely broad and almost anything can qualify as a but-for cause. Perhaps that is why the courts instituted a legal cause as well.

The Cardozo Test will consider proximate cause satisfied only if the individual was in the zone of danger. Thus, it requires that the chain of events leading up to the injury was

reasonably foreseeable to the defendant. It requires that there not be some superseding (i.e. extremely unnatural consequences that comes in the middle) cause.

The Andrews [test] is extremely broad. It merely says that as soon as a negligent act is done, the zone of danger basically expands to everyone and everything.

Using the Cardozo test, Mark will argue that Paul was not within the zone of danger (ZOD) because Mark simply had left the exhaust on his truck. Mark will argue that by leaving the exhaust on, it was not foreseeable that Clerk would take Paul into a seldom-used backroom and have the Carbon Mono leak into that room. Mark will further argue that Clerk's actions were a superseding cause because if Clerk hadn't taken Paul into the room, there would be no injury.

Paul will reply that he was in the ZOD because the backroom was next to the garage. Paul will say that leaving the exhaust was a legal cause because he was a foreseeable plaintiff. Paul will argue that it is foreseeable that an exhaust, which everyone knows emits carbon monoxide, will seep into an adjoining room. Paul will further argue that while Clerk did falsely imprison him, this does not amount to a superseding b/c generally unless it's an Act of God or crime by 3rd party[,] many acts by another 3rd party do not amount to superseding causes.

Under the Andrews test, Mark really had no arguments b/c it's essentially another but-for test.

Paul should succeed in demonstrating foreseeability/caus[a]tion because it seems pretty clear he was in the ZOD. Paul was placed in a room adjoining the garage[;] most people should have the knowledge that it's dangerous activity. Further, the acts of the Clerk probably will not be construed as a superseding cause, even though it is an intentional tort.

Damages

Damages here would amount to Paul's medical expense and whatever suffering that has occurred.

Defenses

Paul will attempt to argue that he was not contributorily negligent or did not assume the risk.

Contributory negligence requires that the victim do something that contributed to the negl[ig]ence, thereby depriving of his right to damages (in a c/n jurisdiction).

Mark will argue that Paul was c/n because he should have realized the[re] was CO and that any reasonable person would have ran [sic] out the door or at least pounded on the door.

Paul will reply that CO cannot be smelled, that it simply knocks a person out. Paul will reply that there was no way for him to know that there was CO[;] therefore he cannot be contributorily negligent.

Assumption of risk requires that the victim voluntarily assume the risk of whatever occurred to him.

The facts do not indicate that Paul voluntarily assumed any risk. While the door was unlocked, he could not have voluntarily assumed the risk that there would be CO leaking from the garage. Therefore, AOR is a bad defense for Mark to assert.

Further, comparative negligence will only serve to decrease some of Mark's liability. In some jdx's, one who is over 50% negligent cannot recover. In pure jdxs, P can always recover something, unles[s] she is 100% negligent. The facts do not seem to indicate any negligence on Paul's part[;] therefore Mark will be responsible for 100% of the negl[ig]ence, as it relates to Paul.

2. Vicarious Liability/Respondeat Superior

<u>Vicarious Liability/Respondeat Superior</u>

Generally, an employer is guilty for the acts of his employees, provided that it is within the scope of his employment.

In the case, Clerk was acting within the scope of his employment. He was trying to protect the store from being robbed. The store may try to argue by falsely imprisoning Paul, Clerk was acting outside of it. Further, store will try to argue that b/c Clerk was talking on the phone, he was also acting outside the scope of employment.

The store's arguments probably will not work because Clerk undoubtedly in [sic] given the privilege by his employer to detain those he believes is stealing. It would appear from the facts that Clerk was acting within the scope of his employment[;] surely his job entails detaining those who he believes was [sic] stealing from the store. Thus, the store cannot relieve itself of Clerk's false imprisonment tort.

Mark, on the other hand, left his truck on while running on a personal errand. The store will try to claim he was acting outside the scope of employment because he was on a detour. The general rule is that when an employee detours from his employment functions, the employer might not be held responsible.

The store will argue b/c Mark left on a personal errand, his actions cannot be attributed to them. This argument probably will not work b/c Mark left his truck at work. Mark did not take his truck on a personal errand and run somebody over. It is given that people

generally take their cars to work, and if that car poses a problem and causes injury to a customer, that is within the scope of the employment.

Therefore, the store will be held under the vicarious liability/respondeat superior theories.

Trespasser/Licensee/Invitee

All of the rules and arguments above apply to the Employer as well.

Since Paul was a[n] invitee, the Store (or its employees) owed a duty to inspect the premises and by failing to do so, Store is liable for the employer's acts.

Defenses

All the same defenses from above apply.

Answer B to Question 1

1)

I. Can Paul maintain tort claims against Clerk for false imprisonment?

In order to prevail under a claim of an intentional tort, such as false imprisonment, the plaintiff must show an action of the defendant, made with requisite intent, causation and damages. False imprisonment specifically requires the following: (1) an act or omission of the defendant that causes the plaintiff to be restrained to a bounded area. This can be done through a physical act or under an imminent threat. There must be no reasonable means of escape. (2) The defendant must have acted with specific intent to confine or general intent, meaning he acted with substantial certainty that he was acting in the proscribed manner. (3) It was the actions of the defendant that caused the harm to the plaintiff. The action must have been at least a substantial factor. (4) Damages. The plaintiff had to suffer some harm so he must have known of the restraint or suffered damage because of it.

Action of the defendant (C)

In this case, C did ask P to go with him to the back of the store, which P did. Though C may argue P was free to leave, P should argue that he only went to the back room under threat of having trouble with the police. He knew C had taken down his license number, and P arguably was willing to go into the back room so he could have a chance to explain himself. P was put into the room and C closed, though did not lock [,] the only door to the room, which contained no windows. This should be enough to meet the requirement that there be no reasonable means of escape. Even though P could have physically opened the door and may have been able to walk out, he was being held there under threat of having to deal with the police.

M may argue that the threat of calling the police should not be considered to be a threat that confined the P. If P was truly innocent, all he would have to do is give his story to the police. Plus, P should have known that his money was still on the counter, and if he could convince C or the police to look for [it], this story would

be shown to be true. Therefore, C would argue, P did not really have to stay in this back room [;] it was only P's desire to avoid dealing with the cops that caused him to be back there. This is probably not going to work because the [sic]

Intent

Here, P should argue that C acted with the specific intent to hold P in the bounded area. The facts do support this argument, because C did specifically tell P to go into the back room to wait for Mark, the store manager. C also intentionally made the statement that caused P [to] feel that he had to stay in the back room. Therefore, this element is met.

Causation

The causation element is also met because there is a direct link from C's actions to P being held in the store room. The facts state that P went into the back room after hearing C threaten to call the police.

C may try to argue that, while his action may have caused P to be bounded to the room, it did not cause P's harm because of the intervening force of M. This is discussed below in the section on defenses.

Damages

The facts state that as a result of being held in the back room for 25 minutes, P was knocked unconscious from carbon monoxide poisoning. Therefore, he did suffer actual physical harm at the time. He also continues to suffer headaches as a result of that, so he has ongoing damage. He also may have suffered damage even before being knocked unconscious. The facts state that he recalls feeling ill even before he passed out, so he may have been afraid or suffered emotional distress.

Defenses

Because P does not seem to have met the above elements for a claim of false impri[s]onment against C, C will need to offer up some defenses if he is to shield himself from liability. The following defenses should be considered by C:

Storekeeper privilege

Tort law does permit storekeepers to retain customers suspected of shoplifting. The idea is that storekeepers are permitted to try to recapture their chattels by using reasonable means and holding the suspected thief for a reasonable amount of time. The shopkeeper is protected against making reasonable mistakes as to whether or not the suspect actual stole anything.

In this case, C should argue that he was reasonable to suspect P of shoplifting. There are facts to support this claim [.] C did witness P pocked [sic] the candy and was not aware that P had paid. It is true that P had tossed money on the counter to cover the cost of the candy, but it was reasonable for C not to have seen this. This is because it is customary for customers to pay for items by going up to the cash register and being rung up by the cashier, and giving money directly to the cashier. Clerks are not used to having to look for money dropped on counters to be sure if someone has paid or not. Therefore, C was reasonable to think P was shoplifting, so he was covered by the privilege.

However, P has a very good claim to shoot down this defense. The detention by a shopkeeper asserting this privilege must be reasonable. Here, C hold [sic] P in the back room for 25 minutes while he was waiting for Mark (M) to arrive. Arguably, this is too long to hold someone in a windowless back room by themselves to discuss stealing a candy bar that cost $1.50. C will of course argue it was reasonable for C to make P wait for the manager, and that 25 minutes really is not that long. However, he was held in the back room and was never once checked on to be sure he was okay. This is arguably unreasonable. Also, the harm that came to P as a result of being in the room was clearly not reasonable. Therefore, C was outside the bounds of the storekeeper privilege and this defense is not available to him.

Superseding force

As discussed above, C may also want to argue that it was not his tortious act that caused the harm, but rather it was Mark's supervening actions. C would argue that if M had not left his truck running in the garage for so long, the exhaust would have not leaked into the back room and P would not have

suffered any damages. Therefore, it is M's negligence (either in merely running the engine or in failing to take his medication) that was the real cause of the harm.

The rule for causation in tort cases is that the defendant's act was a substantial factor. P should easily be able to show that C was a substantial factor in the harm, because C left him there by himself for long [sic]. Therefore, the superseding force will not absolve his liability.

Consent

C may also try to argue that P consented to the imprisonment. Consent is a valid defense against intentional torts. C would argue that P went to the back room of his own volition, because he made the choice to go back there rather than have the police be called by C.

The problem with this defense, P will argue, is that consent must be given voluntarily, and the actions of the defendant must not exceed the bounds of the consent. Here, the consent was not voluntary, because P was acting under threat of having the police be called, even though he did pay for his item. Also, even if P did arguably consent to going into the back room, he surely did not consent to being held for 25 minutes by himself and to suffer such physical harm.

Conclusion

Based on the above, it appears that P does have a tort claim against C for false imprisonment. Though there are defenses that C will try to argue, he will probably not succeed with any of them.

II. Can P maintain a tort claim against M for negligence?

A basic cause of action for negligence requires a showing of the following elements: (1) existence of a duty with an accompanying standard of care; (2) a breach of that duty; (3) defendant's actions were the but [-] for and proximate cause of the plaintiff's injury and (4) the plaintiff was actually damaged. Therefore, P must show all of these elements in order to prevail against M for negligence.

Duty and Standard of Care

A duty of care is not owed to all. However, a duty of care is owed to all people who can forseeably be injured by the actions of the defendant. In this case, the vicinity of P to the area of where M was running his engine would make him a foreseeable plaintiff. M may argue that no duty of care is owed to P because M had no idea P was back there, and had no reason to know because the store room was seldom used. However, this probably will not absolve M of his duty of care, because it is foreseeable that someone will be in the back of the store or garage at some point, and that leaving an engine running for so long in a closed area will cause harm to someone.

The standard of care owed is usually that of a reasonable person acting under similar circumstances and with ordinary prudence. This will be the standard of care applied in this case.

Breach

Now it must be determined if M's conduct fell below the standard of care. There are several ways that P can argue that it does. First, P could argue that M was negligent merely in leaving the engine running for so long in the closed area. Certainly, reasonable people know that they should not allow highly toxic carbon monoxide to fill a small space, especially when the small space is so close to a public business where it is certain people will be found. Second, P could argue that M was negligent because M failed to take his medication. A person who knows that they are likely to forget doing things that would make their actions safe (like, in this case, turning off [the] engine of his truck) arguably should not be engaged in those actions. Here, M must have known of his likelihood of forgetting such things, since he has a prescription for short-term memory impairments. Therefore, he was negligent in failing to remember to take the medication in the first place that would have allowed him to avoid putting P at risk. P should be able to show breach on both of these points, since no

reasonable person would leave their car on when it[']s confined to such a small place.

Finally, P may argue that M's action is negligence per se. Negligence per se may arise when there is a statute that provides for penalties, that states the conduct that is required, that is meant to address the sorts of injuries caused [by] the defendant, and that is meant to protect peo[p]le in the plaintiff's position. In this case, P would argue that the state statute is meant to protect people from suffering carbon monoxide poisoning, by requiring everyone to shut off their car before leaving it unattended. Therefore, M's action was covered by the statute, and P's injury was meant to be addres[s]ed by the statute. However, M should be able to strike down this argument fairly easily. M should argue that the point of such statute is to prevent vehicles from causing accidents because the vehicle rolls while being unattended. The language of the statute makes it pretty clear that this is the injury the statute is meant to protect against, since the statute specific[a]lly addresses setting the brake on the vehicle and curbing wheels so the vehicle does not roll. Nothing indicates the statute is meant to protect against carbon monoxide poisoning.

Causation

C will have to show M's actions were both the but[-]for cause and the proximate cause of his harm. It is the but[-]for, or legal, cause, because were it not for the negligence of the defendant, P clearly would not have suffered any injury. Nothing indicates that he would have suffered such harm just by being in the room. Also, it is the proximate cause. There is a direct link from the actions of the defendant to the harm suffered by P.

M will certainly try to argue that there were superseding forces that were the actual cause of P's harm. His best argument would be that it was C's false imprisonment of P that was the true cause of P's injury. However, superseding forces will not absolve a defendant of negligence unless they are unfor[e]seeable. Here, it should have been foreseeable [to] M that someone, at

some point, would go into the back room or even into the garage. The facts do state that the back room is seldom used, which may seem to support M. However, this does mean that the back room is sometimes used. Therefore, the superseding force was foreseeable and will not break the chain of causation.

Damages

As discussed above, P did suffer damages. These damages can be attributed to M's actions just like they can be attributed to C's intentional tort. The likely result is therefore that P will be able to collect from both C and M, as joint and several tortfeasors.

III. Is Delta Gas (DG) liable for the acts of (a) Clark and (b) Mark?

Though the facts do not specifically say it, C and M both appear to be employees of DG. Therefore, if DG is liable for the acts of C or M, they would be liable under the theory of vicarious liability. Vicarious liability states that an employer is liable for the torts of an employee if that employee is acting within the scope of the employment. The court will consider the time and place of the employee's act, and will also consider if the employee is acting for the benefit of the employer. In general, the scope is broad.

Liability for the tort of C

In this case, DG would argue that C was not acting within the scope of the employment. Certainly, DG would not authorize its employees to commit intentional torts, such as false imprisonment, against its customers.

However, the mere fact that DG did [not] authorize this action will not get it off the hook. All P would have to show to hold DG liable for C's act is that C was acting in the interests of the employee. It is clear that C held P only because he thought P had stolen something from DG. Therefore, C was acting to held [sic] the employer. This is going to be consider[e]d within the scope of employment, even though it was not specifically authorized. Therefore, is [sic] C is going to

be liable, so too will DG. P should also point out that C was on the clock and was at the place of employment when the tort occur[r]ed, strengthening the argument that this is within the scope.

Liability for the tort of M

The same rules will apply to determine if DG is liable for the torts of M. M's tort occurred when he was running the engine of his personal truck in the back room of the garage. Nothing indicates that M was on the clock at this time. Also, nothing indicates that M was doing this with any intention of helping employer. Rather, it appears he was doing this only for himself. Therefore, it is unlikely that DG will be liable for the act of M.

The best argument P could make to hold DG liable would be the close proximity of M to the place of employment. However, this probably will not overcome the facts that he was not on the clock and was not acting to benefit the employer.

Independent contractors?

If for some reason C and M are ICs and not employees, then a different standard would apply. Employers of ICs are generally not liable for the torts of ICs. However, they are liable if the tort involves a non-delegable duty, such as the duty of care owed to an invitee. In this case, P would be an invitee of the business, so he would be owed a very high standard of care. The employer would be charged with warning him of any latent dangers that the employer knows or should have known about. Clearly, carbon monoxide is a latent danger, since it is one that is not immediately apparent and cannot be seen. Also, P would argue that the defendants should be charged with knowing when there are gas leaks in the store. It would not matter that they did not have actual knowledge. The standard is that they should have known. Failing to warn of the latent danger would therefore be a breach, and DG would be liable for the torts of

M and C, even if they are construed as independent contractors and not employees.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

Manufacturer designed and manufactured a "Cold Drink Blender," which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer's brochure that came with the Cold Drink Blender states that it is "perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas," and cautioned, "Do not fill beyond 2 inches of the top."

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

> (1) Consumer's injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.
>
> (2) Consumer's injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.
>
> (3) The design of the Cold Drink Blender was not defective since It complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

> (4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Answer A to Question 2

Strict Liability Claim

A strict liability claim requires: (1) the defendant to be a merchant, (2) the product was not altered since leaving the defendant's control, (3) the product has a defect, (4) the plaintiff was making foreseeable use of the product, and (5) the defect caused the injuries and damages.

Merchant:

A defendant is a merchant if he is in the regular business of producing or selling the product sold.

In this case, the Manufacturer is in the business of producing and selling the blenders in question. The Retailer is in the business of selling the blenders. Thus, both the Manufacturer and the Retailer are merchants.

Not Altered:

There is no evidence to indicate that the blender was altered or tampered with since leaving either the Manufacturer's control of the Retailer's control.

Defect:

There are three types of defects: manufacturing defect, design defect, or failure to warn.

A manufacturing defect is a defect that makes the particular unit defective compared to all other produced units. In this case, there is no evidence that Consumer's unit is any different from other units.

A design defect is a defect that is inherent in the design of the product. It can be shown through the existence of an alternative design that can be implemented effectively to reduce the risk without adding too much cost to the product.

In this case, Consumer has shown that there is a design for a locking mechanism on the cover that can prevent the injuries here. Thus, unless the cost of producing the locking mechanism is prohibitively high, Consumer has established a design defect.

Failure to warn is a defect that occurs when a merchant knows of a defect, but fails to warn of it.

In this case, Manufacturer can argue that it has provided warning in the instructions to not fill the blender to within 2 inches of the top. However, Consumer can argue that the warning is not conspicuous such that a reasonable person would be able to see it. Further, the warning is not adequate to warn of the consequences of the action. Lastly,

while the manufacturer knows that the design is unsafe for hot content, it did not warn specifically against hot content. There, there is a good case for failure to warn also.

Foreseeable Use:

The plaintiff must be using the product in a foreseeable fashion, but need not be using the product in a manner as the producer intended to be used.

In this case, while Manufacturer intended to produce the blender for cold drinks only, Consumer can argue that it is entirely foreseeable that someone may use it for hot contents as well.

Causation:

Causation requires both factual causation and proximate cause.

There is factual causation for injuries based on the defects. Consumer can argue that "but-for" the lack of adequate warning or the lack of a hatch on the cover, Consumer would not be injured.

As for the proximate cause, Manufacturer can argue that the causation was not liable because Consumer was not making foreseeable use of the product. Therefore, Consumer's own negligence is an unforeseeable intervening cause.

On the other hand, Consumer can argue that it is entirely foreseeable that a consumer may want to use the blender for hot contents, or that the consumer may fill the blender to near the top. Most other blenders on the market are designed for use with both hot and cold content, so it is foreseeable that someone would use it that way even if it was not intended to be used that way.

Because Consumer's use is foreseeable, there is proximate causation also.

Damages:

Consumer showed that he has suffered damages in being severely burned.

Negligence:

Negligence requires: (1) duty, (2) breach of duty, (3) causation, and (4) damages.

Duty:

Under the majority Cardozo ("zone of danger") theory, duty is owed to all who may be foreseeably injured. Under the minority Andrews theory, duty is owed to everyone in the world.

In this case, by producing the blender and selling the blender, it is foreseeable that a consumer could be injured. Therefore, Manufacturer and Retailer owe a duty to Consumer under either theory.

Breach:

The standard of care is that of a reasonably prudent person. In cases where a reasonable person has superior knowledge of a fact not known by others, that person is held to the standard of a reasonable prudent person with the superior knowledge.

In this case, Manufacturer has the knowledge that the blender may cause danger if filled too close to the top. Therefore, Manufacturer is held to the standard of a prudent person with this special knowledge.

Retailer is held to the standard of a reasonably prudent person, assuming that he has no special knowledge.

Causation and breach are similar to those above for strict liability and not repeated here.

Manufacturer's Motions:

Typically, for a motion to dismiss, the evidence is viewed in the light most favorable to the non-moving party. With this principle in mind, and the general elements for strict liability and negligence in mind, I will analyze each of Manufacturer's motions.

(1) Motion to dismiss because of the Consumer's misuse:

For the strict liability claim – as discussed above in the elements for the strict liability claim, strict liability is attached when the defendant is making foreseeable use of the product. As discussed above, Consumer's use of the blender – filling it to the top and using hot contents – is foreseeable even if it is not intended by Manufacturer. Since consumers of blenders typically use it for both hot and cold contents, and some models allow contents to be filled to the top, it should be foreseeable that Consumer would use it that way. Therefore, Consumer's misuse does not relieve Manufacturer of the strict liability claim.

For the negligence claim: Duty is owed to all those who may be injured. Therefore, Consumer's misuse of the product does not relieve Manufacturer for its duty towards Consumers. As discussed above, the injury was caused by the blender and the injury was foreseeable. Therefore, the causation element is satisfied as well. Hence, as discussed above, whether Manufacturer is liable depends on if breached its duty towards Consumer, judged by the reasonable person standard with similar specialized knowledge. Hence, Consumer's misuse by itself does not relieve of the negligence claim.

Defense of Contributory Negligence:

In jurisdictions following the contributory negligence rule, any negligence on the plaintiff's part relieves the defendant of liability. If the case is tried in such a jurisdiction, Manufacturer could argue that Consumer was negligent in using a blender for cold drinks, as implied by its name, for hot soup. Thus, if the jury finds the consumer to be negligent, this would relieve Manufacturer of liability.

It is noted that Manufacturer is moving for dismissal here. Hence, Consumer's contributory negligence is a question of fact to be tried. Consumer is not negligent per se for using a blender with a name implied for cold drinks for hot soup. Therefore, even if they are in a contributory negligence jurisdiction, Manufacturer is still not entitled to dismissal.

It is also noted that this is only a defense for the negligence claim. The strict liability claim is strict liability, thus is not open to contributory negligence defenses.

Assumption of Risk:

The manufacturer can argue that consumer assumed the risk by operating the blender in a dangerous fashion, in contrary to common sense and the instruction. Therefore, the consumer assumed the risk of injury, and this relieves Manufacturer of liability.

In this case, while the Manufacturer implied that the blender is good for cold drinks by naming it the "Cold Drink Blender" and specifying that it is "perfect for cold drinks", Manufacturer has not warned that the blender could cause injuries if used for hot drinks. Further, while Manufacturer said it is perfect for cold drinks, it did not specify it cannot be used for hot drinks.

Therefore, Consumer can argue that since there is no warning of the risk while using the blender for hot drinks, and the warning is not apparent to a reasonable person, Consumer has not assumed the risk by using the blender for hot soup.

Defenses of Comparative Negligence:

In a comparative negligence regime, the liability of the defendant is reduced through the relative negligence of the plaintiff.

In this case, even if the plaintiff is negligent, this would only amount to a reduction of damages. This defense does not entitle Manufacturer to dismiss the claim.

(2) Motion to dismiss because of the Consumer lack of care:

Consumer's lack of care would amount to evidences used to establish that Consumer was negligent in operating the Blender.

For the strict liability claim: Under the strict liability claim, Manufacturer is strictly liable if all the elements are proven. (See elements above). Thus, Consumer's own lack of care, amounting to negligence on the consumer's part, is irrelevant to Manufacturer's liability under the strict liability theory. The assumption of risk doctrine is applicable, but fails here. (See discussion above.)

For the negligence claim: See discussion above for contributory negligence, comparative negligence, and assumption of risk. As discussed above, none of these theories allow Manufacturer to dismiss the claim.

(3) Motion to dismiss because there is no defect:

For the strict liability claim: As discussed above in the elements for strict liability, there is evidence that could lead a jury to believe there is a design defect or a failure to warn defect.

In this case, while evidence that Manufacturer's design complied with regulations could be evidence towards proving there are no defects in the locking mechanism, it does not establish conclusively there is no defect. Further, this does not resolve the question over the failure to warn defect (whether the warning was conspicuous enough).

As discussed above, in a motion to dismiss, the evidence is viewed in light most favorable to the non-moving party. Thus, because there is some evidence of defect, and the evidence of compliance with regulation is not conclusive on the question of defect, the motion to dismiss should be denied.

For the negligence claim: As discussed above, the standard of care is measured by a reasonably prudent person with similar specialized knowledge. Therefore, compliance with regulation does not relieve Manufacturer of either the duty or the standard of care.

It is noted that if the regulation is violated, Manufacturer could be held as negligent per se. However, the inverse is not true. Therefore, motion to dismiss for the negligence claim should be denied also.

(4) Retailer's Claim:

For strict liability: As discussed above (see above), the claim of strict liability just requires Retailer to be a merchant that put the article in the stream of commerce. There is no requirement for the Retailer to take part in designing or manufacturing. Thus, the motion to dismiss should be denied.

It is noted that Retailer could get indemnification from Manufacturer if they are held jointly liable, and Manufacturer is the negligent party.

For negligence: As discussed above, the standard of care for Retailer is that of a reasonably prudent person. Thus, under this standard, whether or not Retailer took part

in the design, whether it is negligent or not depends on what other reasonably prudent persons would have done (such as inspection and testing). Thus, the fact that Retailer took no part in the design or manufacturing does not relieve it of its negligence claim. Therefore, motion to dismiss should be denied also.

Answer B to Question 2

Strict Products Liability

Consumer's lawsuit against Manufacturer seeks to recover on a strict products liability theory. In order to establish such a claim, the consumer must demonstrate that (1) the defendant is a merchant, (2) there was either a design or manufacturing defect in the product, (3) the product was not altered after leaving the merchant, (4) the product caused the plaintiff's injury, and (5) the customer was using the product in a foreseeable manner.

In this case, the Manufacturer was a merchant because it was the company that designed and manufactured the product at issue. It then sold this product to retail stores. The Retailer was also a merchant because it presumably made its business by selling these types of appliances to consumers. There is nothing in the facts that indicate that the retailer was not a merchant of similar products in the course of its business.

Consumer must also assert that this product had a defect. A design defect is a flaw in the design of a product that makes it unreasonably unsafe. If there is a way to reasonably make the product more safe without lessening the utility of the product or prohibitively raising costs, then it may have a design defect. Additionally, the presence of the design defect must be the cause of the plaintiff's injury. Here, Consumer argues that there was a design defect because the blender did not include a locking cover. The absence of this safety feature was the cause of her injury, because if it had been in place, the top would not have come off and she would not have been burned by the hot soup. Consumer must demonstrate that installing such a lock would have been reasonably feasible, and would not impinge on the utility or costs of the blender. She could point to other blenders that have similar safety devices of the development of such devices in similar small appliances. Since installing a small lock would not be unduly costly and is generally available on blenders, then the product was defective because it lacked this reasonable safety feature. Additionally, the causation element is met because but for the omission of this feature on the blender, Consumer would not have been injured in this way. The lock would have prevented her injury.

Consumer must also demonstrate that the product was not altered once it reached her in the chain of commerce. There is nothing in the facts to indicate that upon leaving the manufacturer or the retailer, the blender was changed in any way, thereby satisfying this element.

Consumer will have the most difficulty in proving that she was using the product in a foreseeable manner. A plaintiff may recover if she can demonstrate that her use was foreseeable, even if it was not the use intended by the manufacturer. The defendants in this case will argue that they should not be liable because Consumer's use of liquefying vegetables for a hot soup was not foreseeable. The product was clearly called the "Cold Drink Blender" and marketed itself as a tool for making cold drinks and crushing ice. Consumer will counter this by pointing out that although the regular use of all blenders may be to crush ice or make daiquiris, it is certainly foreseeable that a person may also

decide to make other uses of the blender. There is no reason why a person would think that the blender was not fit to handle hot soups, and so she should not then be deemed to be using the product outside of its foreseeable use.

Under the above analysis, the Consumer can properly allege a prima facie case of strict products liability against both the Manufacturer and Retailer. The specific items in each motion to dismiss will be further discussed below.

Negligence

Under a negligence action based on products liability, a plaintiff must allege that there was a (1) duty of care, (2) that was breached, (3) the breach was the actual and proximate cause, of (4) harm suffered.

The standard duty of care is that of a reasonably prudent person in similar circumstances. Under the majority view, a person or entity owes a duty of care to those foreseeably harmed by their actions. Consumer will argue that the defendants breached this duty because it was unreasonable to manufacture and then sell a blender that did not have a locking feature. She will try to point out that a reasonably prudent manufacturer would not create a blender that did not have a lock, relying on evidence of commonly-held expectations of the marketplace when people make, sell, and buy blenders.

In order to show actual cause, the Consumer must show that but for the defendants' breach of duty, she would not have suffered her injury. She will argue that if they had not breached their duty and had included a lock, she would not have been burned. Additionally, she must show that the breach was the proximate cause of her injury. A breach is the proximate cause of an injury when a person is in the zone of danger created by the breach. It was foreseeable to the manufacturer or retailer that upon buying a blender without a safety lock, the top could fly off and a person could be injured. Consumer was in the zone of danger since it was foreseeable that her injury would be caused in this manner due to the lack of the safety device.

Finally, Consumer must show that she suffered damages as a result of the defendants' negligent act. Here, Consumer was severely burned by the hot soup. She suffered a personal injury.

Under the above analysis, the Consumer can likely establish a prima facie case of negligence. Specific defenses and the issues of each motion to dismiss are addressed below.

Manufacturer's Motion to Dismiss

1. Consumer's Injury Caused by Her Own Misuse

The manufacturer argues that it should not be liable because the Consumer herself misused the product. This argument goes to the prong of strict products liability requiring that a consumer's use be foreseeable. Under the above discussion, it was

foreseeable that a person who buys a blender would use it for many different blending purposes, not solely mixing cold drinks. Simply because you purchase an item that is labeled as a cold drink blender would not make a reasonable person believe that they could only use the product to blend cold items. Blenders are multi-purpose appliances and generally used to mix and blend a variety of products, including vegetables for a hot soup. Accordingly, it would be foreseeable that the Consumer would use the product in this way, and so the Manufacturer cannot rely on her misuse to avoid liability. Under the same analysis, the manufacturer would not prevail if it claimed that its breach was not the proximate cause of her injury because the injury was unforeseeable. It would be foreseeable that a person would use this blender for hot and cold products, so a person being burned by the contents leaking out when the top flies off would not be so unforeseeable as to defeat a finding of proximate cause.

The Manufacturer will also argue that the misuse of the product was negligent by the consumer. Under the traditional rule, contributory negligence could serve as an absolute bar to recovery on a negligence of products liability action. If the plaintiff herself was even slightly negligent, then all recovery could be barred. Under the modern rule of comparative negligence, recovery can be reduced proportionally according to the amount of negligence on the part of each party. If it was negligent for Consumer to use the product with hot soup, then Consumer's recovery may be limited. It will point out that even if it is foreseeable to use the blender for things other than cold drinks, pouring in hot soup that had the ability to severely burn a person was itself an unreasonable act.

Under the modern rule, this argument could successfully limit the amount of damages recovered by Consumer. However, the court should deny the motion to dismiss based on this ground because it does not negate the elements of strict products liability, negligence, or serve as an affirmative complete defense.

2. Consumer's Injury Caused by Her Own Lack of Care

The Manufacturer also asserts that consumer was negligent in that she overfilled the blender and then operated it at a high speed. The blender came with a warning cautioning a user not to fill beyond two inches of the top. The manufacturer will argue that by failing to observe this warning, the consumer was herself not making a foreseeable use of the product and was herself negligent.

A warning on a product cannot completely shield a manufacturer from a products liability claim. It would be foreseeable that despite this warning, a user would fill a blender close beyond two inches from the top, and then use it at the highest speed set on the machine. Such a use is likely common, and therefore should have been foreseen by the manufacturer. Accordingly, the Manufacturer cannot discharge all of its liability by claiming that the warning shielded it from an injury caused by this use. It was foreseeable that a consumer would use the product in this way, meaning that this use does not discharge the elements of a products liability or negligence action.

Again, the Consumer's lack of care may limit the amount of damages recovered on a

comparative negligence theory. Under the discussion above, since it was likely unreasonable for the Consumer to fill the blender to the brink with hot soup, then under the modern rule, her recovery should be proportionately reduced due to her negligent actions. The court should deny a motion to dismiss on this ground.

3. Design Not Defective

The Manufacturer finally asserts that the design was not defective since it complied with federal regulations. Compliance with government regulations is evidence of lack of a defect, but it is not conclusive. A manufacturer may still be liable for a design defect or negligence even if it comports with regulations. Even though the Consumer Products Safety Commission may not at this point require any locking mechanism, it may be unreasonable for the Manufacturer not to include the lock, on the basis of the current knowledge in the industry. A manufacturer cannot hide behind official regulations to avoid liability. If it was minimally costly to include the lock and did not effect the utility, then the lack of a lock can be deemed a design defect. Also, if it was a breach of duty to consumers not to include the lock, then its failure to provide one may be a negligent act by the Manufacturer.

Accordingly, the court should deny a motion to dismiss on this ground.

Retailer's Motion to Dismiss – No Part in Manufacture

The Retailer asserts that it should not be liable to the Consumer because it was not the party who manufactured the blender. In a strict products liability action, any link in the distribution chain may be liable. The fact that the Retailer did not design or make the blender will not shield it in this action. The Consumer need only establish the elements of a strict products liability are met and the Retailer may be held equally as liable as the Manufacturer.

Here, the Retailer was a merchant because it regularly dealt in the sale of these kinds of goods. The design was defective, under the analysis above. The machine was not altered once it left the Retailer's premises. Finally, the Consumer's use of the product was foreseeable. Accordingly, the court should not dismiss the strict products liability suit against the Retailer.

If the Retailer is held liable in the strict liability suit, it may seek indemnification from the Manufacturer. Indemnification is available when a party is held liable for injuries suffered by a plaintiff, but another party's actions are actually the cause of the injury. Since the Retailer was not responsible for the design defect and the Manufacturer was responsible, the Retailer should be able to recover any amount of damages it owes to the Consumer from the Manufacturer.

Retailer must also argue that it was not negligent, so that claim should be dismissed. Consumer may argue that Retailer breached its duty by not inspecting the item and discovering its defect, that failure to inspect was unreasonable, and that it caused her injuries. This is a more attenuated theory than the negligence action against the

Manufacturer. A Retailer should not be held responsible for inspecting every product that is properly packaged and labeled for sale in its own store. Although it may be held liable on a strict liability theory, there was likely no actionable negligence by the Retailer. Accordingly, the claim of negligence against the Retailer should be dismissed.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Peter, a twelve-year old, was playing with his pet pigeon in a field near his home, which is adjacent to a high voltage electricity power substation. The substation is surrounded by a six-foot tall chain link fence topped with barbed wire. Attached to the fence are twelve 10 inch by 14 inch warning signs, which read “Danger High Voltage.”

Peter’s pigeon flew into the substation and landed on a piece of equipment. In an attempt to retrieve his pet, Peter climbed the surrounding fence, then scaled a steel support to a height of approximately ten feet from where the bird was stranded. When Peter grasped the bird, it fluttered from his hand, struck Peter in the face, causing Peter to come into contact with a high voltage wire, which caused him severe burns.

Peter’s father is contemplating filing a lawsuit on Peter’s behalf against the owner and operator of the substation, Power and Light Company (PLC), to recover damages arising from the accident.

What causes of action might Peter’s father reasonably assert against PLC, what defenses can PLC reasonably raise, and what is the likely outcome on each? Discuss.

Answer A to Question 1

The following courses of action might reasonably be asserted against PLC by Peter's father on behalf of his son:

I. Strict Liability for Ultrahazardous Activity

A defendant (∆) can be held strictly liable for damages caused to a plaintiff (π) where the ∆ is engaged in an ultrahazardous activity. An ultrahazardous activity is one that is 1) inherently dangerous, 2) uncommon to the geographic area, 3) cannot be made safe and 4) whose risk outweighs its social utility.

A. Inherently dangerous. Electricity is inherently dangerous. In this case, the substation was a high voltage station. This element is met.

B. Uncommon to the geographic area. Substations are often located in neighborhoods or near them. In this case, the station was located in a field near π's house, not close where it might be uncommon, for example, next to his house. Arguably, a substation in a field near a residential community is not uncommon. This element weighs against finding an ultrahazardous activity. This element [sic.]

C. Cannot be made safe. Arguably, high voltage electricity cannot be made safe.

D. Social utility vs. risk. The social utility of providing electricity to homes is clear. People need electricity for everyday purposes. Moreover while the activity cannot be made safe, the related risks can be lessened. In this case, fences, razor wire and signs were posted and used to prevent people from coming into contact. Therefore the social utility outweighs the risks.

On whole, the factors weigh against finding an ultrahazardous activity and holding ∆ strictly liable.

II. Negligence

In order to find ∆ liable for negligence, π must prove duty, breach, causation, and damages.

A. Duty

1. Foreseeable π? Here, a child from the houses near the station is certainly within the zone of danger presented by a high voltage station.

2. Standard of Care. Absent a special relationship, the Δ must use reasonable care. Here, there may be a special relationship with the π.

a) Anticipated Trespasser. Where a landowner foresees trespassers, the landowner has a duty to warn of known artificial conditions that present serious risks of bodily harm. In this case, the high voltage electricity is an artificial condition that presents a risk of serious harm. Therefore, Δ had the duty to warn. Δ met this duty by posting 12 signs to the fence warning of danger.

b) Attractive Nuisance. Where a landowner has an attractive nuisance on his land, the landowner may have the duty to make the artificial condition safe or have a greater duty than to just warn the trespasser.

1. Foreseeable to have children trespassers. Since the station is near his home it is foreseeable that children might trespass.

2. Unlikely to appreciate the danger. It is arguable that a 12 year-old boy is unlikely to appreciate the danger that high voltage electricity presents; however, younger children might not.

3. The cost to make safe outweighs the risk of harm. The risk of harm in this case is death from electrocution. However, given the social utility of the activity and the steps taken by Δ (fence, warnings, razor wire) one could argue that the appropriate actions were taken to satisfy the landowner's duty.

Taller Fence? π might argue that a taller fence was not that costly in

comparison to the risk. Here the fence was only 6 ft. Arguably a taller fence may have prevented π from entering the station.

Assuming the special duties of a landowner were satisfied, Δ only owed a duty of reasonable care to π.

B. Breach of Duty of Reasonable Care in Operating Substation

Here, Δ posted danger signs, enclosed the station in a fence; however, it only used a 6 ft. chain link fence. Kids climb fences often; therefore, reasonable care would dictate that a higher fence made of something less "climbable" was necessary to prevent entry to the substation. Arguably, therefore, Δ breached its duty to π.

C. Causation

1. Actual Cause. But for Δ's failure to erect a more formidable barrier, π would not have been able to come into contact with the electricity.

2. Proximate Cause. Where another force intervenes, Δ is only liable if the force is merely intervening and not superseding.

    a) Intervening. Here, the pigeon struck Peter in the face and caused him to make contact with the wire. This is intervening.

    b) Superseding. Acts of God, intentional torts, and crimes are intervening acts. Here, the flight of a pigeon could arguably be superseding, however, where Δ's negligence creates the situation which gives rise to the act, Δ can still be liable if it was foreseeable. Once a child is inside a substation, many acts could cause the child to become electrocuted. Therefore, perhaps this will be held to constitute proximate cause.

D. Damages

π sustained burns and undoubtedly related expenses. These damages were foreseeable, unavoidable, certain and [sic.]

E. Defenses

1. Assumption of the Risk. Here π scaled a fence posted with 12 warning signs and scaled a steel support. Arguably, a 12 year-old comprehended the risk of high voltage electricity and assumed that risk when entering the station. This would, if successful, preclude π's recovery.

2. Comparative/Contributory N. π could be held N. for failing to heed the warnings posted. This would preclude (contrib. N.) or reduce (comparative N.) his recovery.

Answer B to Question 1

Strict Liability

Peter's father (Father) can assert a claim of strict liability against Power and Light Company (PLC) to recover damages arising from Peter's accident. To establish strict liability, (i) the defendant is engaged in abnormally dangerous activity, (ii) no amount of due care can eliminate the dangerous conditions, and (iii) the activity or conditions are not common in the community.

Abnormally Dangerous Activity

Father can argue that PLC is engaged in abnormally dangerous activity on its property. In this case, PLC operated a high voltage electricity power substation. Father can argue that the substation is a participial condition created by PLC that is inherently dangerous. The high voltage substation is continuously conducting high amounts of electricity. Upon contact with the electric substation, a person can be shocked with a deadly amount of voltage. Furthermore, the operation of a high voltage power substation is not a low risk activity. The possibility and likelihood of injury due to electric shock is extremely high. Therefore, regardless of the utility of the substation, the operation of the substation is an abnormally dangerous activity.

On the other hand, PLC can argue that the operation of the electric substation is not an abnormally dangerous activity. The substation, while producing high voltages of electricity, is in a controlled, secure environment. The electricity is used to power the community, and it is not being used for any type of dangerous purpose other than to provide electricity. PLC can argue that providing electricity to a community is not an abnormally dangerous activity. Furthermore, while the high voltage substation is inherently dangerous, it is not abnormally dangerous. The substation is operated safely by PLC, and the risk of harm or danger only arises when a third party fails to observe the danger warnings and acts without regard to their safety when near the substation.

The court will likely agree with Father and find that the operation of the high voltage electric substation is an abnormally dangerous activity. Simply operating such a substation carries with it the high risk of danger. PLC's argument that the power is being used to benefit the community will not outweigh the risk that the substation poses to the general public.

Due Care Will Not Eliminate Danger

Father can argue that regardless of the due care the PLC may have used in securing the high voltage electric substation, the danger of electric shock was not eliminated. Although there was a fence around the substation, and warning signs posted on the property, the substation was still producing high voltages of electricity. The dangerous conditions were still present even though there were warnings. Father can argue that the only way that the risk of electrocution could be eliminated was to shut down the substation so that it would no longer produce high voltages of electricity. Therefore, regardless of any amount of due care by PLC, the substation was still extremely dangerous and capable of electrocuting people who came in contact with the substation.

On the other hand, PLC can argue that the danger in operating the substation arose from third parties who ventured onto the property and came into contact with the substation. The substation was inside a fenced area. The fence was six feet tall with barbed wire on top. PLC can argue that it completely restricted access to the substation to third parties. Therefore, since the substation was in a secure area, the risk of harm to those outside of the secured area was eliminated. By eliminating free access and contact with the substation, the substation posed no harm to the third parties not authorized or legitimately inside the secured fenced-in area near the substation.

The court will likely agree with Father and find that regardless of the erection of the fence and warning signs on the property, PLC still could not eliminate the danger of electrocution to persons coming into contact with the substation. Therefore, no amount of PLC's due care could eliminate the danger posed by the high voltage electric substation.

Not a Common Activity

Father can argue that operating a high voltage electric substation is not a common activity that occurs in the community so close to a residential area. Father can argue that while electric substations are common, they are not erected and operating near residential areas. In this case, PLC operated the high voltage electric substation adjacent to Father and Peter's home. The substation should have been operated in a remote part of the community where it would not pose a danger to the public. Furthermore, if PLC was to operate a substation near a residential area, it should only operate low voltage substations that do not have deadly amounts of electricity being produced from them. Therefore, PLC's operation of the substation next to Father's home was not a common activity.

PLC can argue that it had numerous substations situated throughout the community. The only way PLC can deliver power consistently and reliably to the whole community is to have high voltage substations near residential areas, where power consumption is high. Furthermore, PLC can argue that power companies throughout the area commonly place high voltage substations near densely populated areas. PLC can argue that by placing the substation in a

remote area, it would defeat the purpose of providing electricity directly to the areas that have high power consumption and electricity needs. PLC may even argue that the residential area was constructed after PLC built and began operating its substation. Therefore, operating the substation next to Father's home is common practice in the power generation industry and PLC commonly practices placing such substations near residential areas.

The court will likely agree with Father that PLC's operation of the high voltage substation near a residential [community] was not a common activity. Furthermore, even if Father's home was built after PLC began operation of the substation, PLC's operation of the substation was still not a common activity, and the operation should have ceased.

Assumption of the Risk

PLC can argue that Peter assumed the risk of electrocution. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence and attempted to climb a fence topped with barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

Contributory Negligence

Contributory negligence is not a valid defense in strict liability cases.

Conclusion

Father will not prevail against PLC for strict liability since Peter assumed the risk of electrocution by climbing onto the substation. However, if the court finds that Peter did not assume the risk of electrocution, then Father may recover on Peter's behalf since PLC was engaged in abnormally dangerous activity by operating the high voltage substation, no amount of care by PLC could eliminate the harm of electrocution to third parties, and the operation of the substation was not a common activity. Father can recover compensatory damages from the injuries sustained by Peter as a result of being electrocuted by PLC's substation.

Negligence

Father can assert a claim of negligence against PLC for negligently operating the substation. A claim of negligence requires that (i) the defendant owed a duty to the plaintiff, (ii) defendant breached this duty, (iii) the breach was a cause-in-fact of plaintiff's injury, (iv) the breach was a proximate cause of plaintiff's injuries, and (v) plaintiff suffered damages. In this case, Father is bringing a claim of negligence against his son and injured party, Peter.

Duty

A defendant is liable for negligence only to those plaintiffs to whom they owe a duty. Under the Cardozo test (majority view), a plaintiff has a duty to all foreseeable plaintiffs who may be injured as a result of defendant's negligence. Under the Andrews test (minority view), a plaintiff has a duty to all plaintiffs who are injured as a result of defendant's negligence. In this case, Peter was injured as a result of being electrocuted by PLC's high voltage substation. Under the Cardozo test, Father can argue that Peter is a foreseeable plaintiff because it is foreseeable that children living near the substation would climb on the substation or otherwise come into contact with the substation, and be electrocuted. PLC can argue that it is not foreseeable that someone would climb over the six foot high fence with barbed wire, and ignore all warning signs posted by PLC. The court is likely to find that Peter was a foreseeable plaintiff, since PLC was aware of the danger posed by the substation, and it is foreseeable that children in the residential area near the substation would sneak into the secured area and be harmed. Therefore, under the Cardozo and Andrews tests, Peter is a foreseeable plaintiff, and PLC owed a duty of reasonable care to Peter.

Attractive Nuisance

Father can argue that PLC's substation was an attractive nuisance, and PLC breached its duty of care to Peter by failing to eliminate the harm posed by the substation. For a defendant's activities to be an attractive nuisance, (i) defendant must know that children frequent defendant's property, (ii) defendant is aware of dangerous conditions existing on the property, (iii) defendant failed to eliminate the dangerous conditions, and (iv) the cost of eliminating the dangerous conditions is outweighed by harm.

PLC Must Know that Children Frequent the Property

Father can argue that PLC knew, or should have known, that children play on the substation. Father can argue that the substation is in a field adjacent to the residential area. Therefore, children from the area could easily play near the substation, or inside the fence by sneaking into the property. On the other hand, PLC argues that it was not aware that children have entered the fenced-in area of the substation. PLC has not received any warnings of children sneaking into the secured area, nor had there been any past incidents of children being harmed by sneaking into the fenced-in area. Furthermore, PLC can argue that it was not aware that children lived in the residential area. The court will likely find that absent any evidence that PLC knew children had been sneaking into the fenced-in area, or that PLC should have known that children live in the neighborhood and play near the substation, PLC did not know that children frequented the property and played near the substation. However, in the event that Father prevails in showing that PLC was aware that children snuck into the

fenced-in area of the substation, we can continue the analysis for attractive nuisance below.

PLC is Aware of the Dangerous Conditions

Father can argue that PLC was aware of the danger posed by the high voltage substation. PLC was aware of the danger since it had posted signs stating "Danger High Voltage." PLC can argue that while it was aware that its substation posed the danger of electrocution to third parties, it was not aware of the danger being posed to any children in the area. However, Father will easily prevail since PLC did know that the substation was capable of electrocuting persons who came into contact with the substation.

PLC Failed to Eliminate the Dangerous Condition

Father can argue, as above with strict liability, that PLC failed to discontinue operating the substation. Thus, the risk of electrocution remained, despite the erection of a fence and posting of warning signs by PLC. The court will likely find that PLC did not eliminate the dangerous conditions since the harm of electrocution remained.

Cost Outweighed by Benefit

Father can argue that the benefit of eliminating the risk of death to children in nearby residential areas greatly outweighs any costs associated with discontinuing operation of the substation. Father can argue that PLC can simply move the substation operation to another less densely populated part of the community. On the other hand, PLC argues that the substation is strategically placed to provide reliable power to the community and its residents and businesses. The cost of discontinuing the substation would be great, and the adverse effects of unreliable power would be felt throughout the community by everyone. Furthermore, PLC would suffer a great financial hardship by having to shut down one of its high voltage substations.

Conclusion

The court will likely find that PLC was not aware that children frequented the property; thus, PLC did not breach any duties owed to Peter under the attractive nuisance doctrine. Even if Father proves that PLC was aware or should have known that children frequented the property, PLC may have a strong argument in showing that the cost of shutting down the substation is outweighed by the financial hardship it will face, as well as the hardship to the community for the loss of reliable power.

Breach – Reasonable Care

Father can argue that PLC breached a duty of reasonable care in failing to erect a more protective fence around the substation. In this case, the fence was six feet tall and had barbed wire around the top portion. Father can argue that since the substation was extremely dangerous since it produced high voltage power, a higher fence should have been erected. However, PLC can argue that it acted as a reasonable substation operator would have acted. It erected a high fence, with barbed wire at the top; thus, reducing the chance that even if someone climbed the fence, they would not be able to scale the top of the fence. Furthermore, the PLC posted conspicuous 10 inch by 14 inch warning signs which clearly stated "Danger High Voltage." The court will likely find that PLC acted reasonably, since it did construct a reasonable protective fence and posted warning signs advising of the danger posed by the substation.

Cause-in-Fact

Father can argue that but-for PLC's operation of the high voltage substation, Peter would not have been harmed. PLC can argue that but-for Peter chasing his bird into the substation area, Peter would not have been electrocuted. The court will likely find that PLC's operation of the substation was a cause-in-fact of Peter's injuries, since a defendant's conduct need only be one cause of the plaintiff's injuries.

Proximate Cause

Proximate is legal cause, and the plaintiff's injuries must have been a foreseeable result of the defendant's conduct. In this case, Father can argue that it was foreseeable that a child could sneak into the substation area, and be electrocuted while climbing the substation. On the other hand, PLC can argue that it is not foreseeable that a child would scale the six foot high wall, climb over the barbed wire at the top of the fence, then scale a ten foot high steel support in order to catch a bird, and in the process of doing so, be electrocuted by falling onto the substation. Father can argue that all that is necessary is that it was foreseeable to PLC that if someone was to enter the fenced-in area, they could be harmed by electrocution, regardless of how that electrocution came about. The court will likely find that Peter's electrocution by the substation was a foreseeable injury. Therefore, PLC's operation of the substation was the proximate cause of Peter's injury.

Intervening Cause

PLC may argue that Peter's chasing the bird was an intervening cause which cuts off PLC's liability. However, an intervening act must be unforeseeable

to cut off liability. In this case, Father can argue that it was foreseeable for a child to chase a pet into the fenced-in area. Thus, Peter's chasing his pet bird was not an intervening cause of Peter's injuries which cuts off PLC's liability.

Contributory Negligence

PLC can argue that Peter was contributorily negligent for chasing his bird into the fenced-in area, and that his injuries were due in part to his own negligence. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence, and attempted to climb a fence topped with a barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

The court is likely to find that Peter was contributorily negligent since he failed to heed the warning signs posted by PLC. In a contributory negligence jurisdiction, Father will not recover at all since Peter's negligence cuts off recovery. In a pure comparative negligence jurisdiction, Father's recovery on behalf of Peter will be reduced by Peter's percentage of his own negligence. Finally, in a modified comparative negligence jurisdiction, Father will only recover on Peter's behalf if Peter's negligence is not more than 50%.

Assumption of the Risk

Similarly as above, PLC can argue that Peter assumed the risk by ignoring the warning signs and scaling the fence. Unless Peter could not read or was otherwise not mentally competent to appreciate the risk, Father will not be able to recover on Peter's behalf since Peter assumed the risk of electrocution.

Conclusion

The court is likely to find that PLC was not negligent in operating the substation. Furthermore, Peter most likely contributed to his own negligence, and he assumed the risk of electrocution. However, if they are found to be negligent, Father may recover damages for injuries sustained by Peter, including medical bills and pain and suffering.

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ESSAY QUESTIONS AND SELECTED ANSWERS
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Question 4

ConsumerPro, a consumer protection group, published a manual listing the names, addresses, telephone numbers, and specialties of attorneys who represent plaintiffs in tort cases. The manual also included comments rating the attorneys. The manual was distributed by ConsumerPro to its members to aid them in the selection of an attorney should they need one.

Paul was listed in the manual as an attorney who litigates automobile accident cases. In the related comments, the manual stated that "Paul is reputed to be an ambulance chaser and appears to handle only easy cases."

Paul sued ConsumerPro for defamation, alleging injury to reputation and requesting general damages. ConsumerPro moved to dismiss for failure to state a claim on which relief could be granted, on the grounds that (1) the statement was non-actionable opinion, (2) Paul failed to allege malice or negligence under the United States Constitution, (3) Paul failed to allege special damages, and (4) in any event, the statement was privileged under the common law.

How should the court rule on each ground of the motion to dismiss? Discuss.

Answer A to Question 4

1. Statements of Opinion May Be Actionable in a Defamation Action

To state a claim for defamation, the plaintiff must allege (1) a defamatory statement (2) that is published to another. ConsumerPro alleges that the statements about Paul in its manual are not actionable defamatory statements because they are opinions. This is incorrect. Statements of opinion are considered defamatory (and actionable) if a reasonable reader or listener would have reason to believe that the declarant has a factual basis for his or her opinion. Here, a reasonable person reading the manual would have reason to believe that ConsumerPro has a factual basis for its statements concerning Paul. A reader would reasonably assume that ConsumerPro – a consumer protection group – researched the various attorneys before writing and publishing its manual, that it investigated their reputations and their prior experience, and that it based its assertions on facts it had discovered through this investigatory process. In such circumstances, statements of opinion are actionable. Accordingly, the court should not grant ConsumerPro's motion to dismiss on this ground.

2. Failure to Allege Malice or Negligence Does Not Defeat Liability Here

If the subject of a statement is a matter of public concern, the First Amendment requires a plaintiff in a defamation action to allege falsity and fault in addition to the elements listed above. If the plaintiff is a public official, public figure or limited public figure, the level of "fault" the plaintiff must prove is that the defendant acted with malice or recklessness. If the plaintiff is a private figure, he need only show that the defendant acted negligently. If, however, the subject matter of the statement is not a matter of public concern, the plaintiff need not prove malice, recklessness, or negligence. Even a non-negligent good faith publication of a defamatory statement on matters that are not of public concern will support liability for defamation.

Here, ConsumerPro may argue that the subject matter is a public concern because lawyers offer a service to the public, making their abilities and expertise relevant and important information for the public to know. This argument should fail. While an individual's qualifications to do a job may be relevant to specific people (or a specific group of people), it does not qualify as a mater of public concern that it [is] important information for the community at large. Accordingly, Paul did not have to allege fault (malice, recklessness, or negligence) here and ConsumerPro's motion to dismiss on this ground should also be denied.

3. Failure to Allege Special Damages Does Not Defeat Liability Here

In some defamation cases, the plaintiff is also required to allege special (i.e., actual economic) damages in addition to the elements discussed above. A plaintiff need not allege or prove special damages; however, in cases involving libel (written defamation) or slander per se (spoken statements concerning a person's ability to do his or her job, imputing unchastity to a woman, accusing someone of a crime of moral turpitude or stating that a person has venereal disease). Special damages are only a necessary element in complaints alleging regular slander. Here, the statements were made in writing and are therefore properly characterized as libel. Accordingly, Paul need not allege special damages, and ConsumerPro's motion to dismiss on this ground should be denied.

Notably, Paul may not be able to recover a substantial amount of money if he is unable to prove any special damages at trial, but failure to allege special damages is not a ground on which to dismiss a defamation action based on libel.

4. The Statements Are Subject to a Qualified Privilege

There are two types of privilege that may be asserted as a defense to a defamation action: Absolute privilege and qualified privilege.

Absolute privilege is available as a defense with respect to statements made by one spouse to another, and with respect to statements made by government officials (including lawyers) in the course of their duties. This privilege is not applicable here.

Qualified privilege is available when there is a socially useful context for the speech at issue. In such cases, statements will be privileged if (1) the speaker has a good faith belief in the truth of the statements and (2) the statements are relevant to and within the scope of the useful purpose for the speech. For example, a former employee providing a reference will have a qualified privilege defense to a defamation action if he believed the statements he made and refrained from injecting extraneous and irrelevant information into the communication. Here, ConsumerPro is providing a service to the public by providing information about lawyers to individuals who may require a lawyer's services. This is a socially useful context. The statements about Paul being an "ambulance chaser" and taking "only easy cases" are relevant to the purpose of the manual in that they provide information that a person looking to hire an attorney would be interested to know to inform his or her selection. Accordingly, the latter element of the qualified privilege defense is likely satisfied here.

Nevertheless, ConsumerPro's motion to dismiss on the ground of qualified immunity should be denied. A factfinder could find based on evidence presented at trial that ConsumerPro did not have a good faith belief in the truth of the statements. If so, the privilege would not be applicable and Paul could prevail at trial.

Conclusion

In sum, ConsumerPro's motion to dismiss should be denied in its entirety because none of the arguments asserted by ConsumerPro are meritorious.

Answer B to Question 4

Paul's motion to dismiss will be evaluated on the basis of the facts alleged in his complaint. The court will assume that the facts alleged by Paul are true and will determine whether Paul is entitled to relief on the basis of the facts as he alleges them.

Part One: Non-Actionable Opinion & Application of the Basic Definition of Defamation to Paul

Definition of Defamation

Paul sued ConsumerPro for defamation. Defamation requires a defamatory statement about the plaintiff that is published to a third person. A defamatory statement is one that tends to negatively affect the plaintiff's reputation. However, statements of opinion are usually excluded from the definition of defamatory statement. You may not hold someone liable for offering their opinion, unless the defendant gives the impression that the statement is based on verifiable facts known to the defendant.

Publication to a third person may be oral or written; the defamatory statement must be conveyed in some manner to someone other than the plaintiff. Truth is always a defense to defamation but, depending on the type of defamation alleged, the plaintiff may bear the burden of proving the untruth of the statement or the defendant may bear the burden of raising truth as an affirmative defense. Whether and what kind of damages plaintiff must prove depends upon the type of defamation alleged.

Here, Paul alleges that ConsumerPro's statement was defamatory and that it was published to the group of persons who read the ConsumerPro manual.

Defamatory Statement or Non-Actionable Opinion

To succeed in his claim, Paul must show a defamatory statement about him made by ConsumerPro. ConsumerPro stated in its manual that Paul "is reputed to be an ambulance chaser and appears to handle only easy cases." Since Paul is a lawyer, the allegation that he is an "ambulance chaser" reflects poorly on Paul's integrity and draws on stereotypes of lawyers propagated in the media. The statement suggests that Paul takes advantage of people by finding them at their weakest—immediately after an accident or illness—and trying to convince them to hire him. Moreover, stating that he only handles easy cases suggests that Paul is not a very good lawyer or that he is lazy and refuses to take challenges. Since the statement will negatively affect Paul's reputation, it could be considered a defamatory statement.

As to the first part of the statement, ConsumerPro will argue that its statement is merely a non-actionable opinion. It will point out that the statement does not address a particular incident. For example, if ConsumerPro alleged that Paul was seen at the hospital yesterday talking to an accident victim, that would be a statement of fact that is either true or untrue. Here, the statement is more general and just says Paul is reputed to be an accident chaser.

Paul will argue that the claim that he is "reputed to be an ambulance chaser" gives the impression that ConsumerPro's statement is based on fact. The opinion of ConsumerPro alone does not make a reputation. Rather, ConsumerPro gives the impression that it has talked to a group of people who all hold opinions about Paul and that the majority of the group believes Paul to be an ambulance chaser.

As to the second part of the statement, ConsumerPro will again argue that the statement that Paul "appears to handle only easy cases" is non-actionable opinion. ConsumerPro will point out that the statement cannot be proven true or

untrue because different people hold different views of which cases are easy and hard. Moreover, ConsumerPro will argue that the statement does not give the impression that it is based on any facts. Unlike the first statement, the second part of the statement does not imply that ConsumerPro's statement is based on the opinion of more than one person. Instead of referring to Paul's reputation (which implies many people's opinions), ConsumerPro directly asserts its own opinion by stating that Paul "appears" to only handle easy cases.

The court should conclude that the first part of ConsumerPro's statement is actionable because it gives the impression that it is based on facts. The statement could be verified by polling the relevant community and determining whether Paul indeed has a reputation for being an ambulance chaser.

The court should, however, conclude that the second part of ConsumerPro's statement is non-actionable because it is purely ConsumerPro's opinion. As explained above, it does not imply that it is based on any facts and it cannot be proven either true or false.

Conclusion: The court should deny ConsumerPro's motion to dismiss as to the first part of the statement (reputation as ambulance chaser) because it gives the impression that it is based on facts. It should grant the motion to dismiss as to the second part of the statement (only takes easy cases) because it is non-actionable opinion.

Part Two: Allegation of Malice

Whether or not a plaintiff must allege malice depends on whether the defamatory statement deals with public persons and public matters or not. When a defamatory statement involves a private person and a private matter, plaintiff need not allege any fault on the part of the defendant. However, if the statement involves a matter of public interest and a private person, the plaintiff must allege

and prove at least negligence on the part of the defendant. Finally, if the statement involves a matter of public interest and a public figure, the plaintiff must allege and prove malice. Malice requires a showing that the defendant made the statement either knowing that it was false or with recklessness to the truth or falsity of the statement.

Conclusion: As explained below, a court will conclude that the statement concerns a matter of public interest, but that Paul is a private figure. Therefore, Paul will be required to allege negligence or more on the part of the ConsumerPro. Because he did not do so, the motion to dismiss should be granted on this ground.

Matter of Public Interest

A matter of public interest is a topic that would be of general concern or interest to the community. ConsumerPro will argue that the statement is a matter of public interest because many people eventually need to hire attorneys. Consumers have a strong interest in knowing which attorneys will responsibly handle their cases and which will not. ConsumerPro will support its argument by pointing to the fact that members of the community join ConsumerPro, a consumer protection group, to learn more about the issues that ConsumerPro discusses in its manual. People go out of their way to access the information offered by ConsumerPro, suggesting that the information is of general concern to the community.

Paul, on the other hand, will argue that the matter is not of public interest. He might point out that ConsumerPro is only one group amidst the entire community, which shows that consumer protection issues are really of limited concern and interest only a small number of people. Paul will argue that, if consumer issues were really of public concern, they would be covered in the newspaper and ConsumerPro would not need to publish its manual.

Since the topic of ConsumerPro's statement is of interest to a number of people (ConsumerPro's members) and since the entire public has an interest in making an informed decision when it hires lawyers, the court will probably decide that the statement by ConsumerPro concerns a matter of public interest.

Public Figure

A public figure is one who lives their life in the public eye, for example, a politician or movie star. The person may have sought out fame or may have become notorious, for example, as a well-known criminal.

Paul will argue that he is not a public figure because he does not live his life in the public eye. Since the facts do not indicate that he is a famous lawyer or that he has had any particularly notorious cases, he probably does not give press conferences or appear on television. There is nothing to indicate that he even engages in public speaking, for example, at lawyer's conventions or continuing education events.

ConsumerPro will argue that Paul became a public figure by making himself available as an attorney. However, there are no facts to support this argument. Nothing suggests that Paul has sought out public attention or has unwillingly received it. Therefore, he is neither famous nor notorious. A court will conclude that Paul is not a public figure.

Since Paul is not a public figure but the statement does involve a matter of interest to the general public, Paul will be required to plead negligence on the part of ConsumerPro.

Did Paul Plead Negligence?

In order to plead negligence, Paul needs to allege that ConsumerPro did not act with reasonable care in making its statement about Paul. Paul has not alleged any particular actions by ConsumerPro in relation to the making of the statement. He alleges only that the statement was made. Negligence, on the other hand, requires more. For example, Paul could have pled negligence by alleging that ConsumerPro made the statement without engaging in a fact-checking process, even thought it is standard for consumer protection organizations to do three hours of research before publishing a review of an attorney. If Paul had alleged that ConsumerPro fell below the normal standard of care, he would have alleged negligence. However, he failed to do so. Therefore, the motion to dismiss should be granted on this ground.

Part Three: Special Damages

Defamation carries a variety of damages requirements, depending on the type of defamation alleged. Plaintiffs injured by slander, which is oral defamation, but [sic] allege and prove special damages unless the statement falls into one of the four slander per se categories. However, plaintiffs injured by libel, which is written defamation, generally need not allege special damages. However, when the defamatory statement involves a public figure, the plaintiff must allege special damages even for libel.

As explained in Part Two, the court will conclude that ConsumerPro's statement concerns a matter of public interest but that Paul is not a public figure. Because Paul is not a public figure, he will not be required to allege special damages.

Conclusion: Because Paul is not a public figure and is not required to allege special damages, the motion to dismiss on this ground should be denied.

Part Four: Privilege?

At common law, to protect the free flow of information, certain types of statements received a qualified privilege. If a statement falls within the privilege, a defamation plaintiff must show that the speaker knew the statement was false when it was made.

Statements made for the benefit of either the speaker or the audience fall within this qualified privilege. For example, a statement in a credit report would fall within the qualified privilege because it is made for the benefit of the audience of the credit report. Because the public has an interest in ensuring the accuracy and reliability of credit reports, the publishers of such reports receive a qualified privilege. The privilege encourages them to openly and honestly report blemishes on someone's credit because they will be protected from suit unless the publisher knows the statement is false when it is made.

Does the Statement Fall within the Privilege?

Paul will argue that ConsumerPro's statement does not fall within the privilege because a manual reviewing attorneys is not as important as something like a credit report. He will argue that the public has a weaker interest in the accuracy of consumer information manuals than they do in other sorts of documents and that the privilege should not be applied to ConsumerPro's statement.

However, ConsumerPro will prevail in its argument for privilege. ConsumerPro's statement was made for the benefit of its members: to help them make informed decisions about hiring attorneys. Moreover, the public has a strong interest in being able to access accurate consumer information when it hires attorneys or buys products. Because the accuracy of ConsumerPro's statement is important to the audience and the statement was made for the benefit of the audience, the

court will conclude that ConsumerPro's statement falls within the qualified privilege.

Did Paul Allege Knowledge of Falsity?

Paul will argue that it is clear that ConsumerPro must have known that the first part of its statement was false when it was made. The statement gives the impression that ConsumerPro polled the community to determine Paul's reputation. Paul will argue that since he does not have a reputation as an ambulance chaser, ConsumerPro could not possibly have based the statement on a poll. If ConsumerPro did not make a poll, it must have known that the statement was false.

ConsumerPro will prevail, however, because Paul did not allege that ConsumerPro knew that the statement was false when it was made. Assuming for the moment that the statement implies that it was based on a number of opinions, ConsumerPro could only have known its statement was false if it had conducted a poll and determined that Paul has a reputation as a wonderful diligent lawyer. Paul has not alleged that ConsumerPro had any knowledge, good or bad, about Paul's reputation at the time it made its statement.

Conclusion: ConsumerPro's motion to dismiss should be granted because ConsumerPro's statement falls within the qualified privilege and Paul has not alleged that ConsumerPro knew that the statement was false when it was made.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the $1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. "There isn't a lot of money involved," she said, "but I want to teach David a lesson. David can't possibly afford the legal fees to defend this case, so maybe we can put him out of business."

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the $1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David's favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David's motion to dismiss on the grounds stated? Discuss.

2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? Discuss.

Answer A to Question 1

Patty instituted a suit via her lawyer Art for losses incurred due to Patty's inability to deliver a kidney on time owing to a traffic jam. The traffic jam occurred when David's truck skidded on an oily patch and became wedged across the roadway. There are two issues that need to be determined. First, the validity of the court's decision to dismiss Patty's cause of action for damages based on strict liability owing to an ultrahazardous activity. Secondly, whether David will be successful in recovering against Patty and Art in a claim of malicious prosecution.

1. David's motion to Dismiss based on Failure to State a Cause of Action

David has instituted a motion to dismiss for failure to state a cause of action upon which relief can be granted. In the alternative, David argues that damages would not have been recoverable against David for strict liability from malicious prosecution. A motion to dismiss based on a failure to state a cause of action upon which relief can be granted is a 12(b)(6) motion in federal court. This motion can be filed as a preliminary motion to the filing of a complaint or contained within the answer. Along with failure to include an indispensable party it can be raised at any time prior to trial or at trial itself. The motion charges that the plaintiff has failed to adequately state a cause of action upon which relief can be granted. It requires the judge to accept that all the facts that are stated by the plaintiff are taken to be true and then requires a determination as to whether there exists an adequate basis for relief. In other words, even if everything that plaintiff asserted in the complaint is true, would that be sufficient to allege a cause of action against the defendant?

In the current case, in order to determine whether the emotion to dismiss was appropriately granted in Art's favor, it is necessary to examine Patty's allegations against David. Patty's lawyer, Art, determined that a negligence claim would not be viable against David. Likely because there is nothing to indicate in the facts that David engaged in any activity whereby he breached the standard of care towards a

foreseeable plaintiff. There is nothing to indicate that he was negligent in driving his truck, but rather he skidded on an oily patch in the middle of the road and then his truck swerved to block all lanes of traffic. As a result, Art decided to pursue Patty's claim on a strict liability theory for transporting an ultrahazardous activity.

Strict Liability for an Ultrahazardous Activity

Strict liability for transporting an ultrahazardous activity is an action whereby the defendant is engaged in an ultrahazardous activity. This is where the activity is so dangerous that the danger of its harm cannot be mitigated even with the exercise of reasonable care. Secondly, the activity has to be one that is not of common usage in the community. In a strict liability claim for ultrahazardous activity, in jurisdictions that still retain contributory negligence, this is not a valid defense to a strict liability claim.

In the current case, David transports gasoline over long distances in a tank truck. In the current case, he was transporting gasoline through the City. It is important to note that transporting gasoline through residential parts of a city is inherently an ultrahazardous activity because of the dangers that can occur if any gasoline spills, owing to the fact that gasoline is highly combustible and can cause serious injuries and damage to property in a matter of seconds. No amount of care can mitigate against these risks, and transporting gasoline through a residential community is not a matter of common usage in the community.

However, in the current case, when David was transporting the gasoline across the bridge, he skidded on an oily patch. There is no indication that he is responsible for the oily patch, rather, it was already spilled on the road when he arrived at the scene. As a result he skidded on the spill and his truck wedged across the roadway and blocked traffic in all directions. This blockage caused a traffic jam to develop in both directions and the delay of two hours caused Patty to be late in making her organ delivery. Yet the crucial distinction in this case is that the ultrahazardous nature of the gasoline was not the cause of Patty's damages. Even if David had been transporting a truck filled

with benign materials, such as flowers or children's toys, he still would have skidded on the oily patch and his truck would have wedged across the highway and caused the traffic jam. For strict liability to attach for transporting ultrahazardous activity, the nature of the harm or loss has to emanate from the ultrahazardous activity. This is not met in this case. There is nothing about the inherently dangerous nature of transporting gasoline that is the cause of Patty's harm.

As a result, even if the judge was to take all of the allegations that Patty made in her complaint to be true, she has failed to state sufficient facts necessary to constitute a cause of action for strict liability for transporting dangerous materials. Therefore, the judge was correct to grant David's motion to dismiss.

Patty's Damages are not recoverable

Moreover, David claimed that the damages that Patty claimed in her complaint were not recoverable. In this case, Patty sought to recover the $1,000 fee she would have been paid had she been able to deliver the kidney while it was still viable.

As already noted, under strict liability the damages have to accrue from the inherent dangerousness of the activity - which in this case would have been transporting gasoline. However, in this case, the nature of Patty's damages resulted from the truck skidding on the oily patch, and as previously mentioned this could have occurred to any truck, even one transporting regular household goods. As a result, Patty is not entitled to recover for damages based on a theory of strict liability.

Her only viable claim would have been under a negligence theory which requires a duty under the applicable standard of care to all foreseeable plaintiffs (which under the majority Cardozo theory is to all plaintiffs in the zone of danger). There has to be a breach of the duty, causation (both factual and proximate), as well as damages. In this case, David would be held to the standard of care of a reasonable person driving a big truck along a bridge. The facts do not indicate that he was negligent in any manner,

such as driving too fast, or driving while distracted. As a result, Patty would be unable to establish a prima facie case for negligence and would be entitled to no damages. It is likely that Art realized that the negligence claim would be a non-starter and as a result he decided not to pursue the claim.

In conclusion, the court was correct to grant David's motion to dismiss for failure to state a cause of action and, in any event, the damages alleged were not recoverable because Patty failed to assert an appropriate and viable cause of action.

2. David's Suit for Malicious Prosecution against Patty and Art.

David decided to file suit for malicious prosecution against both Patty and Art. To establish a prima facie case for malicious prosecution, the plaintiff is required to show that there was an institution of civil proceedings against the plaintiff. Second, there was a termination of the proceedings in favor of the plaintiff. There also has to be a lack of probable cause. Moreover, the institution of the civil proceedings has to be for an improper purpose and the plaintiff has to show damages.

David's suit for Malicious Prosecution against Patty

In David's suit against Patty, David can show that Patty instituted a claim against him for strict liability based on transporting an abnormally dangerous activity. Since the judge granted the motion to dismiss, there was a termination in his favor.

The third prong requires David to show that the proceedings were instituted for an improper purpose. In the current case, when Patty came to Art for advice she was clear that she wanted to sue David for the loss of her fee, i.e., the $1,000 she would have received if she could have successfully delivered the kidney. In her mind, she believed that she had suffered damages and that David was to blame because he had caused the traffic jam on the bridge. As a result, it is unclear whether her motive to bring the suit was based on lack of probable cause. As a layperson, she likely did not have the legal knowledge to ascertain the proper basis for determining probable cause, and she

came to her lawyer for advice to determine the merits of her case. As a result, it is likely that the court will find that Patty's decision to bring suit against David was based on her relying on the legal expertise of Art and she might have honestly believed that there was sufficient probable cause to bring the action.

The fourth prong requires bringing the suit for an improper purpose. This requirement is likely met in this case, because Patty acknowledged that there was not a lot of money involved in the action; however, she wanted to teach David a lesson and try to run him out of business. As a result, the primary motivation behind the suit was not to recover damages, but rather to seek revenge and damage to David. This is an improper purpose because the legal system is not to be used in a civil proceeding in order to extract a revenge against a defendant or for an improper purpose.

Lastly, the plaintiff has to show sufficient damages. In the current case, David was forced to respond to an action for strict liability and although the matter was dismissed under a motion for failure to state a cause of action, this still might have resulted in David losing days at work because of the lawsuit. There is also the loss of professional and social reputation from being forced to defend against a lawsuit. However, David would have to present evidence of any such pecuniary loss in order to meet the damages prong.

In conclusion, David would likely not succeed in his suit for malicious prosecution against Patty because he cannot show that she instituted the proceedings without probable cause. Patty likely relied on Art's advice that there was a viable claim for strict liability and, as a result, she thought there was sufficient merit in the action to proceed to court.

David's suit for Malicious Prosecution against Art

David also filed suit against Patty's lawyer Art for malicious prosecution.

Again, the first two prongs are easily met, because Art was the attorney that brought the strict liability action against Patty and there was a termination in Art's favor with the court's decision to grant the motion to dismiss based on failure to state a cause of action.

In the current case, the third prong, whereby the plaintiff has to show that the action was brought with a lack of probable cause, is likely to bring David more success against Art. An attorney is held to possess the required duty of competence, whereby he has to possess the legal skill, knowledge, preparedness and ability to pursue the case. In this case, Art realized that a negligence action would not be successful, but he still decided to pursue a claim for strict liability. This was the only plausible claim that he could bring against David and if he failed to adequately research the facts of the case based on the elements of strict liability, then he will be held liable for bringing a cause of action based on lack of probable cause. On the other hand, if Art honestly believed, with sufficient preparation and research in the case, that a strict liability cause of action might be viable in this case, then arguably there is sufficient probable cause. However, as previously noted under the first part, there was no connection between the ultrahazardous nature of transporting the gasoline and the accident that occurred in this case, and, as a result, Patty would be unable to recover damages based on a strict liability theory. As a result, Art should have realized this and counseled Patty against filing suit, and therefore, David will be able to successfully demonstrate the lack of probable cause in a suit for malicious prosecution against Art.

The fourth prong requires the plaintiff demonstrating that the suit was brought for an improper purpose. In the current case, Patty told Art that she knew that there was not a lot of money involved in the case, but that she simply wanted to teach David a lesson and run him out of business. A lawyer is held to a duty of candor and fairness to the court and an adversary. He is required to properly research the cause of action to

ensure that there is a viable cause of action. A lawyer signs Rule 11 motions asserting that there is a proper factual basis to the claim and legal contentions are accurate and that a claim is not being brought for an improper purpose. In the current case, Art should have counseled Patty against bringing a lawsuit for an improper purpose and made her aware of the legal basis of the claim and whether there were sufficient facts to bring a cause of action. Attorney representation can be expensive, and Art should not have taken a frivolous claim simply as a means of earning fees and wasting time. As a result, David will be able to show that the cause of action was brought for an improper purpose.

As previously noted, as long as David can show damages in the form of lost wages from days missed from work owing to the need to defend the lawsuit or other pecuniary losses, he will have sufficiently demonstrated the damages prong.

In conclusion, David will be successful in a claim for malicious prosecution against Art. Even though his case against Patty is not likely to be successful owing to the inability to demonstrate that Patty consciously knew that there was a lack of probable cause to the action. However, as an attorney, Art will be held to a higher professional standard, and he had an ethical duty to ensure that he only brings suit where there is a sufficient legal and factual basis and that the suit is not being brought for a frivolous purpose or to waste time or embarrass an opponent. As a result, he should be entitled to damages, based on the damages he incurred due to the inappropriate suit brought against him for strict liability.

Answer B to Question 1

1. Patty (P) v. David (D) – Motion to Dismiss Suit for Strict Liability

A motion to dismiss for failure to state a claim looks at the facts in a light most favorable to the party it is being asserted against. The court will then see if sufficient facts have been pled to sustain a prima facie case of the cause of action alleged. The court does not evaluate the merits nor go beyond the complaint.

In the present case, P filed a claim of strict liability for ultrahazardous activity against D. Therefore, the elements of the claim must be evaluated in light of the complaint to see if grant of the motion was proper. Additionally, the court noted the case would be dismissed because the damages alleged were not recoverable.

Strict Liability – Ultrahazardous Activity

Strict liability is tort liability without fault. It applies in cases of products liability, ultrahazardous activities, and wild animals. Here, the allegation is one of ultrahazardous activity. The elements of strict liability are 1) an absolute duty of care, 2) breach of that duty, 3) causation, and 4) damages.

Absolute Duty of Care – Is the activity an ultrahazardous activity?

For there to be an absolute duty of care (a duty that may not be met by reasonable protective measures), a court must decide if an activity is in fact ultrahazardous. An ultrahazardous activity is one where the activity is 1) highly dangerous even with remedial measures, and 2) not within common usage within the community. This is a question of law to be decided by the trial judge.

In the present case, D was driving a tanker truck filled with gasoline. P will argue that this is a dangerous activity, because no matter how safe D behaves the tanker is a giant gas bomb waiting to explode. D can argue that it is not that dangerous because, as the facts show, there was no explosion when the tanker crashed. However, because the

court will view the facts in a light favorable to P, the tanker is probably sufficiently dangerous.

However, the second element poses a problem for P. The activity must not be in common usage within the community. Here, D's tanker truck was transporting gas. This is an activity in common usage within all US communities, because gasoline is the primary fuel for automobiles, which is the most common method of transportation in the US. Additionally, gasoline must be transported by some means to service stations. Tanker trucks are the most common, if not [the] exclusive method of delivering gas to service stations in the US. Therefore, driving a tanker truck is an activity of common usage in City.

Therefore, the duty element has not been met, because driving a tanker truck is not an ultrahazardous activity.

Breach: if the duty element had been met, any damage caused by the ultrahazardous activity would be sufficient breach. Here, the truck crashed and blocked traffic for 2 hours.

Causation

Causation has 2 parts: 1) actual (factual) cause and 2) legal (proximate) cause. Both must be met for the causation element to be sustained.

Factual Cause

The test for factual cause is the "but for" test. This asked but for the defendant's conduct the injury would not have occurred. In the present case, but for D crashing the tanker on the bridge, P would not have been late for her delivery, the kidney would have been viable, and P would have been paid $1,000. Viewing the facts in a light most favorable to P, factual cause is met.

Proximate Cause

Proximate cause is a question of foreseeability. First, the court must ask what is dangerous about the activity. Here, a tanker truck filled with gas is dangerous because it could explode or cause a fire. Second, the court will isolate the breach. Here, the breach was a crash that resulted in blocked traffic on the bridge. Lastly, the court will match up the danger of the activity to the breach; if they do not match up, then the injury is not the type of harm that would result from the ultrahazardous activity. Therefore, it would not be foreseeable. In the present case, the danger of explosion or fire does not match the breach of mere traffic jam. Thus, P's injury was not foreseeable.

Damages

Strict liability compensates damages from personal injury or property damages. In the present case, the type of harm is economic damages. Economic damages are those damages which result from the loss like lost wages or lost business opportunity. Therefore, there is not sufficient damage that P may be compensated for. While she may argue that the breach damaged the kidney. However, the kidney did not belong to her. At the very least it belonged to the kidney donor or the recipient. Additionally, one cannot have ownership interest in human tissue (see 13th Amendment). Thus, there is no personal injury or property damage that P has pled to sufficiently make a prima facie case.

Conclusion

The motion to dismiss was proper, because P did not sufficiently plead facts to sustain a cause of action of strict liability for an ultrahazardous activity. Tanker driving is not an ultrahazardous activity. There is no proximate causation between the crash and the loss of $1,000. Additionally, the damages requirement is not met because it is mere economic damages. Additionally, the trial judge was correct to assert that P's alleged damages are unrecoverable.

2. D v. P and Art (A) – Malicious Prosecution

Malicious prosecution is a tort that protects the interest of only having process instituted against a party for proper purpose and only when there is a valid case. The elements are 1) institution of legal proceeding, 2) termination of case in plaintiff's favor, 3) absence of probable cause, 4) improper ulterior purpose for bringing legal process, and 5) damages.

Institution of proceedings: Typically, malicious prosecution involves the institution of criminal proceedings. However, institution of civil proceedings will sustain a cause of action as well. Here, P (under the advisement and representation of A) filed a civil claim for $1,000 in lost damages in strict liability for an ultrahazardous activity (see above). A civil complaint was filed against D. This is sufficient to meet the first element/institution of legal proceeding.

Termination: The second element, termination of the case in plaintiff's favor, is met because the case was dismissed on failure to state a cause of action. This was a termination in D's favor, because he filed the motion to dismiss. The case was terminated on the granting of the motion.

Absence of probable cause

Probable cause is the reasonable belief that there was a valid cause of action. In the present case, P relied on A's advice as her attorney to form her basis of probable cause. A told her that he believed there was a plausible claim for strict liability. Reliance on counsel will sustain a finding of probable cause. Therefore, this element is not met, as to P.

A, on the other hand, probably did not have probable cause. As discussed above, the claim of strict liability lacked sufficient facts to make a prima facie case. The complaint was just so bad that an attorney with minimal competence could not have a reasonable belief that there was a valid cause of action based on strict liability. Therefore, this element is met as to A.

Improper purpose is any purpose except that of justice. Here, the just purpose would be to make P whole again, after the loss of her $1,000. This is the point of tort liability: to make the plaintiff whole. In the present case, she wanted to "teach D a lesson." P and A will argue that this is not improper because D should be a safer driver. D may argue that strict liability has no punitive damages; therefore, strict liability is not to punish. Therefore, teaching a lesson is an improper purpose.

Additionally, and more flagrantly, P believed that D could not afford the legal fees, and bringing the strict liability case would cause him to go out of business. A acquiesced in assisting her in the case. This is an improper purpose because the $1,000 was not a lot of money to her, but it would be a total loss of D's livelihood. This is not a proper basis for suit because it is merely to harass and damage D.

Defenses: A may assert that he would qualify for immunity based on the prosecutor exemption. However, this will not happen because of the exception for state prosecutors filing criminal charges.

Conclusion: D will probably prevail against A. However, he will probably not prevail against P, because she had probable cause.

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ESSAY QUESTIONS AND SELECTED ANSWERS
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Question 1

Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that "all firearms must be stored in a secure container that is fully enclosed and locked." Burglar broke into Homeowner's house while Homeowner was out and stole the handgun.

Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron had just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused. Burglar drew the handgun, pointed it at Patron, and stated, "You made me mad, so now I'm going to shoot you."

Patron fainted out of shock and suffered a concussion. Burglar took her purse and fled, but was later apprehended by the police. Cinema had been aware of several previous attacks on its customers in the parking lot at night during the past several years, but provided no lighting or security guard.

Under what theory or theories, if any, might Patron bring an action for damages against Homeowner, Burglar, or Cinema? Discuss.

Answer A to Question 1

Patron (P) v. Homeowner (H)

The issue is under what theories P might bring an action against H.

Negligence

Negligence is an action where a plaintiff asserts that a defendant breached a duty and caused damages. In order to prevail on a claim of negligence, the plaintiff must prove (1) Duty; (2) Breach; (3) Actual Causation; (4) Proximate Causation; and (5) Damages.

(1) Duty

Duty determines the level of care a defendant must exercise. Everyone owes a general duty to avoid harming others. In certain circumstances, an individual owes a higher duty of care. Under the Cardozo majority test, the duty is owed to those in the "zone of danger," meaning, those in the vicinity who may be harmed by the action. Under the Andrews minority test, the duty is owed to all foreseeable plaintiffs.

Applying the Cardozo test, H will claim that he did not have a duty to P, because she was not in his home when the event occurred. Under the Andrews test, P will claim that H did owe a duty because it was foreseeable someone could use the firearm to go out and shoot someone, or injure someone, or put someone into fear, as B did in this case. Depending on where H lives, and whether it is a community where burglaries often occur, P may succeed in showing it was foreseeable that a burglar could come in and take the handgun.

The court will likely agree with P, because it was foreseeable the gun could be used on a person, so H owed a duty to P.

Standard of Care

The next issue is what the standard of care is, meaning how H must exercise his duty.

The court determines the appropriate standard of care. While the standard of care might be adjusted based on such things as physical conditions or professional

occupations, the court does not consider mental or emotional individual characteristics in setting the standard of care.

In this case, P will claim that H owed a duty of a reasonable person in his circumstances, meaning the reasonable care of a handgun owner. H may claim that he owes less of a duty because for some reason he is particularly afraid of people breaking into his home. However, this argument will fail, because the court does not consider mental or emotional individual characteristics in setting the duty of care. It does not appear that there are any particular physical characteristics of H that alter this standard of care, or that he was a professional or a child, in which case the standard of care would be higher or lower.

Therefore, the standard of care is a reasonable handgun owner.

It should be noted that though H is a landowner, the issues of landowner liability do not apply to H in this case, because the injury was not to a person on his land (B), but rather to another person (P).

Negligence per Se

P may further attempt to invoke the doctrine of negligence per se. Negligence per se is a doctrine that allows the court to substitute the standard of care with the words of a statute. Where the defendant has violated the statute, that is sufficient to prove breach of duty. The plaintiff must still prove the three other elements of negligence, actual causation, proximate causation, and damages. In order for negligence per se to apply, the plaintiff must prove that (1) her harm was the type of harm the statute was designed to protect and (2) she was in the class of persons the statute was designed to protect.

In this case, P will try to apply the statute that provides that “all firearms must be stored in a secure container that is fully enclosed and locked.” She will claim that this is the standard of care.

As for the first requirement, P will argue that her harm is the type the statute was designed to protect, because it was designed to protect people from being injured by handguns. She was injured by a handgun. The court will likely agree.

However, as for the second requirement, H will argue that P was not in the class of persons, because the requirement that the guns be stored in a secure container seems to protect children in the home. It does not seem to protect people who will be harmed by guns that are stolen, because if that were the case, the requirement might be that guns be kept in a "hidden" location, or that they must be kept in rooms with locked doors, but not necessarily in "secure containers." P will argue that the statute is broader, and legislative intent may show that it was designed to protect all people who might be injured by guns. The court will likely agree with P and that she was in the class. Therefore, the standard of care will be the statute and H will have breached. P must still prove the other elements of negligence.

However, if the court finds that the statute does not protect P, P will need to prove Breach.

(2) Breach

Breach determines whether the defendant met the standard of care, as established above. The standard of care in this case is the care of a reasonable handgun owner.

P will claim that H breached this duty because he kept a handgun on his dresser by his bed, and a reasonable handgun owner would be aware of the risks of doing that and put it somewhere more secure. He would also comply with the statute. H may claim that it was reasonable to keep it there because it was for self-defense, but P will claim he could have kept it under the bed or at least with some sort of a safety lock on it so that someone who came in and stole it would not be able to use it. Additionally, she will claim he should have put it away while he was "out," so that it could not be stolen. This may depend on whether B had a home alarm system.

The court will likely agree there was a breach.

(3) Actual Causation

Causation is satisfied if the defendant's act was the "but-for" cause of the plaintiff's harm. Where more than one thing contributes, the causation is satisfied if the defendant's act was a "substantial factor."

In this case, P will argue that H's act was the but-for cause because if he had not kept the gun out, B would not have gotten it and would not have brought on her damages. H will claim that a burglar is likely to find a gun in someone's house, so even if he had not had it in his, B would have found a gun somewhere else and the harm would have occurred anyway.

The court is likely to find H's argument tenuous, and find that H's breach was the but-for cause.

(4) Proximate Causation

The next issue is whether H's breach was the proximate cause. This is likely to be H's strongest argument. Proximate cause determines whether it was foreseeable that the harm would occur and whether it would be fair to hold H liable.

In this case, H will argue that it was not foreseeable that someone would break in, steal the gun, and use it to commit a tort against someone else. Typically, the court finds that criminal acts of third parties are "superseding intervening causes," meaning that they break the chain of causation. Therefore, H will argue B's burglary and criminal assault should break the chain. P will argue that it was foreseeable this harm would occur, as discussed above, because people often steal guns when they break into homes. Where a homeowner had notice that he was in a dangerous neighborhood, it is more likely proximate cause will be found. Additionally, it would be relevant whether H's home had ever been broken into before.

H will also claim the chain of causation was broken because P was leaving a midnight movie in a dangerous neighborhood, so that made it more likely she would be attacked. This argument will likely fail, because people often see late movies without getting assaulted at gunpoint. H will also claim that P was not injured because of his leaving

the gun out, but rather because she "made [B] mad," and he was going to shoot her for that reason. If she had handed over the purse, he would not have taken out the gun.

Therefore, the court will likely agree with H and find no proximate cause.

(5) Damages

However, if P were to succeed in showing proximate cause, she would also need to show damages. In this case, she will claim that the damages were the shock she suffered, the concussion, and perhaps any emotional damages.

Damages must be foreseeable, certain, unavoidable, and caused directly by the defendant's action. The forseeability of P's harm is discussed above, and H may argue it was not foreseeable she would faint but rather that she would be shot. The damages from the concussion and medical bills are certain, but future damages like time away from work and emotional distress may be less certain. P could have mitigated the damages by not seeing a movie at that hour. Causation is discussed above.

Conclusion

Therefore, the court will likely find that there was no negligence on the part of H because there was no proximate causation.

Defenses

If negligence is found, H may assert defenses.

Contributory Negligence

Contributory Negligence is mostly abolished. However, if the jurisdiction retains it, the defendant argues that the plaintiff should receive no recovery because his [sic] negligence contributed to the harm. H would argue that P owed a duty to exercise care for her own safety, and failed to do so because she saw a movie late at night, was approached by a burglar who demanded her purse, and failed to give it to him. This was the but-for cause of her harm and also a foreseeable result of her failing to give over the purse. However, a court would likely find that a reasonable person would not necessarily give over their purse, because she might think that a security guard could

come help her or that the burglar was not armed. This would depend on whether P knew it was an area where attacks had happened before and if she saw the gun in B's pocket before he drew it.

On these facts, P was likely not negligent, so there was no contributory negligence.

Comparative Negligence

Comparative negligence reduces the plaintiff's recovery by the percentage of her negligence. Modified comparative negligence only allows the plaintiff to collect if her negligence was less than the defendant's.

For the reasons above, P was not negligent.

Assumption of Risk

This defense requires the assumption of a known risk. This would depend on whether P knew it was a dangerous area. It will also depend on whether she knew that B might be armed. It is unclear whether she knew these facts.

P v. Burglar (B)

P may bring various actions against B. It is important first to note that B may be guilty of several criminal acts, but they are not causes upon which P may bring an action for damages.

Assault

Assault is the (1) intentional (2) placing a plaintiff in fear of an imminent battery plus (3) causation and (4) damages.

Intent

Intent is desire or substantial certainty to cause a result. In this case, P will argue that B intended to place P in fear, because he said "I'm going to shoot you." He might have done it intending to frighten her into giving over the purse, but at least should have known it would cause fear.

Fear of an imminent battery

Battery is a harmful unconsented touching. P will argue that B's action put her in fear of this, because she saw the gun and through she was going to get shot. She was "shocked." Assault requires that the plaintiff be aware of the danger, and in this case P was. Therefore, this element is met.

Causation

P will argue that B's action caused the fear, and the court will agree.

Damages

As discussed above, P will claim that her damages are her concussion, her emotional distress, any medical bills, and perhaps time off work. As discussed above, these must be foreseeable, unavoidable, certain, and caused. There was nothing P could do to mitigate because she could not control fainting, and the harm was caused by B's act, so the requirements of unavoidability and causation are met.

In terms of certainty, it will be more difficult for P to prove her future time off work. Additionally, B may claim that it was not foreseeable she would faint and get a concussion. However, the defendant must take the plaintiff as he finds her, and, therefore, he is responsible for any damages that might occur, regardless of a plaintiff's extreme sensitivity. Therefore, P will succeed in proving damages, and may recover these damages from B provided that the court finds they are certain enough.

Conclusion

P will succeed in proving assault.

<u>Battery</u>

Battery is an unconsented harmful or offensive touching, harmful or offensive to a reasonable person. In this case, there was no touching, so this does not apply. P's hitting the ground does not count as a touching, because though B caused it, it was not direct enough.

Intentional Infliction of Emotional Distress

Intentional Infliction of emotional distress requires (1) extreme or outrageous conduct (2) intentionally or recklessly caused (3) that in fact causes extreme emotional distress.

Extreme Conduct

P will argue that B's saying "You made me mad so now I'm going to shoot you" is extreme and outrageous. It would be outrageous to an average person, because they might think they were going to die. They might think about their children or live lives, and be very disturbed. Therefore, this is met.

Intent

B need not have intended to cause extreme emotional distress, he just need have recklessly done so. Recklessness is extreme indifference and beyond gross negligence. A person would clearly know this action would cause extreme emotional distress.

Emotional Distress

P will claim this is met because she fainted, and the court will likely agree. It may be bolstered by psychiatrist testimony.

Conclusion

Therefore, P will succeed in proving this tort.

Negligent Infliction of Emotional Distress

This occurs where a defendant negligently inflicts emotional distress, and it causes physical damages. Because B's act was likely intentional, this will not apply. However, if it were found to be negligent instead, this would apply because P suffered physical manifestations – fainting.

Conversion/Trespass to Chattel

Conversion is an intentional and extreme interference with a plaintiff's property.

B intended to take the purse.

P will argue this applies because B stole her purse and took it away, which had many valuable in it. B will argue this was not extreme because she was able to get the purse back when he was apprehended by the police, so it was instead Trespass to Chattel, which is a minor interference with a plaintiff's property right. This may depend on whether all of P's belongs were in the purse at the time she got it back. She may argue that a purse is particularly important to a woman, so even taking it for a brief period is conversion. The court will likely determine this based on whether P got it back intact, or if it was permanently damaged. If the police did not return it, the suit will be conversion.

False Imprisonment

False imprisonment is intentionally holding a plaintiff captive, or preventing her from escaping. This occurs where there is no reasonable means of escape. P will argue that for the brief time she was held at gunpoint, she was falsely imprisoned. A plaintiff need be held for only a second. He need not physically tie her up; merely holding at gunpoint is sufficient.

B may argue that P provoked him and "made him mad," but this is no defense to this intentional tort.

Therefore, P will likely succeed on this charge.

Negligence

Negligence does not apply because, as discussed above, B's act was intentional.

Defenses

It is unlikely that any defenses will apply. D may try to claim self-defense, but there is absolutely no evidence that P attacked him in any way.

P v. Cinema (C)

P may have a suit against Cinema for negligence. There are 5 elements to negligence, as discussed above.

(1) Duty

Duty is defined above. As discussed above, some people owe higher duties, and one such category is landowners. Landowners owe a duty to protect people on their premises. While the modern trend is a duty of reasonable care under the circumstances, under traditional rules, duty depends on what kind of an individual is on the land.

No duty is owed to an undiscovered trespasser. A slightly higher duty is owed to a known trespasser, and a higher duty to a person on the land for social purposes. The highest duty is owed to someone known as an "invitee," who is on the land for profit. In this case, the court will find that P was an invitee, because she was there to see a movie, and therefore for a business purpose. The parking lot belonged to Cinema, so C was the landowner and owed a duty to P as an invitee.

A landowner owes a duty to an invitee to inspect for dangerous circumstances and make them safe or warn the invitees.

Additionally, applying either [the] Cardozo or Andrews test, P was in the zone of danger (the parking lot) and she was a foreseeable plaintiff.

(2) Breach

Breach is defined above.

In this case, P will argue that C's failure to protect its customers was a breach. P will argue that C should have installed lighting, security guards, or some sort of a fence to protect the premises. It could have also warned patrons, so that if P had known, she could have been more on her guard walking through the lot. She might not have refused to give over her purse.

Therefore, there was a breach.

(3) Actual Causation

C will claim its action was not the but-for cause, because the burglary and P's fainting might have occurred even if C had put in a security system. However, the court will likely find that if C had taken some sort of security measure, it would have indeed prevented this event.

(4) Proximate Causation

This is defined above.

C will claim the chain of causation is broken by the criminal act of a third party. However, this does not protect a landowner from liability where the risk was known to the landowner. In this case, C was "aware" of "several" previous attacks in the parking lot in past years. C may claim that they were spread out over many years. C may also introduce evidence that the neighborhood has become more safe recently, or that there is a greater crackdown by the police so it had less reason to worry. But absent this sort of evidence, P will argue that if there were "several" attacks, C should have done something more to protect. It was foreseeable there could be another attack, particularly because C shows movies at midnight, when crime is more likely to occur.

B's stealing the gun will not affect this, because it happened before the attack. It is foreseeable that a burglar would have a gun, regardless of how he obtained it. It is also foreseeable that a victim could faint and get a concussion, because people are frequently afraid of guns.

The court will likely agree with P, and find proximate causation because it was foreseeable. The court will also find it fair to hold C responsible, because it was in the best position to avoid the danger and prevent this from happening. Customers rely on their businesses to protect them. P could analogize to common carriers and claim that businesses should also owe a duty of care, because customers put themselves in their hands for protection.

(5) Damages

The damages analysis is the same as above, and it will be determined by the court on the same bases.

Defenses

The defenses of contributory and comparative negligence and assumption of risk do not apply, as discussed above.

Answer B to Question 1

Patron v. Homeowner

Negligence: Keeping the Handgun on Bedside Table

Patron will contend that Homeowner was negligent in failing to keep his handgun in a secure locked container as directed by the statute. In order to prevail in an action for negligence, Patron must prove that Homeowner owed him a duty, that he breached the duty, that his breach caused Patron's injury, and that he suffered damages.

Duty

Under the Cardozo view, a duty is owed only to foreseeable plaintiffs. Under the Andrews view, a duty is owed to the whole world. In this case, Patron will argue that it was foreseeable that a thief could steal an unsecured handgun and use it to perpetuate crime such as a robbery.

Negligence per se: Violation of Statute

When a statute proscribes certain behavior, the violation of that statute establishes a breach in the standard of care when the harm is of the kind that the statute is designed to prevent, and the plaintiff is among the class of people the statute is designed to protect. Here, Homeowner will argue that the statute is intended to prevent small children from gaining access to dangerous guns and hurting themselves or others. However, Patron can persuasively counter that it was also designed to prevent thieves or criminals from obtaining weapons that they would then use to perpetuate crime. The legislative history of the statute might shed some light on the purposes of the law. If its purpose includes preventing criminals from stealing unsecured weapons, then Patron, a crime victim, would be within the class the statute was designed to protect, and Homeowner's breach would establish per se negligence.

A reasonable Person would have Secured the Gun

Alternatively, Patron can argue that even without the statute, Homeowner was negligent in leaving the gun in a place where it was easily accessible to any burglars. He would argue that a reasonable person would foresee that the gun would be noticeable and would be stolen by a burglar. He will also argue that the mere

presence of the gun, which Homeowner kept to ward off intruders, indicates that Homeowner did in fact foresee the possibility of violent criminals entering his home.

Breach

Homeowner kept the gun on his bedside table. There is no indication that the gun was kept in a locked drawer, but rather out on his table. Therefore he violated the statute.

Causation

But-for Cause: Homeowner's act of leaving the gun on the table was the but-for cause of Burglar's assault on Patron. If he kept the gun in a locked container, Burglar would not have had access to it.

Proximate Cause: Homeowner will argue that Burglar's intervening criminal acts of breaking into his house, and then robbing Patron, were superseding causes of Patron's injury. However, an intervening act by a criminal will not interrupt the causal chain if it is foreseeable. As discussed above, it was foreseeable that a criminal could break into the house and use the gun on another unsuspecting victim. Therefore, Homeowner's argument will fail.

Damages

Patron suffered shock and a concussion as a result of Burglar's robbing him [sic]. Therefore, if Burglar's act is a foreseeable result of Homeowner's negligence in failing to secure his handgun, Homeowner can be liable for Patron's injury.

Patron v. Burglar

Burglar confronted Patron in the parking lot and demanded her purse. When Patron refused, Burglar pointed the gun at Patron and threatened her. Patron fainted, suffering a concussion, and Burglar took her purse and fled.

Assault

The prima facie case for assault is met when the defendant (1) performs an act that places the plaintiff in reasonable apprehension of imminent harmful or offensive

contact with his person, (2) the defendant had the intent to place the plaintiff in apprehension, and (3) causation. There must be some physical conduct, not mere words, to constitute assault.

Here, Burglar drew his handgun and stated "You made me mad, so now I'm going to shoot you." His words, combined with pointing the gun at Patron, created in Patron an apprehension that Burglar was going to immediately shoot her. Further, Burglar had the intent to make Patron believe he was going to shoot her. This act caused Patron to faint and suffer a concussion. Therefore, Burglar can be liable for assault.

Battery

Battery consists of (1) harmful or offensive contact with the plaintiff's person, (2) intent by the defendant to cause the touching, (3) causation.

Here, Burglar intentionally took the purse from Paton's person after she fainted. Taking an object from someone's person satisfies the offensive touching element. Further, the fact that Patron may have been unconscious when Burglar seized her purse does not negate the offensiveness of the touching he caused. Therefore, he can be liable for burglary.

Trespass to Chattels

Trespass to chattels occurs when the defendant (1) interferes with the plaintiff's possession of her chattel, (2) had the intent of performing the act that interferes with possession, (3) causes the interference, and (4) plaintiff suffers damages.

Here, Burglar grabbed Patron's purse and ran away with it, interfering with her right to possess it. He did so intentionally. The police later apprehended Burglar. If he still had the purse and it was returned to Patron, she may recover for any damages that resulted from her temporary loss of possession.

Conversion

Conversion occurs when the defendant (1) interferes with the plaintiff's possession of her chattel, and the interference is so extensive as to warrant payment for the full

value of the chattel, (2) has the intent of performing the act that interferes with possession, (3) causes the interference. When defendant's act amounts to an exercise of dominion and control over the chattel, conversion is more likely to be found.

Here, Burglar seized the purse with the intent to completely and permanently deprive Patron of possession. If Burglar's later apprehension by the police restored the purse to Patron's possession, she may not be able to obtain the full value. If, however, Burglar disposed of the purse before he was apprehended, Patron can recover the full Value of the purse and its contents at the time Burglar seized it.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress occurs when the defendant (1) engages in extreme and outrageous conduct (2) with the intent to cause severe emotional distress, or is reckless as to the likelihood of causing severe distress, (3) causation, and (4) damages: severe emotional distress.

Burglar's conduct in pointing a gun at Patron, demanding her purse, and stating that he was going to shoot her is conduct "beyond all bounds of decency in a civilized society." Theft and threats to inflict serious bodily injury are extreme and intolerable. Burglar clearly intended to cause Patron emotional distress, as he likely hoped his threat and menacing her with the gun would convince her to hand over the purse. Patron fainted out of shock and suffered a concussion. She is likely to suffer emotional distress including fear of being out at night by herself following this robbery. Therefore, she can prevail under this theory.

Negligent Infliction of Emotional Distress

Patron could also prevail under a negligence theory because she suffered physical harm (shock and concussion) as a result of her emotional stress from her encounter with Burglar. However, because Burglar's conduct was at least reckless with respect to her emotional distress, she will not need to rely on a negligence theory.

In sum, Patron can recover for her physical injuries, emotional distress, and the deprivation of her purse.

Patron v. Cinema

Duty to make Safe for Invitees

Patron was robbed in a parking lot belonging to Cinema, just as she was exiting the Cinema around midnight after viewing a late movie. She will argue that Cinema breached the duty of care owed to her as an invitee by failing to provide lighting or a security guard in the parking lot.

A person who comes onto the land for the economic benefit of the landowner, or as part of the general public is invited onto the premises, is an invitee. Patron was an invitee because she entered Cinema's property, which was open to the public, and paid to see a movie. Cinema's duty to invitees is to make safe or warn of any latent dangers, manmade or natural, that are known or discoverable with reasonable inspection.

Cinema knew that there had been several previous attacks on customers in the parking lot in previous years, yet failed to provide any lighting or a security guard. Because the threat was known to Cinema, there was a duty to make a reasonable effort to enhance security.

Negligence

Cinema can also be liable under a negligence theory (see above). A duty of care is owed to all foreseeable plaintiffs, and Patron was a foreseeable victim of crime because she was exiting the cinema after midnight in an area where there was a known risk of assault. A reasonable theater owner would have provided either a security guard or bright lighting to discourage crime. Providing lights is [a] fairly low cost and would significantly improve safety. Therefore, Cinema's failure to do so was a breach of duty.

The lack of lights or a guard was a but-for cause of the attack because Burglar would not have been emboldened to attack Patron if there was a security guard present or if bright lighting would increase his risk of apprehension.

Proximate Cause: Cinema will argue that Burglar's intentional tortious and criminal act was a supervening cause of Patron's injury. However, as discussed above, a defendant can be liable where his negligence increases the risk of subsequent criminal acts. Here, the failure to provide lighting or a guard, despite the known attacks on other patrons, was a substantial cause of the burglary.

Joint and Several Liability

In a jurisdiction permitting joint and several liability, a plaintiff can recover the full amount of any damages proximately caused by the combined tortious acts of two or more defendants, whether acting independently or in concert, that result in a single indivisible harm. If this jurisdiction follows joint and several liability, Patron can recover from any of the defendants, and they can seek contribution from one another.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 4

Gayle is 16 years old and attends high school in School District.

One day, Gayle's teacher was relaxing in the teacher's lounge during the first ten minutes of class time, as he usually did, leaving the students unsupervised. School District had long been aware of the teacher's practice, but had done nothing about it.

That day, in the teacher's absence, Gayle walked out of class and out of school. She got into her car and drove to the house of an adult friend, Frances. Gayle had promised Frances that, for $10, she would help her move some paintings.

Arriving at Frances' house, Gayle carelessly parked her car several feet from the curb and entered the house. She came out later, carrying paintings to her car. In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Frances caught sight of the patrol vehicle and told Gayle, "Quick, move your car to the curb."

Gayle jumped into her car just as Paula was walking towards it. Suddenly, without looking, Gayle swung her car toward the curb, hitting and severely injuring Paula.

After Paula was transported to a hospital, she was visited by her husband, Harry. Shocked at Paula's condition, Harry collapsed and suffered a broken arm in the fall.

1. Under what theory or theories, if any, might Paula bring an action for damages against (a) Gayle, (b) Frances, and (c) School District, and how is she likely to fare? Discuss.

2. Under what theory or theories, if any, might Harry bring an action for damages against any defendant, and how is he likely to fare? Discuss.

Answer A to Question 4

1. What theories may Paula bring [in] an action for damages against the following defendants:

(a) Paula v. Gayle

Negligence

In a negligence case, the plaintiff must show that the defendant owed a duty of care to the plaintiff. They also must show that the defendant's conduct breached the standard of care owed to the plaintiff and the breach was the actual and proximate cause of the injury to the plaintiff. The plaintiff must be able to show damages to recover in a negligence case.

Duty of Care

The defendant owes a duty of care to all foreseeable plaintiffs. Under the Cardozo view, foreseeable plaintiffs are those who are within the zone of danger. Under the Andrews view, the test is broader, and considers all plaintiffs to be foreseeable plaintiffs. In this case, Paul was a foreseeable plaintiff under the Cardozo view because as a driver on the street she was within the zone of danger of other cars on the street, including Gayle's parked car that was far away from the curb and onto the street. Similarly, Paula would be a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable.

Police Officer Exception

Members of certain professions, like police officers and firefighters, cannot recover for injuries that are inherent in the risk of their job. Gayle may argue that as a police officer with a patrol vehicle, the risk of being hit by someone's car is inherent to the job. Paula will argue that being hit by a car is a general risk that everyone on the street takes, and is not a special risk that comes along with being a police officer. If Paula is successful

in rebutting the exception, she must prove that Gayle acted below the standard of care expected.

Standard of Care

The standard of care determines the particular duty of care the defendant owed to the plaintiff so it can be determined whether the defendant breached the duty or complied with the duty. Generally, in a negligence action, the plaintiff must exercise the level of care of a reasonably prudent person in the plaintiff's position. Since Gayle is a child, she will argue that the child standard should be used. Under the child standard of care, the child must exercise the level of care of a child of similar age, intelligence, education, and experience. Paula will argue that the adult standard should be applied because Gayle was engaging in an adult activity. Because driving a car is an adult activity, Paula is correct and the court will hold Gayle to the standard of a reasonably prudent person in her position.

Breach

Paula must show that Gayle breached a duty owed to her by acting below the standard of care. Paula will argue that Gayle breached a duty to her by parking far away from the curb, and suddenly, without looking, swinging her car to the curb. This is wrongful because a reasonably prudent driver always looks both ways before they move their car on the street, to look for other vehicles. Moreover, Gayle knew Paula was in the vicinity since Frances told Gayle that a police officer was around and suggested she move her car. Thus, this element is met.

Causation

The breach must be the actual and proximate cause of the plaintiff's damages for the defendant to be held liable.

Actual Cause

An act is the actual cause of an injury when it is the but for cause. If the injury would not have occurred, but for the defendant's act, the actual causation element is satisfied.

Paula will argue that but for Gayle jumping into the car and swinging it toward the curb without looking, Paula would not have been hit by Gayle's car, and would not have been injured. The court will agree. It should be noted that Frances' act of yelling at Gayle to move her car was not a superseding force that cuts off Gayle's liability because it occurred before Gayle's negligent act. Thus, this element is also met.

Proximate Cause

The defendant also must prove that the act was the proximate cause. To be the proximate cause, the act must have been foreseeable at the time the act was committed. Here, this was a direct cause case. As soon as Gayle swung her car toward the curb, Paula was hit and injured. There was no superseding intervening act that would cut off Gayle's liability. Thus, Gayle's breach was the actual and proximate cause of Paula's injury and if Paula can prove damages, she will recover.

Damages

The plaintiff must prove her damages. Under the "eggshell" plaintiff rule, the defendant must take the plaintiff as she finds them and is liable for the recovery no matter how surprisingly great it is considering the particular plaintiff. Here, Paula was injured from Gayle's car.

Compensatory Damages

The purpose of compensatory damages is to put plaintiff in the position she would have been in had the injury not have occurred. Paula may recover general damages for her injuries as well as the cost of the treatment of the injuries at the hospital. If she lost earnings, she may recover special damages subject to the certainty, avoidable, and mitigation principles.

Defenses

There are no applicable defenses because there is no indication Paula was contributorily negligent, assumed the risk, or comparatively negligent in a jurisdiction that recognizes these respective principles.

Conclusion

Gayle is liable for negligence against Paula and Paula may recover the damages noted above.

(b) Paula v. Frances

Negligence

Paula will have to prove the same elements above to hold Frances liable for negligence.

Duty/Standard of Care

Paula was a foreseeable plaintiff under the Cardozo view because Paula was within the zone of danger as a driver on the street. When Frances told Gayle to move her car, it was foreseeable that Paula was within the zone of danger. Paula is also a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable using this standard. Since Frances is an adult, she must exercise the level of care that a reasonably prudent person in her position would. Paula will argue that Frances owed a duty of care to Paula because Frances, as an adult, should have supervised Gayle and made sure she never carelessly parked her car far from the curb, and made sure she was careful when trying to move her car to the curb. She may also argue that Frances had a duty to make sure that Gayle was not skipping school.

Frances will argue there is no duty to act affirmatively. Frances, as an adult friend, is not responsible for Gayle's actions, and therefore had no duty to supervise her. The only time a duty to act affirmatively arises is when there is a close relationship (usually a familial one), when the defendant puts the plaintiff in peril, when the defendant undertakes to rescue the plaintiff or when there is a duty imposed by law or by statute. A duty also arises when an employer is vicariously liable for employees.

Vicarious Liability

Paula will argue that because Gayle promised to pay Frances $10 for moving her paintings, Gayle was an employee of Frances, making Gayle vicariously liable for

Gayle's torts. Vicarious liability attaches to an employer, when the employee commits a tort while performing an act in the scope of their employment. In this case, Gayle was loading paintings into her car when Frances told Gayle to move her car so the police would not see the car parked illegally. Because Gayle was performing an act in the scope of her employment with Frances, Frances may be held vicariously liable for the negligent torts of Gayle.

Breach

Paula will argue that Frances breached a duty by allowing her employee to park in the middle of the street and telling her to move her vehicle to avoid the police. She will say this is wrongful because someone could have been injured by Gayle moving her car so quickly toward the curb. However, Gayle had no duty to review the way her employee parked her car before she arrived at Frances' house to do the job.

Still, because Frances is vicariously liable for the torts of her employee, she will be liable for Paula's injuries and damages in the same manner that Gayle will be liable, as indicated above. Because Frances did not independently breach a duty owed to Paula, it is unnecessary to continue with the causation and damages analysis since she will only be liable for Gayle's negligence which was analyzed above.

(c) Paula v. School District

Negligence

Duty/Standard of Care

The same rules above apply here. Paula was a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable. Under the Cardozo view, it is less clear whether Paula was in the zone of danger. Paula will argue that she was in the zone of danger because Gayle left school in a car and Paula was a driver on the road. School District may argue Paula was not in the zone of danger because Paula was not on school property, or anywhere near the property. Moreover, Gayle is 16 years old and

presumably has a license to drive a vehicle. Thus, there is no clear indication that the School should have a duty to protect third parties from a licensed driver. However, because students are in custody of schools during school hours, it is foreseeable that children who are not in school at the time they are supposed to be will injure a third party. Thus, School District likely owed a duty to Paula under both the Andrews and Cardozo views.

School District owed the duty of care of other reasonably prudent school districts.

Vicarious Liability

Because the school district itself did not commit a tort, Paula will have to hold it liable on a theory of vicarious liability. As mentioned above, an employer is liable for the torts of its employees during the scope of their employment. Gayle's teacher was on school hours, relaxing in the lounge. Class had already started, thus she was in the scope of her employment when she left the students unsupervised and School District will be vicariously liable.

Breach

Paula will argue that School District breached the duty of care owed to Paula when it knowingly allowed Gayle's teacher to leave Gayle's class unsupervised. This is wrongful because children in high school need to be supervised. School District will argue that Gayle is 16 and is almost an adult; thus it was not wrongful to leave her unsupervised for only ten minutes. Although this is a close call, because schools are responsible for students during school hours in the same manner that a parent is responsible for a child during other hours, Gayle's teacher, and the school district through vicarious liability, probably breached a duty.

Actual Cause/Proximate Cause

School District was the but for cause because but for the negligent supervision, Gayle would not have been allowed to leave the property. School District will argue the teacher was not the proximate cause because Gayle's actions of hitting the teacher in

the car was a superseding intervening act. Because it was not foreseeable that a student would leave school and drive negligently into a police officer, School District will not be liable and Paula cannot recover damages.

Defenses

There are no defenses for the same reason noted above.

2. Harry's Theories

Negligent Infliction of Emotional Distress

To make a claim for negligent infliction of emotional distress, Harry must show that the defendant was negligent, and that he was part of a near miss situation, or a bystander on the scene who witnessed a close family member's injury. He also has to show some manifestation of a physical injury.

Gayle and Frances were negligent. Harry was not in a near miss situation himself, and he was not a bystander present on the scene. Although he suffered a physical injury, it is not enough to make out a case for bystander emotional distress because he did not collapse until he saw Paula in the hospital, which was not the scene of the accident.

Answer B to Question 4

Paula v. Gayle

Negligence

Paula has a good cause of action for a negligence claim against Gayle. To make out a prima facie negligence case, Paula must show that Gayle (1) owed a duty to Paula, (2) breached that duty, (3) the breach was both the cause-in-fact and proximate cause of Paula's injuries, and (4) that Paula sustained damages.

Duty

Under the Cardozo standard, plaintiffs owe a duty of due care to all foreseeable victims of their conduct. Under the broader Andrews standard, plaintiffs owe a duty of due care to everyone else in the world. The law defines "due care" as that of a reasonably prudent person. However, since Gayle is only 16, she will argue that she be held to a lesser standard: that of a reasonably prudent person of like age and experience. Paula will contend, however, that since Gayle was engaged in an adult-oriented activity, that of driving an automobile, that the law should make no exception for Gayle's age. Courts have consistently held that children engaged in adult activities must perform those activities with the care of a reasonable person, so Gayle will not be able to lower her standard of care to take her age into consideration.

Breach

A duty is considered breached when the defendant's conduct falls below the standard of care. Here, Gayle swung her car towards the curb "suddenly" and "without looking," conduct which clearly falls below the standard of care. Automobiles are inherently dangerous and heavy, and proper vision and care are required. Moreover, since Frances caught sight of the patrol vehicle and told Frances, "Quick, move your car to the curb," it likely put Gayle on notice that someone was coming, making her sudden and quick movement of the car without looking that much more unreasonable. Paula will probably have no problem proving this element.

Another theory of breach would be that Gayle breached when she "carelessly" parked too far away from the curb, as a reasonable person would have parked next to the curb.

Causation

Courts have traditionally divided the causation element into two parts: (1) cause in fact and (2) proximate cause. Under the cause in fact, the traditional test is whether the harm would have occurred "but for" defendant's breach. Under proximate cause, the harm will be said to proximately cause the injury if the harm is a foreseeable result of the breach. Here, Paula will be able to establish both cause-in-fact and proximate cause. If not for the fact that Gayle quickly turned her car into Paula, it would not have "hit and severely injured" her. As for the proximate cause, the very reason prudent care is required while driving a car is because they are extraordinarily heavy and can cause severe damage to people and property they come into contact with. This makes the danger of hitting someone clearly a foreseeable result of driving negligently. Paula will satisfy both elements of causation.

On the second breach theory, that Gayle parked too far from the curb, the proximate cause prong will be harder to satisfy. It is true that, had she parked closer to the curb, Paula would not have had to get out of her car, and therefore the "but for" cause is met. But not parking near a curb is not reasonably prudent because you do not leave space for other cars on the road, and generally accidentally hitting someone is not something thought of as a foreseeable risk of parking too far from the curb. However, since Paula satisfies both elements under the first theory, she will probably stick with that one, and jettison the second theory of breach.

Damages

In a negligence action, the plaintiff must prove damages. The damages need not be economic, but must be real. Here, Paula will once again have no problem making out a case for damages because she was "severely injured" and taken to a hospital.

Defenses

Comparative Negligence

Gayle will try to argue that Paula was comparatively negligent because Paula saw the car near the curb and could likely have seen Gayle walking towards the car. After all, she would be hard to miss carrying some paintings. Gayle would also point out that since Frances called out "Quick, move your car to the curb," that Paula had notice that the car was about to be quickly moved to the curb. Therefore, by standing within a reasonable distance from a car that Paula knew was about to be quickly moved, Paula was also negligent. Paula will reason that as a police officer she has a duty

Fireman's Rule

Under the fireman's rule, firefighters and police officers who engage in dangerous activities in connection with their jobs are barred from bringing suits for injuries sustained from those activities. The rationale is that the nature of the job is such that the police assume the risk of their jobs. Under this theory, Paula will not be able to recover for damages incurred if she was acting in connection with her job. Since she was coming to the curb to talk to Gayle about her car being illegally parked, it is clear that she was doing something in connection with her job. On this theory, Paula will probably be barred from recovery.

Battery

Paula may be able to make out a battery action against Gayle, but it will be more difficult. Battery is defined as the (1) intentional, (2) harmful or offensive contact (3) with Plaintiff's person.

Intentional

Contact is intentional if the conduct is voluntary and there is a substantial certainty that the contact will occur. This is the most difficult for Paula to prove. There is nothing in the facts to indicate that Gayle acted voluntarily, or that she had any intention of hitting Paula. While her conduct was likely negligent and maybe even reckless, it does not contain the requisite intent. So while elements 2 and 3 will easily be met--hitting

someone with a car is indisputably harmful, and the car hit Paula directly--the first element will not be proven, and the battery action will fail as a result.

Paula v. Frances

Agency

In order for Frances to be liable for Gayle's negligence, there needs to be an agency relationship between Frances and Gayle. This may be established under the doctrine of Respondeat Superior.

Under the doctrine of Respondeat Superior, employers are liable for the torts of their employees, so long as the conduct was within the scope of employment. So Paula must first prove that Gayle was an employee of Frances. If so, Paula must then establish that Gayle was acting within the scope of her employment when she injured Paula. If it is found that Gayle was merely an independent contractor, Paula must prove that either the duty was non-delegable or that [sic].

Employee versus Independent Contractor

The major test to determine whether someone is an employee or an independent contractor is whether the employer had a right to control the method and manner of the work. Factors that the court looks to include the degree of control, whether the pay was hourly or by piece, whether the employer furnished the tools and other items, whether the job was for the benefit of the employer's business, and the length of the working relationship.

Here, the job was done at Frances' house, was for a seemingly short duration, and does not appear to have much supervision. Moreover, the fact that Gayle received a one-lump sum of 10 dollars for the work suggests that it was not an employee relationship, but rather an informal, independent contractor type relationship. There is nothing to suggest a long-term commitment, and the movement of paintings is the type of job that needs to be done only once in a great while. Additionally, there was no benefit to

Frances' business objectives because the paintings were being moved from Frances' home. This is in fact a prototypical independent contractor relationship.

Scope of Employment

Assuming Gayle is considered Paula's employee, [sic].

Negligence

Paula might also be able to make out a negligence action against Frances' own negligence. For the negligence framework, see above.

Duty

See above.

Since Frances is an adult, she owes that of a reasonable person. Clearly she saw that Paula was approaching the car, otherwise she would not have shouted to Gayle to quickly move her car. Therefore, Paula was a foreseeable victim.

Breach

See above.

The theory would be that Frances breached the duty of reasonable care by instructing a sixteen year-old to "quickly" move her car to avoid being cited for a minor traffic ticket. A reasonably prudent person would not have instructed an impressionable minor to move such heavy machinery "quickly."

Causation

See above.

As for cause-in-fact, Frances will argue that even in the absence of her instruction, Gayle would have likely moved her car quickly and hit Paula. Paula will counter that Gayle was in fact acting under Frances' instructions and would not have moved the car quickly unless Frances did not tell her. Since Gayle "jumped" into her car right after being told to move it quickly, it is more probable than not that Gayle was acting at the direction of Frances, and therefore Frances' instruction was the "cause in fact" of

Paula's injury. However, Frances probably has the better argument on the issue of "proximate cause." While instructing someone to move their car quickly might not be the most prudent thing to do, it is likely not foreseeable that the mere suggestion that someone act in haste will result in a haste so overwhelmingly that it would cause injury to someone who, at the time of your instruction, was in their own car. Paula will argue that when police officers see something suspicious or in violation of the law, it is reasonable to expect them to get out of their cars. However, while true, this is probably not enough to overcome the foreseeability on the part of Frances.

Damages

See above.

Defenses

Frances will avail herself of the same defenses that Gayle did.

Paula v. School District

Agency

Paula will argue that the school district is acting as the agent.

Negligence

Paula once again will have a negligence claim against the School district. Her claim will be based on the school district's own negligence in allowing their students to roam freely.

Duty

See above. Here, however, it is unlikely that Paula is a foreseeable plaintiff. The chain of events leading from Gayle's ditching school to Paula's injury is extraordinarily remote, and has several intervening forces.

Breach

See above. Paula will claim that the district breached their duty by knowing that the teacher relaxed in the teacher's lounge during the first ten minutes of class time, and permitting him to do so. The reasonably prudent school district would make sure the teachers are supervising the children so they do not leave or otherwise misbehave.

Causation

See above. Here, Paula will claim that, but for the teacher's negligence in leaving the students unsupervised--and but for the school's negligence in allowing the teacher to do so--the injury would not have occurred. Once again, however, Paula has the problem of proximate cause. While the school district understands that schools have to protect their students, and the students could have dangerous propensities if permitted to leave school grounds, the situation here is pretty remote from those duties. However, if the jury finds that the student is likely to commit some harm while ditching school, Paula could be a foreseeable victim of that harm.

Damages

See above.

Defenses

The district will avail themselves of the same defenses that Gayle and Frances did, above.

Respondeat Superior

Paula may also have the claim that the school is negligent due to the teacher's negligence. Since the teacher was an employee of the school district (see respondeat superior discussion, above), the district is vicariously liable for his conduct. The teacher here is likely an employee of the school because the manner of his work is substantially controlled by the district. Moreover, since he was on school property and during school hours, the harm will be said to be within the scope of his employment. The rest of the analysis is substantially the same as the school district's own negligence, above.

Harry v. Gayle

Negligent Infliction of Emotional Distress

Harry can possibly bring a negligent infliction of emotional distress action against Gayle. Under this theory, Gayle is liable for (1) negligent conduct (2) in plaintiff's presence, and (3) plaintiff suffers subsequent physical symptoms.

Negligent Conduct

See above.

In Plaintiff's Presence

This is where Harry will have trouble. Since Harry did not see the accident, and only later saw Paula in the hospital he was not in the presence of the negligence, nor was he in the zone of physical danger.

Physical Symptoms

Under Negligent Infliction of Emotional Distress, plaintiff has to suffer subsequent physical manifestations of the distress. Here, since Harry collapsed at the sight of Paula's condition, breaking his arm, he should be able to prove subsequent physical manifestations. And since the broken arm was a result of the collapse, under the eggshell-skull principle, he would be able to recover for all damages.

However, since he cannot prove he was in the plaintiff's presence, he will not be able to recover.

Harry v. Frances / Harry v. School District

Harry can claim Negligent Infliction of Emotional Distress under the theories of respondeat superior and vicarious liability, the analysis of which will be identical to the analysis above, and will lose once again due to his lack of presence.

Therefore, Harry will be unlikely to succeed against any of the parties for his damages.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2013 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 4

Darla is in the pest control business. She develops and produces fumigation gas for her own use. She also sells the gas to consumers. Some of her competitors do not sell gas to consumers because consumers sometimes do not follow safety instructions.

Darla sold a container of fumigation gas to Albert for use in ridding his apartment of insects. Although she had intended to produce gas of standard toxicity, she had unknowingly produced gas of unduly high toxicity. Albert used the gas and succeeded in killing all the insects in his apartment. Because he used the gas carelessly, some made its way into the apartment of his neighbor, Paul. The gas caused Paul to suffer serious lung damage and to fear that he would contract cancer as a result.

1. Is Darla liable to Paul? Discuss.

2. If so, may Paul obtain damages from Darla for fear of contracting cancer? Discuss.

ANSWER A TO QUESTION 4

Darla is in the pest control business and produces fumigation gas for her own use, and sells it to consumers. She unknowingly produced gas of unduly high toxicity which ended up causing Paul, a neighbor of the user Albert that bought gas from her, lung damage and fear of contracting cancer. Although Albert, who was in privity with Darla as he purchased the gas from her, was negligent in his use, there are several theories that Paul can employ to hold Darla liable for her personal injuries.

Paul can potentially sue Darla on theories of an abnormally dangerous activity that caused Paul harm, strict products liability, negligent products liability, implied warranty and express warranty and misrepresentation theories, as well as intentional tort theories.

Abnormally Dangerous Activity

A defendant will owe a plaintiff a strict duty of care, regardless of the conduct of the particular defendant, when the defendant undertakes an abnormally dangerous activity. An abnormally dangerous activity is one with a high risk of harm, that is not commonly found in the community, which has a risk that cannot be eliminated with due care. The utility is usually lower than the risk of harm. The defendant is liable if the dangerous character actually and proximately causes the plaintiff damages.

Here, Darla is in the business of developing and producing fumigation gas, which she sells to consumers. Fumigation gas contains toxins that carry a risk of harm inherently. Darla will argue this is not an inherently dangerous activity, because fumigation gas is safe in normal amounts of toxicity, and is commonly used to control pests. She will argue it is "common in the community." Paul can counter that toxic gas always carries with it a high risk of harm, and unduly high levels of gas is not common in the community. Paul will argue that the gas is so dangerous that D's competitors will not sell it to consumers for fear that warnings are not enough to abate the danger.

Darla can point out that the risk can be eliminated with due care, as people call pest control and have fumigation all of the time, and this is safe. Paul will argue that no matter the due care, chemicals always carry risk of harm to people.

Causation

Paul will argue that the dangerous character was the but-for cause of his harm, because but for the dangerous toxins, he would not have suffered lung damage and fear of contracting cancer. However, in terms of proximate cause, Darla will argue that Albert, the user of the gas, used it carelessly and the fact that the gas made its way to Paul's apartment was a supervening cause. Paul will counter that while this may have been a supervening cause, only unforeseeable intervening acts will break the chain of causation, and Albert's negligence was foreseeable, since Darla herself knew that "consumers sometimes do not follow safety instructions." It is likely that Albert's negligence does not absolve Darla here. Thus, the dangerous character of the chemicals can be said to be the actual and proximate cause of Paul's harm. If Darla's production of the fumigation gas is an "abnormally dangerous activity" then Darla is liable to Paul on this theory.

The issues of proximate cause and causation will be detailed below under the other theories of liability.

Strict Products Liability

A defendant is strictly liable in tort when the defendant manufactures, distributes, and/or sells a product that is unreasonably dangerous and thus "defective" and the dangerous character actually and proximately causes harm to a plaintiff.

Duty and Standard of Care

A defendant owes a strict duty of care to all foreseeable plaintiffs. The focus in necessarily on the character of the product, and not the actions or due care of the defendant, in a strict liability analysis.

First, it is necessary to see if P and D are proper parties. A proper defendant for strict products liability is a commercial seller of a product. This includes all parties in the chain of distribution. Here, Darla is in the pest control business. She develops and produces fumigation gas for her own use and sells it to consumers. She will argue that since she produces it for her own use, she is not a "commercial" seller and falls outside of the strict liability framework. However, Paul will rightly point out that since she "sells the gas to consumers" she is a property defendant here.

Proper plaintiff-- Strict products liability does not require privity, or a contractual relationship between the defendant and the injured party. A proper plaintiff is thus a buyer, a user, or even a bystander that is harmed. Here, Paul was not a user or purchaser of the gas; his neighbor Albert was. Albert's careless use of the gas resulted in the gas making its way into Paul's apartment and causing him lung damage from breathing the fumes. Since Paul is a "bystander" harmed by the dangerous character of the product, Paul is a proper plaintiff and has standing to sue Darla.

Defect

The defendant, Darla, is liable for a defect in the product that is unreasonably dangerous. There are three types of defects in products liability: a manufacturing defect, a design defect, and a failure to warn defect which is a subset of a design defect.

Manufacturing Defect

A manufacturing defect is a defect caused during the manufacture of the product, whereby the product becomes unreasonable dangerous as a result of a problem during the manufacturing process. The defect is a result of a "one off" problem where the product emerges more dangerous than the other products that are manufactured with it.

Here, Darla may be liable for a manufacturing defect. She intended to produce fumigation gas of standard toxicity, which is presumably safe for human use when properly manufactured, as she is in the pest control business and sells to consumers. However, Darla unknowingly produced gas that was of unduly high toxicity, and sold it to Albert. Since this gas was "unduly toxic" this can demonstrate a product that was made to be unreasonably dangerous, as a result of the production process, and is different than the normal gas.

A manufacturing defect is demonstrated by the "Consumer Expectations Test" which essentially asks, would an ordinary consumer find the product to be more dangerous than they would anticipate? Here, while adult consumers are likely aware of the attendant dangers of toxic pest control fumes, Paul can argue that consumers do not expect that they will suffer serious lung damage as a result of someone spraying to kill some bugs in their apartment. This is likely a good argument for Paul. However, Darla can argue that consumers DO expect that fumigating can cause damage if they breathe in the fumes, and it is common sense that someone should not use too much gas. Darla will point out that the same is true for other items, such as household bleach. Paul likely has the better argument here, as consumers that spray for insects would probably not expect that the gas has "unduly high toxicity." Therefore, Paul has enough facts to prove a manufacturing defect here.

Design Defect

A design defect occurs when a product as designed is unreasonably dangerous, and is measured in terms of whether there is a "reasonable alternative design" for the product that makes it more safe without impairing its utility and function and without making it unduly expensive so as to price the defendant out of the market. It may be the case that Darla's product of the gas was a design defect in terms of the way the chemicals were used. If she used a different chemical combination, she may have been able to avoid the problem of accidentally making it too toxic. However, there are no facts to show this, and it appears that Darla simply made one batch of gas too toxic. There does not appear to be a reasonable alternative design, because pest control fumigation gas is inherently toxic.

Failure to Warn Defect

If there are either no warnings or inappropriate warnings on a dangerous product, this is a type of design defect. Here, it is not clear if there were warnings and what they were. However, because Darla's competitors do not sell the gas to consumers because they don’t always heed instructions, there is some evidence that the gas does come with instructions. However, more facts would be needed to show that there were inadequate warnings here.

Causation

Actual Cause

There must be a showing not only that the product was dangerous but that the dangerous property actually caused the harm to the Plaintiff. The defect must have been present while the product was in Darla's control.

Here, but for the high toxicity levels, Albert's overuse of the product would not have caused the harm to Paul, or so Paul will argue. It is not clear if overuse of the normal gas would have caused the same problem. However, it is likely that the unduly high levels of toxicity caused the harm to Paul, when the fumes from Albert's apartment from Albert's spraying for bugs wafted into Paul's apartment. Therefore, Paul can likely argue that the dangerous defect was the actual, but-for cause of his harm.
It appears that Darla did have control of the product while it was defective, because it can be inferred that when she produced the gas with such high levels of toxicity this was the gas she sold to Albert, who used it and injured Peter.

Proximate Cause

The harm must also have been proximately caused, meaning that it was foreseeable that the harm would occur, and that the defendant created the scope of risks. A strict products liability defendant is liable for all foreseeable misuses of a product, so a misuse that is foreseeable will NOT cut off the chain of liability because it is not an unforeseeable independent or abnormal dependent event such as would break the chain.

Darla will argue that Albert's negligence was an independent intervening cause and she should not be liable for Albert's negligent use of the gas. However, it is foreseeable that users may accidentally use too much gas, or do this purposefully without understanding the true harm. In fact, this was so foreseeable that Darla's competitors have in fact refused to sell gas to customers, because customers sometimes do not follow directions. This demonstrates the danger of the product and the fact that consumers are likely to misuse the gas, and harm themselves or others. Thus, Paul will be able to show that Darla's product was the proximate cause of his harm, despite the fact that Albert was negligent.

Damages

Paul suffered serious lung damage as a result of ingesting the gas fumes. He also worried that he would contract cancer as a result. Typically, products liability actions will only allow a recovery of personal injury or property damage but Paul's emotional distress may also be parasitic to this. This will be addressed below. However, Paul did suffer his requisite damage to recover.

In sum, Paul can likely recover on a strict products liability theory.

Defenses: Assumption of the Risk?

Darla can invoke this defense, which means that one knows of a risk and voluntarily proceeds in spite of it. Paul did not know of the risks, and was an innocent bystander. Therefore, there is no defense.

Contributory Negligence

The plaintiff's conduct is not an issue and cannot be a defense in strict liability, because the focus is on the character of the property, not the parties' conduct.

Negligent Products Liability

Negligence focus on the conduct of the defendant, and not just the character of the property.

Duty

A commercial producer owes a duty of reasonable care to foreseeable plaintiffs, who are plaintiffs in the "zone of danger" per Cardozo in Palsgraf. Here, Paul was arguably in the zone of danger. Even though he was not a user, it is foreseeable that the fumes

could leak out and harm people that are nearby, including neighbors. Darla will argue it is not foreseeable that someone in a different apartment would be harmed; however it is foreseeable that the toxic gas can waft.

Standard of Care

Darla owed a duty to act as a reasonably prudent producer of fumigation gas would act under the circumstances. Since others in the pest control business do not sell gas to consumers, this is evidence of a lack of prudence on her part. She unknowingly produced high levels of toxins in her gas, and should have had safety controls, monitoring, and someone to check the gas before it went out. She likely breached her standard of care here.

The analysis of causation and damages is the same as above; therefore, Darla is likely liable for strict liability as well.

Contributory Negligence

Paul was not negligent here, and thus this will not reduce a potential recovery.

Paul can recover for negligent products liability.

Implied Warranties of Merchantability

A product is deemed merchantable for its intended purpose. Therefore, Paul may be able to argue a breach here, if the product was not fit for its intended purpose and was too dangerous. However, this is likely not the issue; the spray worked well and as intended, because it killed all of the bugs in Albert's apartment here. Therefore, Paul cannot recover on this theory.

Express Warranties/Intentional Torts/Misrepresentation

Here, it does not appear that Darla made any representations to Paul at all, since she did not interact with him. Therefore, he cannot recover on express warranty or misrep theory.

Darla may be liable for battery if she knew to a substantial certainty that she would cause Paul harm but there does not appear to be evidence of this.

(2) Can Paul obtain damages for fear of contracting cancer?

Proper damages for products liability in strict liability or tort involve personal injury and property damage only. Emotional distress can constitute a personal injury, but even if it did not, it is 'parasitic' to Paul's actual physical injury of lung damage so it would likely be awarded on this theory. If fear of contracting cancer is "emotional distress" which it likely is, then it is a proper measure of damages.

Damages must be foreseeable, certain, definite, and unavoidable.

Paul can recover if his emotional distress is reasonable and foreseeable. Here, it is foreseeable that Paul would fear contacting cancer after ingesting toxic gas and suffering severe lung damage. An average person would have this fear especially since it is certain that he developed severe lung damage.

Paul could face problems proving his damages with definiteness/certainty. It is difficult to quantify this measure, and Darla will argue as such. However, a jury would weigh his suffering, and the credibility and likelihood of his distress, and award a number. Juries award damages for pain and suffering routinely, and could award damages based on "fear."

Paul did not need to mitigate here, since he was not a wrongdoer, and he cannot easily mitigate fear, unless he sees a therapist to reduce his fear, which would also cost money and be a measure of damages.

Therefore, it is likely that Paul would also recover damages for fear of contracting cancer, if this constitutes "emotional distress."

ANSWER B TO QUESTION 4

1) Is Darla liable to Paul?

Paul may bring a variety of claims against Darla including a claim based on strict liability, products liability, and negligence.

Strict Liability

A claim for strict liability may be made when the defendant is engaged in an abnormally dangerous activity, in which case he/she owes a strict duty of care to the plaintiff, and that activity causes harm to the plaintiff. Whether an activity is considered an abnormally dangerous one requires a determination of whether the activity is common in the community and whether the defendant, taking all reasonable and proper measures to ensure safety of the activty, the risks involved in the dangerous activity cannot be completely protected against.

In this case, Darla is engaged in the business of developing and producing fumigation gas which she uses for her own purposes in addition to selling to consumers. While some of her competitors do not sell the gas to consumers because consumers sometimes do not follow the safety instructions, the use of fumigation gas to rid one's home or business of pests may arguably be considered a matter common in the community. In this case, Albert did in fact use Darla's gas to rid his house of pests and thus an argument can be made that while the risk danger of using the gas cannot entirely be protected against, it likely is a matter common in the community, thus, a claim for strict liability will likely fail if P brings one against D.

Strict Products Liabilty (SPL)

For a claim of SPL, a defendant must be a commercial supplier of a good who supplies a dangerously defective product into the stream of commerce that causes, both actually and proximately, the harm to the plaintiff that results in damages.

Commercial Supplier

In this case, D is in the pest control business in which she manufactures and distributes fumigation gas. While she does use it for her own use, she also sells the gas to consumers. In this case, she sold the gas to Albert who used it to kill the insects in his apartment. Thus, Darla would owe a strict duty to Albert, but also to Paul. The fact that the gas injured Albert's neighbor Paul, who was not in privity of contract with Darla for the sale of the gas is of no consequence because a commercial supplier owes a strict duty to all foreseeable consumers/users or people who may come into contact with the product. Here, despite the fact that Paul did not purchase and use the gas himself from Darla, this will not prevent him from pursuing a SPL claim against her. Because D may be considered a commercial supplier, this element is met.

Defective Product

A consumer may attempt to show that a commercial supplier supplied a dangerously defective product by claiming that the product contained either a manufacturing defect (using the consumer expectation test), a design defect (feasible alternative tests), or an inadequate warning defect (information defect, which is a subset of a design defect.). In this case, Paul should argue that there was a manufacturing defect in the fumigation gas because Darla had produced gas of unduly high toxicity, and the ordinary consumer would have expected the gas produced to be of standard toxicity.

Manufacturing Defect

As discussed above, using the ordinary consumer expectation test, Paul will argue that a reasonable consumer would not have expected Darla to supply the market (and here Albert) with fumigation gas that had an unduly high toxicity level as compared to the standard toxicity levels that are generally supplied. The fact that Darla produced the higher toxic gas unknowingly and unintentionally is of no consequence in a SPL suit because the supplier owes a strict duty of care to the reasonably foreseeable consumer (here Paul), and breach of that duty (by supplying the dangerously defective product) is enough to make out the prima facie case for duty and breach of the standard of care.

Inadequate Warning

Alternatively, because the facts indicate that some of D's competitors do not sell gas to consumers because the consumers sometimes do not follow safety instructions, there may also be an issue of inadequate warning here; however, there is no evidence that D did in fact fail to supply a warning against the dangers of using the gas, so P's best argument would be to argue that the product was dangerously defective on account of the manufacturing defect.

Causation-actual cause

The injury sustained by P must also be the actual cause of the supply of the defective product. In this case, D's supply of the product to Albert (A) actually caused the harm to P because but for the sale and use of the product in A's apartment, P would not have been harmed. Rather, the issue that D will argue here is that she is not the proximate cause (or legal cause) of P's injuries on account of A's misuse of the product.

Legal Cause (Proximate cause)

Proximate cause is a legal limit on a D's liability, whereby courts will only cut off a D's liability to P's when it exceeds the foreseeable scope of liability. In this case, D will argue that A's misuse of the product in that A carelessly allowed the gas to seep into his neighbor P's apartment, should absolve her of liability because a reasonable person using the product would ensure that it would not injure others. However, this argument will likely fail because a commercial supplier must take into account a user's foreseeable misuse of the product, and such a misuse occurred in this case. It is foreseeable that a user of highly toxic pest control gas may injure other individuals on account of his negligent use of it. Thus, because a court would reject the argument that A's negligent misuse was an intervening and superceding cause that should cut off D's liability to P, this element will also be met.

Damages

Finally, a P must have suffered some form of cognizable damages in order to affect a recovery. Because Paul suffered serious lung damage, a personal harm to his body, he will meet this requirement and his claim against D based on SPL will likely succeed.

Defenses--assumption of risk and contributory negligence

D might try and argue that P assumed the risk of being injured by A's use of the pesticide; however, for an assumption of the risk defense to work, the individual must have knowingly and voluntarily assumed the risk of the activity involved. Here, there are no facts to suggest that P assumed any risk whatsoever, let alone voluntarily accepted such risks. Thus, this defense will fail.

Alternatively, D will argue that A was contributorily negligent in allowing the gas to injure his neighbor; however, as discussed above, this defense will not work in a SPL case because the negligence of the user is not taken into account when there was foreseeable misuse of the product by the user.

Negligence claim against D

The prima facie case for negligence includes duty, breach of that duty by falling below the requisite standard of care, causation (actual and proximate) and damages.

Duty

Under the Andrews minority view, a person owes a duty to everyone; thus D would owe a duty to P in this case. However, under the Cardozo majority view, a person only owes a duty to all those foreseeable persons within the zone of danger. Under this view, D would also owe a duty to P because the fact that P's apartment was located next to A's apartment (from which the gas leaked out of and into P's apartment), it is likely that P was within the zone of danger as to the use of the toxic chemicals and also was a foreseeable plaintiff because D would reasonably foresee that someone's neighbor may be injured by use of the toxic chemicals, especially in the context of apartment homes

which are generally separated by walls and hallways from each other. Thus D owed a duty of care to P in this case.

Breach-Standard of Care

D owed a duty to P and the standard of the duty would be to act as a reasonably prudent manufacturer and supplier of toxic chemicals used for pest control. Here, P will argue that D's actions fell below the requisite standard of care because D negligently produced a much higher toxic gas than she had intended to produce, and a reasonably prudent supplier of such gas would either test the levels of the gas before placing them in the market and selling them or, at the very least, having certain safeguards available to ensure that the gas level of the product produced would not exceed certain specifications. Because P can argue that D likely breached its standard of care in this case, P will have to show that his injuries were also the cause of his damages as well.

Actual Cause

P will argue that but for D's supply of the negligently manufactured product to A, P would not have been injured. Because as discussed above this element is met, P must show that D is also the legal cause of his injuries.

Proximate cause

D will argue, again, that A was in fact the legal cause of P's injuries because of his misuse of the product, and that such misuse was an unforeseeable intervening and superceding cause of P's injuries and should thus absolve D of any liability to P. However, for the reasons discussed above, this argument will likely fail because it is entirely foreseeable that an apartment owner who shares his residency in close proximity to other tenants might injure those tenants by misusing a toxic substance in an attempt to kill the pests in his apartment. Thus, P will be able to succeed on this element as well.

Damages

Again, P must prove that he suffered damages that the law recognizes as compensable. Here, P suffered lung damage and because this is a form of personal injury for which the law provides a remedy, P will be able to easily meet this element.

Thus, P has also made out a prima facie case for negligence against D as well.

Defenses

Contributory negligence

A P's contributory negligence traditionally barred his claim for recovery against the D; however, many courts have adopted a form of comparative negligence to lessen the harshness of the result with regard to the complete bar on P's claim. In this case, D might try and argue that P was contributorily negligent because he should have been able to recognize the smell of the gas or that something was causing him discomfort in his apartment, and should have sought fresh air by going outside or moving out temporarily. However, there aren't any facts to suggest that the gas had an odor; for all intents and purposes, it might have been an odorless gas. Moreover, P might have been asleep while A used the gas and would not have noticed its effects on him. Because there is very little in the facts to suggest that P was contributorily negligent, this defense will likely fail for D to assert. Similarly, an assumption of the risk defense will also fail for reasons discussed above.

2) May P obtain damages for Darla for fear of contracting cancer?

The issue is whether P can recover damages against D for his emotional distress. The claim that P would bring against D is one for negligent infliction of emotional distress, since the elements of an intentional infliction of emotional distress are not applicable here.

Negligent infliction of emotional distress (NIED)

The elements for an NIED claim occur when a defendant negligently causes emotional distress to a plaintiff on account of the D's actions. Traditionally, an NIED claim required the P to suffer some form of physical harm, and not merely some intangible emotional harm out of fear that the courts would receive a large influx of junk cases for unsubstantiated claims. Here, P will likely be able to recover his emotional distress, i.e. fear that he will contract cancer from the exposure to the gas, because he has in fact suffered a physical manifestation of the harm in the form of the lung damage that he has seriously suffered. Thus, because P can show that he has suffered physical harm to his body, he will also be entitled to recover for his emotional distress as well.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 6

Owner owned and operated a small diner where Cook and Waiter worked. After closing one day, Cook called in sick for the following day. Owner knew that an acquaintance, Caterer, owned and operated a catering business. Owner asked Caterer to fill in for Cook. Owner told Caterer: "I want you to run the kitchen for one day. I will pay you your standard catering fee. I just need somebody who knows what he's doing." Caterer agreed, telling Owner, "I'll bring my own knife set, but I assume the kitchen is fully equipped."

Owner did not check Caterer's references. If he had, he would have learned that Caterer's business had once been shut down by the health department.

Caterer went to Owner's diner and started to cook. Patron, a customer, ordered chicken wings from Waiter. Waiter gave the order to Caterer.

A notice posted on the kitchen wall, entitled "Health and Safety Code Section 300 Notification," stated: "To avoid food poisoning, all poultry products must be cooked at a minimum temperature of 350 degrees." Upon observing that the oven was set at 250 degrees, Waiter informed Caterer that the oven should be set at 350 degrees. Caterer responded: "Just worry about waiting tables, and leave the cooking to me." Caterer did not raise the temperature of the oven, and removed the chicken wings shortly thereafter.

Waiter served Patron the chicken wings. Patron ate the chicken wings and suffered food poisoning as a result.

Under what theory or theories, if any, might Patron bring an action for negligence against Caterer, Waiter, and/or Owner, and what is the likely outcome? Discuss.

QUESTION 6: SELECTED ANSWER A

In a negligence case, the plaintiff must show duty, breach, causation, and harm. When the defendant's conduct creates an unreasonable risk of harm to others, a duty of due care is owed to all foreseeable plaintiffs; the defendant must act as a reasonable person to protect foreseeable plaintiffs. Under the majority Cardozo view this duty is owed to all foreseeable plaintiffs, while under the minority view it is owed to all plaintiffs. When the defendant's conduct falls below the relevant standard of care, the defendant has breached his duty. To show cause, the plaintiff must show actual cause (that the plaintiff's injury would not have happened but for the defendant's conduct) and proximate or legal cause (that the plaintiff's injury was foreseeable in that it was a result of the increased risk created by the defendant's conduct/within the normal incidents of the defendant's conduct). Finally the plaintiff must prove that they suffered damages. Here, Patron will be able to satisfy this final requirement of harm/damages with respect to all possible defendants because Patron suffered food poisoning as a result of eating the chicken wings.

Patron v. Caterer

Patron can bring a negligence claim against Caterer for negligently serving Patron undercooked chicken wings. First, Patron could establish the first element of a negligence claim by arguing because Caterer was cooking food to serve to customers at a diner, he owed a duty to all customers who would be eating at the diner to exercise due care/act as a reasonably prudent person in the preparation of their food. Because Patron was a customer at the diner, Caterer thus owed a duty of care to Patron. Caterer breached this duty in multiple ways. First, Caterer failed to exercise due care by not reading and heeding the notice on the kitchen wall that to avoid food poisoning, all poultry products must be cooked at a minimum of 350 degrees. This notice was easy to understand and seems to have been conspicuously posted, and thus a reasonable cook in the kitchen would have read and followed the warning. Second, Caterer was unreasonable in ignoring Waiter's warning that the oven was only set at 250 degrees.

As a cook by profession, Caterer should have known the necessary temperature to cook food at to avoid food poisoning, and even if he didn't there was a notice in the kitchen stating what temperature poultry must be cooked at. Furthermore, as a cook Caterer should exercise due care in making sure that the oven is set at the proper temperature, and even if he were for some reason excused for not noticing that the oven was at the wrong temperature, the fact that Waiter explicitly warned Caterer that the oven was at 250 degrees would negate any possible excuse. Thus, Caterer breached the duty of due care he owed to Patron by cooking the chicken wings in an oven which he knew was only set at 250 and when he knew that the Health and Safety Code required poultry to be cooked at a minimum of 350 degrees.

Moreover, the fact that a Health and Safety Code mandated a minimum temperature of 350 degrees gives Patron another theory on which to show duty and breach. In this case of a violation of a regulation such as this Health and Safety Code, a plaintiff can take advantage of the statutory presumption of negligence. If a plaintiff can prove a defendant violated a statute, that the plaintiff was within the class meant to be protected by the statute, and that the harm caused to plaintiff was of the harm meant to be prevented by the statute, then the duty and breach elements of a negligence case will be presumed. In this case, Caterer clearly violated the statute by cooking the chicken at 250 degrees. The statute explicitly states that it is meant to avoid food poisoning, so the harm caused to plaintiff was indeed the harm meant to be prevented by the statute. Finally, the statute is a Health and Safety Code that is posted in restaurant kitchens, indicating that restaurant patrons are the class of people meant to be protected by the statute. Thus, all the elements are satisfied and Patron can use Caterer's breach of this statute to show duty and breach.

Actual causation is easily established because if Patron had not eaten the chicken wings, she would not have gotten sick ("but for" consuming the chicken wings, she would not have suffered harm). Proximate cause is also straightforward in this case; it is very foreseeable that serving someone chicken wings that have been undercooked will cause that person food poisoning, especially if the person cooking the chicken wings is

a professional caterer. Finally, as stated in the introductory paragraph, Patron can easily establish damages because she got food poisoning. Thus, Patron is likely to prevail on a negligence claim against Caterer.

Patron v. Waiter

Patron can also bring a negligence claim against Waiter under the theory that he negligently served her undercooked chicken wings or negligently failed to warn her of the possibility that the wings were undercooked.

Patron would argue that as a waiter, Waiter has a duty to his customers to not serve them food that he knows has a substantial likelihood of causing food poisoning, whether or not he himself is responsible for cooking the food. Alternatively, Patron could argue that Waiter had a duty to warn his customers if he was serving them food which he had reason to believe could cause food poisoning. Waiter would counter that because he was not responsible for cooking the food, he did not have a duty to Patron. However, while it is true that Waiter probably didn't have a duty to make sure that the food was cooked property because it was not his job to cook the food, as a professional waiter he did at least have a duty to either not serve food he had reason to believe would cause food poisoning, or to warn Patron that the food might cause food poisoning. This is because a restaurant patron reasonably relies on their waiter to serve them food that the waiter believes to be safe for consumption. If Waiter had no reason to believe that the chicken would cause food poisoning, he would not have breached his duty to act as a reasonable person with respect to his customers. However, here Waiter knew that the oven was only set at 250 and that the cook had ignored his warning to adjust the temperature. Under these circumstances, a reasonable person exercising due care would not have served the chicken wings, at least not without warning their customer. Thus, Waiter breached his duty to Patron by serving her chicken wings when he knew that they were not cooked at the required temperature.

Patron would argue that actual cause is established because if waiter hadn't served her the chicken wings, she would not have eaten them and gotten sick. Waiter would try to argue that if he hadn't served the chicken wings, a different waiter working that day would have brought them to the table, and he is therefore not a "but-for" cause of Patron's injury. However, the most likely interpretation of this situation is that because Waiter knew that the chicken was undercooked, his duty was not simply to refrain from bringing the chicken to the table but rather to make sure that Patron was not served the chicken or was warned about the chicken; because he was employed as a waiter at the restaurant where Patron was eating and knew of the danger, he cannot avoid liability on that argument. Patron would thus be able to establish actual cause: but-for Waiter's failure to prevent Patron from being served or failure to warn her, Patron would not have eaten the wings and gotten sick. Patron would also be able to establish proximate cause: Waiter knew the oven was only set to 250 degrees and that Caterer had ignored Waiter's warning. It was thus foreseeable that the chicken would be undercooked, foreseeable that if Waiter served the chicken to Patron, Patron would eat the chicken, and foreseeable that if Patron ate the chicken she would get sick. Thus, Patron could establish proximate cause. Damages could be established as above.

Therefore, Plaintiff would also likely win in a negligence action against Waiter for negligently serving her chicken wings that he knew were likely to cause food poisoning.

Patron v. Owner

Patron could bring a suit against Owner either for vicarious liability for Caterer's negligence, vicarious liability for Waiter's negligence, or direct negligence for negligently hiring caterer.

An employer is vicariously liable for the negligence of its employees in the course of their duties. An employer will not be liable for negligence of their employees outside of the duties, nor will someone generally be liable for the negligence of an independent contractor (rather than of an employee). However, someone will still be liable for the

negligence of a contractor if the negligence involves a non-delegable duty or an ultrahazardous activity.

Thus, the first question is whether Caterer is an employee or an independent contractor. A court will address this issue by analyzing the degree of care and control Owner exercised over Caterer, taking into account factors such as the length of employment, the nature of the duties, the amount of responsibility retained by and amount of discretion exercised by the employee/contractor, and the nature of payment. In this case, the fact that Caterer was only filling in for Owner for one day while Cook called in sick, was asked only to "run the kitchen for one day," brought his own knives, was paid a one time payment of his standard catering fee, independently owns and operates his own catering business, and does not appear to have been supervised in his duties all support a finding that Caterer was an independent contractor. The fact that aside from the knives Caterer relied on Owner's "fully stocked" kitchen supports an argument that Caterer was an employee; so does the nature of the job, as generally a cook in a restaurant is an employee of the restaurant; however, these facts are not sufficient to support a finding that Caterer was an employee. Thus, Caterer would be found to be an independent contractor.

Therefore, if Patron were to pursue a claim that Owner was vicariously liable for Caterer's negligence, Patron would have to argue that Caterer was performing a non-delegable or inherently dangerous/ultrahazardous function. The latter exception does not apply because while cooking food at a restaurant does have some inherent risks regarding kitchen safety and food poisoning issues, these are not sufficient for a finding that it is ultrahazardous. However, Patron has a chance of prevailing on the argument that the duty of ensuring that food cooked and served to restaurant patrons is cooked to health and safety code specifications is a non-delegable duty. Common carriers and store/restaurant owners are held to have a particularly high duty of care to their customers, and as such some duties are non-delegable. One example of a non-delegable duty is the maintenance of taxicabs: even though taxi drivers and mechanics are independent contractors, the taxi company may not escape liability for negligence in

the maintenance of their fleet of cars by claiming that they are not liable for negligence of independent contractors on public policy grounds. Another example of a non-delegable duty, and one that is more relevant to this case, is the maintenance of a store to keep it safe for customers. In that case, if for example a store owner hires an independent contractor to repair a dangerous condition in the store that creates a hazard to customers, the store owner can still be found vicariously liable for the independent contractor's negligence under the theory that maintaining the safety of the premises is non-delegable for public policy reasons. By analogy, the owner of a restaurant could still be found liable for the negligence of an independent contractor regarding ensuring that food is cooked according to health and safety code requirements, because restaurant owners owe a particularly high duty of care to their customers and therefore such duty is non-delegable on public policy grounds.

Therefore, Patron has a good chance of prevailing on the argument that Owner is vicariously liable for Caterer's negligence on the grounds that the duty of ensuring that food served at Owner's restaurant is cooked according to health code specifications is non-delegable. Of course, for Owner to be vicariously liable, it must also be established that Caterer himself was negligent. As discussed above, Patron has a strong case that Caterer was indeed negligent; therefore, this will not be a bar to arguing that Owner was vicariously liable.

Next Patron could argue Owner is vicariously liable for Waiter's negligence. Here there are no facts indicating that Waiter is an independent contractor. Owner might try to argue that the fact that waiters generally earn most of their wages in tips supports a finding that Waiter is an independent contractor and not an employee. However, this is not very persuasive and court would probably find Waiter to be an employee. Thus, if Patron did prevail on her claim against Waiter for negligence, she could also prevail on a claim against Owner for vicarious liability; however, if Waiter were found not to be negligent, Patron would have no such claim against Owner.

Finally, Patron could argue that Owner was directly negligent in hiring Caterer because he did not check Caterer's references. First Patron would have to establish duty. Patron could successfully argue that Owner had a duty to his customers to exercise due care in selecting his employees and independent contractors. Patron could also successfully argue that Owner breached that duty by not checking Caterer's references. A reasonable restaurant owner would check the references of a Caterer before hiring him. Owner would argue that here he was only hiring Caterer for one day, that Caterer owned and operated his own catering business which was evidence that he was a competent caterer, and that Caterer was an acquaintance of Owner so perhaps he had independent, circumstantial knowledge of his competence. However, these arguments are not persuasive; it would not have taken long to check Caterer's references, and given the nature of the work he was being hired to do, it was still reasonably prudent to check his references even though he was only being hired for one day.

Patron would argue that Owner's breach of duty in failing to check Caterer's references was the actual cause of her harm because the facts state that if Owner had checked Caterer's references, he would have learned that Caterer's business had once been shut down by the health department. To prove actual cause, however, Patron would still have to argue that had Owner found this out he would have then chosen not to hire Caterer or would have chosen to supervise Caterer more carefully. The court will likely permit this inference in Patron's favor, and she will thus be able to establish actual cause.

Patron would argue that Owner's breach was also the proximate cause of her harm because it was foreseeable that by hiring Caterer without checking his references, Owner was taking the risk that Caterer was incompetent and could cause harm as a result of his incompetence. Patron would probably succeed on this element. It is established practice in the service industry to check references before hiring. Thus, it is foreseeable that a failure to check someone's references could lead to the type of situation at issue. Finally, damages would be established as above. Thus, Patron is likely to prevail on a direct negligence claim against Owner.

QUESTION 6: SELECTED ANSWER B

In all negligence actions, the plaintiff must establish a prima facie case for negligence, which generally is composed of four elements:

(i) defendant owes a duty to plaintiff,
(ii) that duty is breached,
(iii) the breach is the actual and proximate cause of the injury, and
(iv) damages to the person or property.

All four elements must be established to succeed on a negligence claim.

The duty owed to the plaintiff is a general duty to all foreseeable plaintiffs. Further, the majority (Cardozo) is that the duty extends only to plaintiffs within the foreseeable zone of the danger. Conversely, the minority (Andrews) is that the duty extends to all plaintiffs. Also important to the first element is what the duty actually is: the standard of care. There are many different standards of care that will be discussed below.

Whether a duty and standard of care is breached is fact specific, but can look to industry custom, regulations or health codes, and any other relevant information.

For causation, plaintiff must establish both actual and proximate cause. Actual cause is causation in fact; but for the defendant's actions, the plaintiff's injury would not have occurred. Proximate cause is a limitation on liability, and says that the injury must be foreseeable; the defendant is generally liable for all harm that is the normal incident of and within the increased risk of his conduct.

Lastly is damages, which must be to the person or property.

The analysis for these elements in part differs depending on who the action is against; thus, they will be discussed accordingly.

(1) Action for Negligence against the Caterer: The action can be based on negligence or arguably negligence per se; both will be analyzed below.

(i) Duty to Patron: Here, Caterer is working in a restaurant and cooking food that is to be served to customers. Thus, he owes a duty to all customers because they are foreseeable plaintiffs and within the zone of danger of his negligent conduct, meaning they will eat his food and get sick. The standard of care here could be a variety of things, but regardless of which the court chooses, the Caterer will have breached it.

The first possible standard of care is the common law one: a person must act as an ordinary, reasonable, and prudent person would act in the same circumstances as the defendant. Such a standard does not take into account the mental capacity of the defendant, but may take into account any physical incapacities. The court may also take into account any expertise or knowledge that he has, such as being a caterer or chef. This is the most likely standard of care.

The second possible standard of care is that of a professional: which requires that a person act with the knowledge and skill of a professional in good standing in his community. It is arguable that a caterer is a professional, but less likely.

The last standard of care is Negligence Per Se which will be discussed with breach.

(ii) Breach of the Duty:

Looking to the first possible standard of care, Caterer clearly breached it by not checking the temperature on the oven despite the warning from both the clearly present Notification which he observed and from the waiter's comment to him. A reasonable and prudent person would have done so in light of these circumstances, and even without such obvious notifications, it would also be required because it is generally common knowledge that undercooked chicken is dangerous.

The second possible standard of care will have a similar outcome. This is an even higher standard of care, which the Caterer cannot meet. If a caterer or chef is considered a professional, then a reasonable and prudent caterer or chef would surely

check the temperature and have the right temperature for cooking meats, especially chicken.

Lastly is negligence per se. Negligence per se is that the generally common law standard of care may be replaced when there is a government regulation, statute, or as is here a health notification, that imposes a criminal penalty, which includes a fine. If negligence per se is established, then it is conclusively presumed that the negligence elements of duty and breach are satisfied. To establish negligence per se, the regulation must be violated without excuse, the plaintiff must have been within the protected class meaning the type of person the regulation sought to protect, and lastly that the plaintiff suffered the type of injury that the regulation sought to avoid. The first issue with negligence per se is whether the Notice constitutes a regulation or statute imposing a criminal penalty. It may not and if it doesn't, then negligence per se does not apply. It is possible it will not because nothing in the facts shows there is a penalty for such a violation. Conversely, usually there are large fines for violating these health code notifications and so it may be ok. Thus, if it does satisfy the first element of negligence per se, it has obviously been violated because caterer cooked the chicken at 250 instead of 350 degrees. Further, there was no evidence of an excuse the 250 degree-cooking. Next plaintiff was clearly in the protected class the notice sought to protect; the notice sought to protect patrons from getting sick. Lastly, plaintiff suffered the type of injury the notification sought to avoid; food poisoning. Thus, it is very possible that the court will determine negligence per se applies. But regardless of the outcome with negligence per se, it will likely be held that Caterer breached his duty under the common law negligence standard of care.

(iii) Causation: actual cause and proximate cause. Looking first to actual cause, defendant's negligent act of undercooking the meat was the cause in fact for plaintiff's injury. But for the undercooking of the meat, plaintiff would not have gotten food poisoning. Secondly, is proximate cause. Defendant's act directly proximately caused plaintiff's injury because it was foreseeable that serving undercooked meat to a patron would make the patron sick. Thus, the causation element is satisfied.

(iv) Damages: damages will be clearly established because plaintiff suffered food poisoning as a result of his negligence.

Thus, it is likely that the Patron would succeed in his action for negligence against the Caterer.

(2) Action for Negligence against the Waiter: The patron may have a claim for negligence against the waiter as well, essentially because the waiter observed the caterer's undercooking and ended up serving the food without confirming with the caterer that his mistake had been remedied. Again, for the waiter to be liable, the patron will have to establish the four elements of negligence.

The first element of duty: The waiter likely owes a duty to the patron because the patron is a foreseeable plaintiff within the zone of danger for his act of possibly negligently serving undercooked meat. Further, the standard of care would likely be the common law standard of care because none of the other standards of care apply to a waiter, which is a non-professional. Thus, the standard of care is that of an ordinary, reasonable, and prudent person in the same circumstances as the waiter.

The second element of breach: It is arguable that the waiter breached his duty to the patron. One the one hand, a reasonable and prudent person, after observing that the oven was set too low and the hearing caterer's defensive response to his inquiry, would likely make sure after the order was completed that the owner had remedied his mistake and changed the temperature of the oven because a reasonable person would be aware of the dangers of serving undercooked chicken to a patron. A reasonable person might also notify the owner of the carelessness to which the caterer is cooking, especially since he will only be working there one day. Conversely, a reasonable and prudent person might assume that after warning the caterer of the oven-temperature error, that he would simply correct his error and that the caterer's snappy response merely derived from his embarrassment at undercooking a chicken. Thus, the court

could really go either way in determining whether the duty was breached, but it seems more likely that the court would determine that it was breached.

The third element is causation: The actual cause will be satisfied because but-for the waiter serving the undercooked chicken, the patron would not have gotten sick. However, the proximate cause is more difficult to establish, but still likely will be. Although the waiter did not undercook the meat, his negligence (if it is found) contributed to the patron's injury. The waiter's act is likely said to be an intervening force or negligent act. The waiter's failure to ensure that the chicken was cooked properly contributed to the patron's injury and was within the normal incidents of and the increased risk of his conduct. Thus, while more difficult because it is a more tenuous cause, it is likely the court will determine this element to be satisfied.

The fourth element is damages: this will be satisfied because the patron suffered food poisoning.

Thus, it is likely the patron will succeed against the waiter for a negligence claim.

(3) Action for Negligence against Owner: The patron may have a view actions for negligence against the owner of the restaurant. The first being an ordinary negligence claim under vicarious liability. The second being direct negligence for the negligent hiring and or supervision of the employee. All will be discussed.

The owner can be liable for the negligence of his employees, and even possibly the acts of independent contractors, under vicarious liability. Vicarious liability says that the master may be liable if the acts of his servant were within the course of employment. Generally, an owner or master will not be liable for the intentional torts of his servants or employees, unless the intentional tort was natural in the nature of the job, performed at the request of the master, or for the master's benefit. Here, there is nothing to suggest an intentional tort, but rather negligence.

Above, it has been established that the caterer was negligent, and thus, his negligence may be attributed to the owner. The first important determination is whether or not the caterer is an employee or an independent contractor. This is important because the vicarious liability of the owner differs depending on this. Generally, to determine whether someone is an employee or independent contractor, the courts look to several factors: degree of skill required in the job, who provided the tools and facilities, duration of the relationship, did principal control the means of performing the task, was there a distinct business, etc. Applying those facts to this case, it would appear that the Caterer was more likely an independent contractor. The reason being that the employment was only for one day, it was because the owner's normal cook was out for the day, the owner did not operate that much control over the caterer, the caterer had his own distinct business, and the caterer brought his own knives. Thus, if the caterer is determined to be an independent contractor of the owner, the owner generally is not liable unless one of the two exceptions apply.

An owner is liable for the acts of his independent contractor in two situations: (i) when the independent contractor is performing an inherently dangerous task and (ii) when because of public policy, the principal's duties are non-delegable. The latter of the two exceptions likely applies here. Public policy requires that an owner of an establishment that invites and charges members of the public for certain services must reasonably maintain their premises and ensure they are safe. Thus, just because the caterer was an independent contractor, does not mean that the owner could delegate the duty to maintain his restaurant and make it safe. Thus, the owner will likely be vicariously liable for the negligence of the caterer.

It should be noted, that if for some reason the court finds that the caterer was actually an employee of the owner because he was using the owner's kitchen and cooking the owner's menu items, then the owner would also be liable because the negligence occurred within the scope of his employment: it occurred while cooking on the job for a patron of the restaurant.

The owner may also be vicariously liable for the negligence of the waiter (if the waiter is found to have been negligent), because the waiter is an employee and the negligence occurred while acting within the scope of his employment.

The patron could also sue the owner for his Direct Negligence. Even if the owner is not vicariously liable, he can be directly liable for his own negligence. All persons are generally personally liable for their own negligence. Here, the direct negligence would arise from the owner's negligent hiring and arguably negligent supervision of the caterer. The owner owes a duty to his patrons to employ persons that are qualified and will perform the job responsibly. The patron will argue that the owner negligently hired the caterer because he gave him the job when the caterer was only an acquaintance. Further, the owner did not check the Caterer's references or ask around, which a reasonable person would have done; and if such acts had been done, he would have learned that the Caterer's business had once been shut down by the health department for violations. It was the owner's negligent hiring that was the actual, and very likely, the proximate cause of the plaintiff's injuries. Thus, the patron will likely succeed in this direct negligence claim against the owner.

The patron could also sue the owner for his Direct Negligence for negligent supervision of his employees. This is less probable because although the facts do not state that the owner inspected the caterer's work and watched him perform, it is not unreasonable for an owner to not check the every move of a caterer or chef. That being especially true when the caterer is performing such a standard task as cooking chicken. Thus, while the owner owed a duty to supervise, it was likely not breached. The duty here takes on the standard of care required for invitees: which is that the owner must make reasonable inspections to discover all non-obvious and dangerous artificial and natural conditions. That standard of care does not cleanly apply here, and even if it does, it is not apparent that it has been breached. Further, his failure to supervise may not be the proximate cause, because of the caterer's intervening act that was likely not the normal incidents of a failure to adequately supervise. Thus, it is likely the patron will lose on this claim.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Trusts
2.	Torts
3.	Professional Responsibility
4.	Remedies
5.	Evidence
6.	Contracts

QUESTION 2

Jack believed that extraterrestrial aliens had come to earth, were living undercover as humans, and were planning a full-scale invasion in the future. Jack believed that his next-door neighbor, Nancy, was one of these aliens.

One day, Nancy called Jack on the phone to complain that Jack's children were playing in her yard. Jack yelled that his children could play wherever they wanted to. He also said that he was going to kill her.

The next day, Nancy approached Jack, who was playing in his yard with his children. She reminded him to keep his children out of her yard. Jack picked up a chainsaw and said, "When the invasion comes, I am going to use this baby to cut off your head!"

From the other side of the street, Ben saw Jack angrily raise the chainsaw at Nancy. Ben ran across the street and knocked Jack to the ground and injured him.

Later that week, Jack decided that he could wait no longer. He saw Nancy's car, which he believed to be an alien spaceship, parked on the street. He snuck over to her car and cut the brake lines, hoping Nancy would have a minor accident and be taught a lesson.

Unaware that her car had been tampered with, Nancy lent it to Paul. When the brakes failed to work, Paul drove off a mountain road and was severely injured.

1. What tort causes of action, if any, may Nancy bring against Jack, and how is each likely to fare? Discuss.

2. What tort causes of action, if any, may Jack bring against Ben, and how is each likely to fare? Discuss.

3. What tort causes of action, if any, may Paul bring against Jack, and how is each likely to fare? Discuss.

QUESTION 2: SELECTED ANSWER A

Whether Jack can be held liable for Intentional Torts

As a preliminary matter, the overarching issue is whether Jack can be found guilty of intentional torts, where he believed that extraterrestrial aliens had come to earth, were living undercover as humans, and were planning a full-scale invasion in the future. Jack further believed that his next-door neighbor, Nancy, was one of these aliens. Jack will argue that, because of his delusions, he does not have the requisite intent necessary to be liable for an intentional tort. Nancy will argue that, so long as Jack intended his actions, it does not matter that the action was motivated by a delusion. A court is likely to find that Jack can be found liable for intentional torts, as he had both the intent to act and the intent to achieve certain results from those actions. The fact that the actions were motivated by an insane delusion will not be a valid defense to the intentional tort actions that may be brought by Nancy and Paul.

Nancy's Tort Causes of Action Against Jack

Assault

At issue is whether Jack assaulted Nancy when he threatened to kill her when they were talking on the phone, and/or when he raised the chainsaw up while they were talking in the yard.

Assault is the intentional creation of apprehension in another of immediate bodily harm. "Apprehension" means that the victim must be aware of the threat against her. Assault requires more than just threatening words alone - the words must be accompanied by an action. Conversely, words may negate immediacy by attaching a condition or time frame to a threat. Here, Nancy could argue that Jack assaulted her twice - once when he said that he was going to kill her when they were talking on the phone, and once when he threatened her with a chainsaw when they were on the lawn.

As to the phone conversation, Jack yelled that he was going to kill Nancy while they were talking on the phone. Nancy will likely not succeed on this claim of assault because the conversation took place over the phone, and, thus, was not accompanied with a threatening action (that Nancy could see, at any rate) that would cause Nancy to believe that she was in danger or immediate bodily harm. Because she and Jack were in separate houses during the phone call, Nancy would likely not be able to demonstrate that she was in apprehension of *immediate* bodily harm. Thus, this cause of action for assault would fail.

Nancy's cause of action for assault relating to the chainsaw incident is stronger, although it is still likely to fail. After Nancy approached Jack outdoors, reminding him to keep his children off her lawn, Jack raised a chainsaw and said "When the invasion comes, I am going to use this baby to cut off your head!" Raising the chainsaw definitely qualifies as an action that would accompany the threatening words to create an apprehension of immediate bodily harm in Nancy. Additionally, the threat of cutting off Nancy's head would cause apprehension. Jack will argue, however, that his words negated the immediacy required for an assault cause of action, because he stated that he would cut off Nancy's head "when the invasion comes." These words attached a future time condition to the threat, thereby negating the immediacy. Nancy could argue, on the other hand, that since the "invasion" was a delusion by Jack, the time frame could be immediate, not future, as it is possible that, in Jack's mind, the invasion was going to happen right away. If Nancy's point of view prevailed, Jack would be liable for assault. However, since Jack was not screaming that the invasion had arrived, but rather was speaking of the invasion as if it were a future event, a court will likely find that his words negated immediacy, and despite the threatening action he is not liable for assault.

<u>Intentional Infliction of Emotional Distress</u>

The next issue is whether Jack's threats to kill Nancy, and to cut her head off with the chainsaw made to her face, make him liable for intentional infliction of emotional distress, even where she does not appear to have suffered any distress.

Nancy could raise a claim of intentional infliction of emotional distress, which requires for a defendant to commit outrageous conduct that causes severe distress in a plaintiff. Here, Jack's conduct was certainly outrageous, that is, it was outside the bounds of decency as upheld in society. By threatening to kill Nancy and threatening to cut off her head with a chainsaw, Jack clearly made outrageous statements that exceed the bounds of decency. However, there is no indication from the facts that Nancy was emotionally distressed as a result of Jack's statements. Although IIED does not require a showing of physical distress symptoms, there must be at least some allegation that the plaintiff suffered from severe distress. Absent that allegation, as here, there is not sufficient grounds for an IIED cause of action.

Battery

The next issue is whether Jack's tampering with Nancy's car results in a battery against Nancy.

Battery is the intentional infliction of bodily harm caused by harmful or offensive touching to another's person. Here, Jack intended to cause Nancy bodily harm - he was hoping that she would "have a minor accident" to be "taught a lesson." This indicates that, even if he only wished minor harm upon Nancy, Jack intended to cause Nancy bodily harm. Less clear is whether Jack's tampering with Nancy's car resulted in a "harmful or offensive touching to her person." A "person" may be construed liberally to include objects connected to a plaintiff's body, such as her purse. Nancy's car, however, when it was parked on the street, was not connected to her body and it is unlikely that a court would construe the car to be an extension of Nancy's person.

Nancy would argue, however, that battery need not be immediate, and that by cutting the brake lines Jack intended future harm to Nancy's person. Nancy would argue that Jack's actions were akin to poisoning someone - which is a battery even though the harm to a plaintiff's body does not occur until the future. Nancy would likely be successful on this argument if she had actually been injured by Jack's actions. Since

Paul was injured instead, the doctrine of transferred intent may apply (see below), but Nancy did not actually suffer a harm or offense to her person, and, ultimately, she will not be successful in her battery cause of action.

Trespass to Land

Trespass to land occurs when the Defendant unlawfully enters the land of the Plaintiff. Here, Jack cut the brake lines on Nancy's car while it was on the street, and there is nothing to indicate that he trespassed onto her land. Thus, Nancy does not have a claim for trespass to land.

Trespass to Chattel and Conversion

Trespass to chattel and conversion are property torts that occur when the Defendant damages or steals the property of a plaintiff. The difference between trespass to chattel and conversion is one of degree - trespass to chattel occurs where property is harmed but not completely destroyed, and conversion occurs when the property is destroyed or stolen. Here, Jack could be liable for both torts. He intentionally cut Nancy's car's brake lines, and, in so doing, could be liable for trespass to chattel, which means he would owe Nancy the cost of repair for the break lines. Subsequently, however, when Paul drove the car, he drove off a mountain road. These facts indicate that the car was destroyed. If that is the case, Jack could be liable for conversion, which means he would owe Nancy the market value of the car at the time the conversion occurred.

Jack's Tort Claims Against Ben

At issue is whether Jack may bring a claim of battery against Ben, where Ben knocked Jack to the ground and injured him after Ben saw Jack "angrily raise the chainsaw at Nancy." As discussed above, battery occurs when a defendant commits harmful or offensive touching to another's person. Here, Ben did harmfully touch Jack -

he "knocked Jack to the ground" and injured Jack, thereby meeting the requirements for a prima facie case of battery.

The next issue becomes whether Ben may raise any defenses against the battery cause of action. Ben may raise the defense of "defense of others" to protect him from liability for any battery committed against Jack. A person may use reasonable force in defense of another when that person believes that the other is in danger of immediate bodily harm. The force used must be proportionate to the threat. Here, it appears that Ben knocked Jack over in order to protect Nancy, whom he reasonably believed was in danger of being attacked by Jack with his chainsaw. Ben used reasonable, non-deadly force to defend Nancy (even though it could be argued that Jack's chainsaw was a deadly weapon). Ben did not escalate the force, but rather responded proportionately. Thus, Ben is likely to be found not liable for battery, because his defense of protection of others would be valid.

It should be noted that, even if Ben was mistaken about his need to defend Nancy, because Jack did not actually intend to harm Nancy until "the invasion comes", this mistake will not negate Ben's defense. Mistaken self-defense (or defense of others) is still a valid defense to an intentional tort so long as the mistake was reasonable. Here, it was reasonable for Ben - who was standing across the street and likely could not hear what Jack was saying - to believe that Nancy was in danger when Jack raised his chainsaw in an "angry" manner.

Paul's Tort Claims Against Jack

At issue is whether Paul may bring a battery cause of action against Jack, where Jack tampered with Nancy's car, which Paul then borrowed. Specifically, the issue is whether, because of the doctrine of transfer of intent, Jack's intention to harm Nancy could be transferred to Paul. Under the doctrine of transferred intent, the intent to commit an intentional tort, such as battery, against one plaintiff may be transferred to another plaintiff if the harm actually befalls the second plaintiff. As noted above, it is

unlikely that a court will find that Jack committed battery against Nancy, because Nancy was not actually harmed or touched by Jack's actions. Paul, however, was "severely injured" as a result of Jack's attempt to commit a battery against Nancy. As a result, Paul may sue Jack under a theory of transferred intent, and Paul will likely be successful.

QUESTION 2: SELECTED ANSWER B

1. Nancy's Tort Claims Against Jack

A. Assault for Threat over Telephone

Nancy may bring an assault claim against Jack for the threat to kill her that he made over the phone, but this claim will not succeed.

To establish a prima facie case of assault, the plaintiff must show: (i) an act by the defendant that brings about a reasonable apprehension in the plaintiff of an immediate harmful or offensive contact to the plaintiff's person; (ii) intent by the defendant to cause such apprehension; and (iii) causation.

The facts show that while speaking over the phone, Jack told Nancy that he was going to kill her. A threat to kill someone is generally enough to create a reasonable apprehension in that person that they will suffer a harmful contact.

For the element of intent under most intentional torts, the defendant need not actually intend the specific result, but rather just be substantially certain that such result is likely to arise as a result of the act (general intent). Jack's intent to cause such apprehension can be shown by the fact that he can be substantially certain a threat to kill someone would cause them to fear a harmful contact. And causation may be shown because Jack's threat was what caused the apprehension of an immediate harmful contact.

However, Nancy's claim for assault will fail because the intentional tort of assault requires that the apprehension, or fear, be of an immediate harm. A threat of future harm is not sufficient for the tort of assault. Moreover, the reasonable apprehension may not be created by words alone--there must be some threatening act in addition to the words.

Here, Nancy was speaking to Jack over the phone, and thus was not in his presence when he made the threat. Therefore, her apprehension could not have been of an immediate harm, because he was not present to execute on his threat. He would have had to run next door to make good on his threat to kill her (at which point the threat would have been immediate, but not until then).

B. Assault with Chainsaw

Nancy may also bring an assault claim for Jack's threat with the chainsaw. Here, Jack's conduct amounted to more than a mere threat, as he was brandishing a chainsaw. The combination of telling Nancy he would cut off Nancy's head while lifting a chainsaw is certainly enough to cause a reasonable person to fear that she will suffer a harmful contact--here, in the form of a chainsaw to the head.

Nancy will argue that the immediacy requirement is fulfilled because Jack is standing right next to Nancy, and thus can cause the harm at that moment. However, Nancy is likely to lose on this claim as well, because the existence of conditional words will neutralize the immediacy of the threat. Jack told Nancy he will cut her head off "when the invasion comes." Nancy probably has no idea what he is talking about and when that invasion will supposedly arrive, but from Jack's words it seems clear that the invasion will come in the future. Since he is threatening to cut off her head in the future, there is no reasonable apprehension of an immediate contact to Nancy's person, and thus no assault.

C. Intentional Infliction of Emotional Distress (IIED)

Nancy can bring IIED claims for both Jack's threat over the phone and the threat while picking up the chainsaw, so long as she is able to show that she suffered severe emotional distress as a result of such threats.

To establish a prima facie case of IIED, the plaintiff must show: (i) an act by the defendant amounting to extreme and outrageous conduct; (ii) intent by the defendant to cause the plaintiff severe emotional distress; (iii) causation; and (iv) the plaintiff suffered damages in the form of severe emotional distress.

Both the threat over the phone call and the threat in the yard amount to extreme and outrageous conduct, because both involve threats to kill Nancy. A threat to kill someone is definitely extreme and outrageous, and would shock the sensibilities of an ordinary, reasonable person.

The intent element for IIED requires that the defendant intend to cause severe emotional distress, or recklessness as to such a result. Here, the required consent will be found via recklessness--Jack's threat to kill Nancy is a complete disregard of a substantial risk that such a threat will cause his neighbor to fear for her life and safety, and thus suffer severe emotional distress.

Nancy's only potential pitfall on this claim is that there is nothing in the facts that show she suffered severe emotional distress. Such distress does not need to take the form of a physical manifestation, but she does need to show substantial distress (e.g. severe anxiety or fear for her life). Assuming she is able to show such distress, Nancy will prevail on an IIED claim against Jack.

D. Conversion/Trespass to Chattels

Nancy can also bring a claim for conversion for Jack's act of cutting the brakes on her car.

To establish a prima facie case of conversion, the plaintiff must show: (i) an act by the defendant that interferes with the plaintiff's right of possession in a chattel; (ii) intent by the defendant to so interfere; and (iii) causation.

The claim of trespass to chattels has the identical elements, the difference between the torts being in degree of the interference. Conversion requires that the interference with the plaintiff's possession interest be so substantial in quality or nature that it justifies forcing the defendant to pay the full fair market value of the chattel, whereas a more minor interference constitutes trespass to chattel (and Jack would need to pay only the amount of damage caused by the interference).

Here, Jack cut the brakes on Nancy's car, which led the next person driving the car to crash it and presumably damage it further. Thus causation is shown, and the facts show Jack intentionally cut the brakes. Because of the severe damage to her car, Nancy will be able to recover under conversion for its full value.

E. Trespass to Land

Finally, Nancy may bring an action against Jack for trespass since his kids were on her property. However, this action is unlikely to succeed, since a parent is not vicariously liable for the actions of his children. Nancy would need to bring this action against the children themselves.

2. Jack's Tort Claims Against Ben

A. Battery for Tackle

To establish a prima facie case of battery, the plaintiff must show: (i) an act by the defendant bringing about a harmful or offensive contact to the plaintiff's person; (ii) intent by the defendant to bring about such contact; and (iii) causation.

Here, Ben tackled Jack to the ground and injured him, which shows a harmful contact and causation. From the facts, it appears that Ben intended such a contact because he ran across the street and knocked Jack to the ground to protect Nancy.

Jack will have a strong argument against the battery via defense of others. Defense of others is a defense that will prevent Jack from succeeding on this claim. One has the right to defend another if the defendant reasonably believes that that person would be entitled to defend themselves. Here, Ben saw Jack raise the chainsaw and may have even heard him threaten to cut off her head. A reasonable person would believe that Nancy was in danger, and thus Ben acted reasonably by defending her. He used non-deadly force in confronting Jack's potentially deadly force, and thus the type of force he used was appropriate.

Thus Ben will not be liable for battery.

B. Trespass to Land

Jack may also bring a claim for trespass to land against Ben for running onto his property. To show this tort, the plaintiff must show that the defendant interfered with his possession of land; intent; and causation. By intentionally running onto his property, Jack will claim Ben committed this tort.

However, Ben will argue that he was justified in running on his property as a result of a public necessity. A public necessity creates an absolute privilege to enter the land of another. Here, the necessity was Nancy's potential decapitation. Thus Ben will not be liable for this tort.

3. Paul's Tort Actions Against Jack

A. Battery

Paul should bring an action against Jack for battery (see elements above). Paul will show that by cutting the brakes on the car, Jack was substantially certain that a harmful contact would arise in the person of the driver.

Transferred Intent

While Jack may argue that he only intended to harm Nancy, rather than Paul, the doctrine of transferred intent will provide the intent needed to find Jack liable for the tort of battery against Paul.

Under this doctrine, when a person intends to commit an intentional tort against another, but instead: a different tort results against that same person; the same tort arises against a different person; or a different tort arises against a different person; the tortfeasor's initial intent to commit the first tort will provide the requisite intent for the second tort. Transferred intent is available for the intentional tort of battery.

Here, Jack intended to cause a harmful contact to Nancy. The fact that Paul was the first to drive the car, rather than Nancy, will not relieve Jack of liability. Jack's intent to harm Paul will be found via the doctrine of transferred intent, and Jack will be liable for battery.

Defense of Insanity

Jack may argue he did not have the intent necessary to commit the tort because of his insanity, given his belief that the car was an alien spaceship. However, insanity is not a defense to an intentional tort unless the mental defect is such that the tortfeasor does not understand the nature of his act. Here, Jack was aware that he was cutting the brakes with intent to harm Nancy, and thus insanity will not be a valid defense.

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Question Number	Subject
1.	Wills
2.	Remedies / Torts
3.	Evidence
4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

QUESTION 2

Steve agreed to convey his condominium to Betty for $200,000 in a written contract signed by both parties. During negotiations, Steve told Betty that, although there was no deeded parking along with the unit, he was allowed to park his car on an adjacent lot for $50 a month. Steve stated that he had no reason to believe that Betty would not be able to continue that arrangement. Parking was important to Betty because the condominium was located in a congested urban area.

On June 1, the conveyance took place: Betty paid Steve $200,000, Steve deeded the condominium to Betty, and Betty moved. She immediately had the entire unit painted, replaced some windows, and added a deck. The improvements cost $20,000 in all. She also spent $2,000 to remove the only bathtub in the condominium and to replace it with a shower, leaving the condominium with two showers and no bathtub.

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and was going to discontinue renting parking spaces. She also learned that Steve had known about these plans before the sale. She quickly investigated other options and discovered that she could rent parking a block away for $100 a month. At the same time, she also found that, immediately before Steve had bought the condominium, the previous owner had been murdered on the premises. Steve had failed to tell Betty about the incident.

Betty has tried to sell the condominium but has been unable to obtain offers of more than $160,000, partly due to the disclosure of the murder and the lack of a parking space. Betty has sued Steve for fraud.

What is the likely outcome of Betty's lawsuit and what remedies can she reasonably seek? Discuss.

QUESTION 2: SELECTED ANSWER A

Steve's Breach in Respect of the Parking Space

The issue is whether Steve misrepresented to Betty the facts relating to the parking space in a way that would give cause to a right of action.

A misrepresentation is a (i) statement of fact, (ii) that is false, and (iii) either material or the known to the declarant to be untrue, and (iv) which induces a person to act to their detriment in reliance on the representation.

Steve made a clear statement of fact when he said there was an existing parking space available for rent at $50 a month and he had no reason to believe that the arrangement would not be continued. This fact is clearly false since the construction of an office building means that the parking arrangement will be discontinued.

Steve told Betty that he saw no reason she could not continue to park her car subject to the pre-existing arrangement (payment of a $50 a month fee). Parking was important to Betty given the nature of the area (a congested urban area) - a fact that Steve should have been aware of, having lived in the area himself. Betty will argue that this was a material fact of importance in her decision to enter into the condo sale. Steve will argue the opposite, that parking is ancillary to the property purchase and therefore lacks the materiality required for misrepresentation. As Betty later discovered, Steve knew about the plans to discontinue renting parking spaces before the sale occurred, therefore even if the statement is not considered material it will satisfy the requirement of knowledge that it was untrue.

Given the importance of parking to Betty, she will argue that the fact there was a parking arrangement in place was central to her decision to purchase the condo and she therefore acted in reliance on the statement. Again, Steve will try to argue that the parking is ancillary to the condo, it was not part of the deeded property and does not

sufficiently constitute reliance as there must have been many other factors that induced Betty to purchase the condo such as price, size and location.

Given that parking is something Betty probably does on a daily basis, the existence of adequate parking arrangements is likely to be viewed by the courts as sufficient motivation for reliance. Therefore Steve's statement is indeed likely to be viewed as a fraudulent misrepresentation.

Failure to Disclose the Murder

The issue is whether Steve was under a duty to disclose that a murder had previously occurred in the condo.

At common law, the seller of property had no duties of disclosure to the buyer, under the doctrine of caveat emptor. The buyer was entitled to inspect the property prior to purchase and had the obligation to discover any defects for herself. The modern trend is to impose on sellers a duty to disclose material defects of which the buyer was not aware and could not easily discover on inspection. Liability for failure to do so arises under the principles of concealment and fraud.

The fact that a murder had taken place in the condo itself is a fact very likely to affect the marketability of the condo. Indeed Betty found the value had dropped significantly once she disclosed this fact to potential new buyers. Betty will argue that Steve had a duty to actively disclose this information to her and his failure to do so constituted fraud. Steve, on the other hand, will argue that he made no representation about the murder and never stated that a murder had not happened and therefore cannot be found liable for fraud because he did not do or say anything dishonest.

The courts will likely find that Steve did have a duty to disclose this information to Betty, as it is a material fact concerning the property that will have an adverse effect on its value. Steve's failure to disclose will amount to concealment and consequently Betty should have a strong course of action against Steve for fraud.

Appropriate Remedies

Where there is fraud in the inducement of a contract, the contract becomes voidable and entitles the innocent party to treat the contract as void and seek remedies accordingly.

The appropriate remedies for Betty will depend on whether she wishes to stay in the condo, but make good her financial loss, or whether she wishes to force a sale of the property and move out.

Money Damages

If Betty decides to stay in the condo the most appropriate course of action will be to affirm the contract and seek money damages. The various money damages rules are all aimed at compensating for loss of expectation, where the expectation was simply no breach. Expectation damages will be used to put the plaintiff in the position she would have been in had the contract been as expected. In order to claim damages, the claimant must show that (i) the defendant's actions were the cause of the loss, (ii) the loss was reasonably foreseeable at the time the contract was entered into, (iii) the loss is certain and not too speculative, and (iv) it was unavoidable (meaning the claimant has taken all steps available to reduce her loss).

For the Parking Space - With respect to the parking, Betty's expectation was that she would have a place to park her car for $50 a month. Steve's misrepresentation is the clear cause of this loss and it was reasonably foreseeable at the time that if Steve's statement about the parking was false, Betty would suffer damage by either having no parking or potentially having to pay more for it. Betty has taken appropriate steps to find an alternative parking space and thereby mitigate her loss. But the parking space will be twice the cost of what she was expecting. This loss is certain in monetary terms (a clear $50 per month). Therefore Betty should have a successful claim against Steve for monetary damages to make good the loss of the parking place.

Judgment for money damages is normally made in one lump sum payment, discounted to today's value without taking account of inflation. However, the modern trend of some courts is to allow for inflation.

For the Loss in Value Due to the Murder - The courts will apply the same test to ascertain damages in respect of the drop in the condo's value due to the murder.

As before, the causal link is clear - Steve's failure to disclose the murder resulted in Betty paying an inflated price for the condo; this was foreseeable at the time, since it is clear to reasonable people that such a fact would necessarily result in the property being less marketable. Betty has attempted to sell the house but has been unable to do so for more than $160,000; therefore the measure of expectation damages will be $40,000. However, Betty has also spent $22,000 on making improvements to the condo and she will argue that they have raised the value of the condo and she should therefore be able to recover for these too under the consequential damages rule. Consequential damages may be sought in order to compensate the claimant for losses over and above expectation damages that were foreseeable.

Steve will argue that removing the only bathtub in the condo has in fact depreciated the property and that the drop in value is more due to this than the disclosure of the murder.

Rescission

Recission is an equitable remedy that the courts may use in their discretion when there is no available legal remedy. Rescission would allow Betty to treat the contract as void, the condo would be returned to Steve and her purchase money would be returned to her.

If Betty decides she no longer wants to live in the condo, this would be a more appropriate remedy. Since land is always considered unique, Betty may argue that the legal remedy of damages is not appropriate and she should be entitled to avoid the contract altogether.

In addition to obtaining back her purchase money, Betty could seek reliance damages for the amounts spent on improving the property. Reliance damages seek to put the claimant in the position she would have been in had she never entered into the contract.

This would allow Betty to recover the $22,000 spent on improvements.

QUESTION 2: SELECTED ANSWER B

Valid Contract:

Governing Law:
The UCC governs contracts for the sales of goods. The common law governs contracts for services, the sale of land, and all others not under the UCC.

Here, the contract was for the sale of a condominium (condo) which is real property; thus the Common Law applies.

Contract formalities:
A valid contract requires: 1) offer, 2) acceptance, and 3) consideration. Further, a land sale contract must be in writing to satisfy the statute of frauds (SOF).

Here, there is a written contract by both parties relating to the sale of the condo, thus this satisfies the SOF. Steve agreed to sell Betty his condo for $200,000. Thus, this was a valid offer. On June 1, the conveyance took place. Steve deeded the condo to Betty; she paid the $200,000 and moved in. Thus, Betty accepted.

Thus, the parties had a valid contract.

Breach of Contract:

A breach of contract occurs when one of the parties fails to perform on the contract. With land sale contracts, once the conveyance is made, it extinguishes the contract and the parties can only sue on the deed and based on which future covenants were granted in the deed (further assurances, quiet enjoyment, or warranty).

Here, the conveyance had already occurred; thus the deed will control and Betty will not be able to sue for breach of contract relating to the land sale. However, a party can

nonetheless sue based on fraud if there was an intentional failure to disclose. If Betty can establish that there was fraud, she would be entitled to sue on a fraud theory.

Fraud:

Fraud requires 1) a misrepresentation, 2) of material fact, 3) known to induce reliance, 4) actual reliance, and 5) damages.

Parking:

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and would discontinue renting parking spaces and Steve knew about these plans. Here, there was a misrepresentation because during negotiations Steve told Betty that although there was no deeded parking, she would be allowed to park on an adjacent lot for $50 per month just as he had. Meanwhile he knew about the building owner's plans that Betty would not be able to park in that lot. Thus, there was a misrepresentation.

This was a material fact because parking was important to Betty because the condo was located in a congested urban area. The materiality is further evidenced by the fact that she is having a hard time reselling the condo because of the parking.

Further, Steve knew this misrepresentation would induce reliance because he told Betty that he had no reason to believe that Betty would not be able to continue that arrangement. This shows that he knew that Betty would rely on this fact in deciding to continue with the purchase.

The next element is met because Betty actually relied on the misrepresentation because she decided to continue with the purchase of the condo and she did not know about the lack of parking until after the sale had been completed.

Betty's damages are established because she will lose lost the ability to park in the

nearby lot.

Thus, there was a misrepresentation as to the parking.

Murder:

A misrepresentation does not have to be a lie, but can be an omission as well, if the seller knew of the defect and failed to inform the buyer of the defect.

Here, Betty learned in August, some two months after the purchase, that the previous owner had been murdered on the premises, and Steve failed to disclose to Betty about the incident. Steve knew about the murder but failed to disclose it to Betty. Such a failure to disclose would amount to a misrepresentation based on omission. Here, he knew that this was a material fact because a prospective buyer would want to know if a person had been murdered on the premises. Further, the failure to disclose such a horrible fact would result in an innocent buyer to rely on the fact that no such murders had occurred on the premises. He knew that if he disclosed the murder, Betty would back out of the deal. Further, Betty relied on the fact that there had been no murders in the condo when she decided to proceed with the sale. Had she been informed about the murder, she could have had the opportunity to decide if she nonetheless wanted to continue with the purchase. Lastly, Betty has suffered damages because she cannot sell the house for more than $160,000, partly because she has to disclose the murder to prospective buyers.

Thus, there was a misrepresentation about the murder.

In conclusion, because Steve engaged in fraud for the misrepresentation of the parking situation and the murder, Betty will be successful in her suit against Steve.

Rescission:

A contract can be rescinded based on a mutual mistake or fraud.

Here, Betty will seek that the contract be rescinded because she can successfully assert her claim for fraud against Steve, as established above.

Reliance:

Reliance damages can be obtained to avoid any unjust enrichment on the part of the defendant. Reliance seeks to put the non-breaching party in the position as if there had been no contract.

Here, Betty was excited to own her own condo. In anticipation of living in the condo for a long period of time, she decided to make improvements to it. Betty immediately had the entire unit repainted, replaced windows and added a deck. The total value of improvements cost $20,000. She also spent $2,000 to remove the only bathtub and replace it with a shower. Betty made such improvements because she had relied on the fact that there were no defects with the property. It would be unfair to rescind the contract and return the condo to Steve with $22,000 worth of improvements. Thus, Betty should be able to receive reimbursement for the $22,000 she expended on improvements to the condo.

Expectation:

Expectation damages seek to put the non-breaching party in the same position as if no breach had occurred.

Betty will seek expectation damages to put her in the same position as if she had never purchased the condo. When she purchased the condo she expected to live in a unit with nearby parking and no previous murder. But due to Steve's fraudulent misrepresentations, Betty will not be able to do so. As a result, Betty should be compensated as if no contract had occurred.

Betty has tried to sell the condo, but is unable to get offers of more than $160,000 because of the disclosure of the murder and the lack of parking. If Betty sells the condo for $160,000, Steve will be required to pay her for the difference in the original sale

price ($200,000) and the sale price of the condo. Assuming she can get $160,000 for it, Steve will be required to pay Betty $40,000.

Thus, Betty is entitled to $40,000 in expectation damages.

Incidental:

Incidental damages are those damages that the non-breaching party incurs as a result of the breach.

Here, Betty will be entitled to any funds expended in the attempt to sell the condo, such as brokerage fees and listing fees. Further, she should be able to recover the difference of the $50 to park in the current parking lot and the $100 to park in the other lot, until the condo sells.

Punitive Damages:

Punitive damages seek to punish the defendant for willful and wanton misconduct. Generally, punitive damages are not awarded for breach of contract actions. However, a plaintiff may recover punitive damages if there is an underlying tort.

Here, Betty's underlying theory for suit against Steve is for fraud, and fraud is a tort. The court may be compelled to grant Betty punitive damages to punish Steve for his fraudulent actions, and to teach him a lesson.

Thus, Betty may be able to recover for punitive damages.

Limitations on Damages:

Damages must be causal, certain, foreseeable and mitigated.

Here, Betty's damages are caused by Steve's fraud. Her damages are certain because we can place an exact dollar figure on her damages. Her damages are foreseeable

because it was foreseeable that she would have to obtain parking at another parking lot which could cost more money. It was also foreseeable that when she discovered the murder in the condo, she would not want to live there, thus motivating her to move out and sell the property. Lastly, damages must be mitigated. This means that Betty must make a good-faith attempt to sell the condo for a reasonable sum of money and within a reasonable time. Further, until she sells the property she will be

Steve's Defenses:

Parol Evidence Rule:
The Parol evidence rule (PER) seeks to prohibit prior oral negotiations of a contract because the parties intended to put their final expression in the writing itself.

During negotiations Steve told Betty that there was no deeded parking but she would be allowed to park on an adjacent lot for $50 per month, just as he had. Steve will argue that because such communications were oral and prior to the final contract, that the court should exclude them. This defense will fail because his actions constituted fraud, and the contract had already been performed.

Laches:
Laches seeks to bar a plaintiff's recovery if they wait too long to assert a claim and such delay of time causes an undue prejudice to the defendant.

Here, the sale occurred in June and Betty is suing in August. Thus, this was only a three month period and not an unreasonable delay.

Unclean Hands:
The court of equity will not aid suitors who come to the court with unclean hands.

Here, Betty did not engage in any misconduct. Rather, she was an innocent purchaser. Thus, this defense too will fail.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Community Property
2.	Professional Responsibility / Evidence
3.	Remedies
4.	Civil Procedure
5.	Torts

QUESTION 5

Concerned about the dangers of texting while driving, the Legislature recently enacted the following section of the Motor Vehicle Code:

> No person shall operate a motor vehicle upon a public road while using a mobile telephone to send or receive a text message while such vehicle is in motion.

Doug was driving down a busy street while texting on his cell phone. Doug lost control of his car, slipped off the road, and hit Electric Company's utility pole. The pole crashed to the ground, and the fallen wires sent sparks flying everywhere. One spark landed on a piece of newspaper, setting the paper on fire. The burning paper blew down the street, landing on the roof of Harry's house. The house caught fire and burned down.

A technological advance, the Wire Blitz Fuse (WBF), had made it possible to string electrical wires that would not spark if downed. Nevertheless, Electric Company had retained an old wiring system that it and other utility companies had used for years. Electric Company believed that adoption of the WBF system would require a significant increase in electrical rates, and that the WBF system had yet to gain widespread acceptance in the industry. Studies showed that utility companies that replaced their old wiring systems with a WBF system experience vastly increased safety and reliability.

Harry has sued both Doug and Electric Company.

1. What claims may Harry reasonably raise against Doug, what defenses may Doug reasonably assert, and what is the likely outcome? Discuss.

2. What claims may Harry reasonably raise against Electric Company, what defenses may Electric Company reasonably assert, and what is the likely outcome? Discuss.

3. If Harry prevails against Doug and Electric Company, how should damages be apportioned? Discuss.

QUESTION 5: SELECTED ANSWER A

H v. D

Harry (H) can bring a negligence claim against Doug (D)

Negligence

A negligence claim consists of duty, breach, causation, and damages. All elements must be present for a plaintiff to recover.

Duty

A person does not generally owe a duty to act. However, if a person acts, they owe a duty to act as prudently as the reasonable man would and is liable for harms that come to foreseeable plaintiffs for the failure to act with reasonable care. In the majority *Cardozo* view, a foreseeable plaintiff is anyone who is in the zone of danger. Under the minority, *Andrews* view, a foreseeable plaintiff is anyone who is harmed if the defendant could have foreseen harming anyone, even if the person harmed was not the type of plaintiff the defendant foresaw harming.

Standard of Care

Generally, people owe a duty to act with the care a reasonably prudent man would take. There are different standards for landlords or other special relationships.

In this case, D was driving. A reasonably prudent man would have foreseen that bystanders or property could be harmed by inattention to driving. H can argue that D could foresee that texting while driving could have caused him to crash into a person's property. It was foreseeable that he would have run into H's mailbox. Therefore, it was foreseeable that H was in the zone of danger. The fact that D did not in fact run into H's mailbox but instead hit the utility pole which caused a fire is not too remote. D could have crashed into the utility pole that snapped and fell directly into H's house, rather than sparked and caught fire. H will argue that under *Cardozo* he was a foreseeable

plaintiff in the zone of danger because a driver should have foreseen that distraction would cause him to crash into a person's property. D will argue that this is too attenuated. While H may have been in the zone of danger for his mailbox being smashed, H was not a foreseeable plaintiff for having his house burned down. The key question, however, is not whether D could foresee the type or extent of harm, but rather could D foresee H as a plaintiff. As long as H's house was on the road, H was a foreseeable plaintiff in the zone of danger.

D will argue H was not foreseeable because the burning paper "blew down the street," implying that the crash occurred far from where he texted. However, H was in the zone of danger because he was on the street where D was driving and texting. It will be a close call, and many courts will not find H was a foreseeable plaintiff in the zone of danger under the *Cardozo* view. Under the *Andrews* view, H will certainly be a plaintiff D owes a duty of care to, because D could have foreseen his texting while driving would injure someone.

Breach

Assuming D owes H a duty of care, there must be a breach. A driver owes a duty to others to drive responsibly and not be distracted. A reasonably prudent man would not text and drive. Therefore, H will successfully argue that D breached his duty of care.

Negligence Per Se

H can also argue D breached his duty of care under a negligence per se theory. Under negligence per se, a defendant has breached his duty if he violated a 1) statute addressed at the behavior 2) the statute was designed to protect against a specific type of harm 3) the statute protected a specific class of people, and the plaintiff harmed is in that class of people in a way the statute was designed to protect against. Defendants can argue that in the situation it was more reasonable to not follow the statute, because the statute was vague and overbroad, or it would have been more dangerous to follow the statute than to violate it.

In this case, none of the defenses apply. D violated a statute that addressed his behavior. It said that no one should operate a motor vehicle upon a public road while using a mobile telephone and to send or receive a text message while the vehicle is in motion. D was driving the car. He was texting on his cell phone while driving down the street. Because he texted while he was driving, he lost control of his car and hit the utility pole. D will argue that the danger the legislature was trying to avoid was running over people. H will argue that it was to protect against people being run over and against property damage. D will rebut that even if it protected against property damage, the plaintiff it sought to protect would be the owner of the property. It is too much of a stretch to say the legislature intended to pass the statute to establish that a person who crashed while texting is responsible for a burning house down the street. It is simply too attenuated from the likely purpose of the legislature. Therefore, his negligence per se claim will not be successful.

Causation

For a negligence claim to succeed, there must be both actual (but-for) and legal (proximate) causation.

But for (actual)

But for causation means that but for the defendant's action, the plaintiff would not have been harmed. In this case, but for D crashing into the pole, the pole would not have crashed to the ground. But for the pole crashing into the ground, the wires would not have sent sparks up, and the burning paper would not have landed on the roof of H's house. There is but for causation.

Proximate (legal)

The breach must also be the proximate cause of damage. Proximate cause are foreseeable causes. There can be intervening events between D's breach and H's harm as long as D's breach was still a substantial factor in causing D's harm. However, superseding events breach the chain of causation. Superseding events are unforeseeable events such as a criminal act or act of god.

In this case, H will argue that it was foreseeable that Doug texting while driving could result in his house being damaged. As stated above, he will argue it is foreseeable that a distracted driver will drive into another person's property. Even though H's property was damaged in a different way, D could have still foreseen that his actions would lead to this result. However, D will argue that the burning paper is an unforeseeable event, more similar to an act of God. The odds that he would hit the pole just right, the wires would spark, and the wind would take the burning paper down the street onto H's roof is unforeseeable. This is a close case, and different courts might come out differently on it. Under the Andrew's perspective, there would be proximate cause. However, under the *Cardozo* perspective, this would be similar to the explosion in the train station -- the harm is too attenuated from the breach.

Damages

The damages must have been caused by D's breach. If there was causation, then the court will find there are damages. H was damaged by D's breach of care. His house burned down because of D's action.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Abnormally Dangerous Activity

H could also bring an abnormally dangerous activity claim against D. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be

mitigated by sufficient care. In this case, driving is a common activity. Texting while driving, even if a stupid decision, is a common activity in the area. It can be mitigated by only texting while stopped or in other ways.

2. H v. EC

Abnormally Dangerous Activity

H could bring an abnormally dangerous activity claim against EC. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be mitigated by sufficient care. The courts often look to whether the value to society of conducting the activity outweighs the risk and probability of harm. In addition, courts do not hold utility companies strictly liable for activities they are engaged in that makes them public utility companies. This is a matter of public policy.

In this case, utility poles are common to the area. While transmitting electricity can present a substantial risk of bodily harm or death, it can be mitigated by sufficient care. In addition, the value to society outweighs imposing strict liability for any damages that arise from running the pole. The wires are also a part of the activity that makes the utility company a public entity: transferring of electricity in the community.

Negligence

H can bring a negligence claim against EC. He has a greater likelihood of success than against D.

<u>Duty</u>

See above.

<u>Standard of Care</u>

See above. That of a reasonably prudent man.

EC owes a duty to all foreseeable plaintiffs to conduct its activities with the same

prudence a reasonable man would have. H is a foreseeable plaintiff, because it is foreseeable that wires can break, causing sparks that create fire. Under both the *Cardozo* and *Andrews* view, it is foreseeable that a plaintiff's house may be burned down by such a spark. Thus, H is a foreseeable plaintiff.

Breach

H will argue that it has not breached its duty of care because it is using the same wiring system that other utility companies use. Defendants can look to industry standards to show that they have not violated the duty of care. However, industry standards are not dispositive. H can argue that WBF would have prevented the fire, it was not reasonable to rely on old writing systems, and EC should have anticipated its wires sparking. EC will argue that WBF has not gained widespread acceptance among the industry and installing WBF would require significant increase in electrical rates. Ultimately, a court will have to apply Hand's theory to determine whether there was a breach. Hand's theory compares the burden against the probability and the risk. It will look at the expense of installing WBF and compare it to the risk of its wires being defective (and the cost of the resulting damage) against the probability that the wires would break. If the court finds installing WBF or something similar is less than the risk of the old wires causing a fire x the probability of the wires causing a fire, then EC will have breached its duty of care.

Causation

But For

See above. But for not updating the wire system, the wires would not have sparked and caused the fire that burned down Henry's house.

Proximate

See above. It was foreseeable that old wires could break and send sparks. It was foreseeable that sparks could catch fire and spread, causing property damage. EC can argue that the wind was a superseding cause. However, it is foreseeable that the wind would catch a spark and carry it.

Damages

The breach in the duty of care caused the spark to land on H's house which resulted in real property damage.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Defective Product

H can sue for a defective product. Products can be defective in design, manufacture, or label. For a company to be strictly liable, it must be a part of the distributor chain. It could be a manufacturer, distributor, or retail. Companies that do not regularly sell products cannot be held strictly liable.

In this case, EC does not sell its wires. It sells electricity, but that is not a product. Therefore, H's suit will be unsuccessful.

Warranty

N can sue for the breach of warranty of merchantability of fitness for the defective wires. However, to sue for breach of contract there must be privity or N must be a member of the household.

3. Damages

In the majority of states, plaintiff can recover from defendants in joint and several

liability. That means he can recover all of the damages from either of the defendants. However, he cannot "double dip" and recover anything more than 100% of his damages. A jury will apportion the fault. If the jury assigns 70% of fault to A and 30% of fault to D, and plaintiff recovers 100% from A, A can demand D reimburse him 30%. In the minority of states, plaintiff can only recover in several liability. That means he can only recover damages from the defendants in proportion to the fault they were liable for.

If the court does find that D and EC are both liable, then a jury should determine the fault. The jury may reasonably decide that the majority of the damages should be apportioned to D because without his negligence the pole would not have fallen down. His actions set it in motion.

QUESTION 5: SELECTED ANSWER B

1. H's claims against D and D's defenses

Harry (H) will file a claim for negligence against Doug (D)

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, D was driving down a busy street, and therefore owed a duty of care to all foreseeable plaintiffs. H will argue that he is a foreseeable plaintiff because his house is on the street, and houses on a street are within the zone of danger if someone is not driving carefully.

Breach

A defendant breaches a duty of care if the defendant does not act as a reasonably prudent person would in carrying out an activity. Here, H will argue that a reasonable person would not text while driving on a busy street. H will argue that reasonable people know that texting is distracting, and driving a vehicle while distracted is dangerous, and a reasonably prudent person would not drive while distracted. On the other hand, D will argue that that many people text while driving, and since many people do it, he did not act unreasonably while texting. D's argument will probably fail, and D will be considered to have breached his duty.

Negligence Per Se

Negligence per se is a doctrine that replaces the standard duty of care with a statute. If the legislator has enacted a statute with criminal penalties, and the statute is designed to protect against the harm caused, and the injured plaintiff is of the class that the statute was intended to protect, then the statute replaces the duty of care standard. If the defendant breaches the statute, then the majority view is that that conclusively proves that the defendant had a duty and the defendant breached that duty.

Here, the legislator recently passed a section of the motor vehicle code that stated that no person shall operate a motor vehicle upon a public road while using a mobile phone to text while the vehicle was in motion. Here, D was driving down a busy street, which was presumably public, while texting. Therefore, H violated the statute.

The statute will only replace the duty if H can prove that it was intended to protect against the harm caused and that H was part of the class of people intended to be protected by the statute. The legislator passed the law because they were concerned about the dangers of texting while driving. Presumably, the dangers of texting while driving include the distracted driver hitting a pedestrian, or hitting something and causing property damage. H will try to argue that D hit the pole, which then caused the fire, and this was within the property damage the legislator intended to protect. However, D will argue that although the statute was probably intended to protect property damage such as hitting the pole, it was not enacted to protect against fires caused by faulty wiring of a pole. D's argument will probably prevail because it was not likely that the legislator intended to protect homeowners from fires when they enacted the statute.

Even if H could prove that the fire to his home was the type of damage the legislator intended to protect, he also needs to prove that he was of the class of people the statute was designed to protect. H will argue that as a homeowner on a busy street, he

is of the protected class because the statute was designed to protect against property damage by distracted drivers. On the other hand, D will argue that the statute is designed to protect pedestrians who might be hit, or maybe owners or passengers of vehicles struck by distracted drivers. Again, D will probably prevail on this point, because the statute was probably not designed to protect homeowners.

Therefore, H will not be able to establish negligence per se. However, as discussed above, even without negligence per se, H can prove that D had a duty and breached the duty.

Actual Cause

A defendant is the actual cause of a plaintiff's actions if but for the defendant's conduct, the plaintiff would not have suffered the harm. Here, D was the actual cause of H's damage. If D had not been distracted while driving, he would not have hit the utility pole, and the wires would not have sparked when they hit the ground, and the paper would not have lit on fire and therefore H's house would not have lit on fire.

Proximate Cause

A defendant is liable for all foreseeable incidents of his actions. If a defendant's actions combine with another force and then cause the damage, the defendant's action is only the proximate cause of the result if the intervening force was foreseeable. A dependent intervening force is a force that is foreseeable. For example, it is foreseeable that injury invites rescue, and therefore it is a dependent intervening force if someone tries to rescue someone injured by the defendant. On the other hand, an independent intervening force is one that is not foreseeable, and it cuts off liability of the defendant because the defendant was not the proximate cause of the injury.

Here, D will argue that Electric Company (EC)'s utility pole had old wiring, and that old wiring is not safe, and it was the old wiring that caused the fire. D will argue that the old wiring should be considered an independent intervening force, because it is not foreseeable that a company would use old wiring that would sent sparks flying

everywhere when it fell. He will argue that it is not foreseeable that the sparks would then light a piece of paper on fire, and then that paper would land on Harry's roof. However, D's argument will probably fail. H will argue that it is foreseeable that if you drive distracted and hit an electric company's pole that sparks would fly. H will point to the fact that the new Wire Blitz Fuse (WBF) systems have yet to gain widespread acceptance in the industry, and therefore most electric poles probably have old wiring. Further, H will argue that D was on a busy street, so it was likely that if D hit the pole and there were sparks, it was likely something would catch fire. H is likely to win this argument and therefore D's distracted driving will be considered proximate cause of H's injuries.

Damages

H will be able to show damages because his house caught fire and burned down as a result of D's actions.

Conclusion

H will be able to successfully assert a negligence claim against D, and all of D's objections will fail.

2. H's claims against EC and EC's defenses

H will assert a negligence claim and a strict liability claim against EC.

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, EC has a duty to provide and maintain utility poles as a reasonably prudent electrical company would do.

Breach

H will argue that EC breached their duty in not using the new WBF technology, which made it possible to string electrical wires that would not spark if drowned. H will point to the fact that studies showed that utility companies that replaced their old wiring systems with a WBF system experienced vastly increased safety and reliability. H will argue that a reasonably prudent electrical company would have replaced their wiring with WBF since it is safer and more reliable, and because EC did not, they breached their duty.

On the other hand, EC will argue that they did not breach their duty. They will argue that many other utility companies had used the old wiring for years, and the WBF system had yet to gain widespread acceptance in the industry. Although evidence of other companies' actions and industry customs can be used to determine whether a duty has been breached, it is not dispositive. The court will apply a balancing test when deciding whether a company breached its duty in not implementing new technology. The court will look at the cost of the new technology, the amount the new technology would decrease the risk of harm to potential plaintiffs, and the magnitude of the harm suffered by potential plaintiffs. EC will argue that adopting the WBF systems would be expensive and therefore require a substantial increase in electrical rates. On the other hand, H will argue that the WBF systems would vastly increase safety and reliability, and the risk of harm by not replacing (more fires when people hit electrical poles) is great. This is a close call and the court could come out either way, although the court will probably determine that EC did breach its duty because although the WBF technology would be expensive, it would significantly increase safety.

Actual Cause

But for EC's replacement of the old wires with new WBF technology, the electrical wires would not have sparked if downed and therefore H's house would not have caught fire and burned down.

Proximate Cause

EC will argue that they were not the proximate cause of H's house burning down. They will argue that D's negligent driving is an independent intervening force, and therefore they were not the proximate cause. However, it is foreseeable that a driver would drive negligently and hit a pole. Therefore, D's negligent driving was foreseeable, and D's actions do not cut off EC's liability.

Damages

H suffered damages when his house burnt down.

Conclusion

If the court determines that EC breached their duty in not using the new WBF technology, then H will be able to successfully assert a claim for negligence against EC.

Strict Liability

H will try to claim that EC was conducting an ultrahazardous activity, and H was harmed as a result. A company is strictly liable if the company is conducting an ultrahazardous activity and a plaintiff is injured by the dangerous propensity of that activity.

Here, H will argue EC was operating an electric company, which included stringing live electrical wires on poles, and electrical wires are dangerous because they can start fires. When the pole was hit by D's car, the wires fell and sparked and started a fire. Therefore, H's injury was caused by the dangerous propensity of EC's activity.

However, H's arguments will fail because the court will determine that EC was not conducting an ultrahazardous activity. An ultrahazardous activity is one that cannot be done safely, no matter how careful anyone is in conducting the operation, and it must not be of common usage. Here, every city has electrical companies that string electrical wires on poles. Therefore, the electric company's operation will be considered common usage and not an ultrahazardous activity. Therefore, H's strict liability claim will fail.

3. How damages should be apportioned

If actions by two different defendants combine to cause injury to a plaintiff, neither of which alone would have caused the injury, the defendants will be held jointly and severally liable. If defendants are held jointly and severally liable, then the plaintiff can recover the entire amount of damages from either or both plaintiffs. (The plaintiff can only recover the damages once, but it can be from either defendant alone, or some from each defendant.) If the defendant pays more than their share of the damages, the defendant can recover that amount from the other defendant.

Here, D and EC's actions combined to cause H's injuries. H will be able to recover the damages for his burned down house from either D or EC or a combination of both. Depending on how the court rules, D and EC may be assigned different percentages of liability. D and EC will be responsible for paying the percentage of the damages proportional to their percentage of liability. If either D or EC pays H more than their share of the damages, the defendant who paid more can sue the other party for contribution.

The State Bar Of California
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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

QUESTION 2

Dan, a dog breeder, had some eight-week-old puppies to sell. Bob and Carol went to his house to look at them. Dan invited them into the living room where the puppies were located and said, “Whatever you do, don’t go into the room at the end of the hall.” As they were examining the puppies, the largest puppy, without warning, gave Carol a nasty bite on her hand. Dan told Bob to go to the bathroom near the end of the hall to retrieve some bandages.

Forgetting Dan’s earlier admonition, Bob opened the door at the end of the hall, thinking it was the bathroom, and entered a darkened room where Dan kept an enormous pet chimpanzee. The chimpanzee jumped between Bob and the door, beat its chest and made menacing hoots. Frightened, Bob stood still.

In attending to Carol’s bite, Dan mistakenly grabbed a bottle of heavy-duty solvent, thinking it was a bottle of antiseptic. When Dan rubbed its contents into Carol’s wound, she began to scream and shout in pain. Hearing Carol’s cries, Bob barged past the chimpanzee, which gave him a deep gash to his head as he passed. Shaken and sore from their injuries, Bob and Carol fled Dan’s house.

Bob and Carol filed a lawsuit against Dan to recover for their injuries.

1. What claims may Carol reasonably raise against Dan, what arguments may Dan reasonably make, and what is the likely outcome? Discuss.

2. What claims may Bob reasonably raise against Dan, what arguments may Dan reasonably make, and what is the likely outcome? Discuss.

QUESTION 2: SELECTED ANSWER A

1. Carol v. Dan

Strict Liability - Puppy Bite

Carol could claim that Dan is strictly liable for the injuries caused by the puppy who bit her hand. The owner of a wild animal is strictly liable for any injuries caused by the animal's dangerous propensities. A puppy would likely not be considered a wild animal for strict liability purposes. However, the owner of an animal with known dangerous propensities is also strictly liable for any damages caused by the animal's dangerous propensities. An owner will not be charged with knowing the dangerous propensities unless some circumstances exist which would give him reason to know of the animal's dangerous propensities, such as a prior incident of biting. Here, Carol will argue that Dan should have known that the largest puppy had dangerous propensities. However, this is unlikely to be successful, because the facts indicate that the puppy bit Carol "without warning." Further, it is generally known that puppies have a tendency to nip and chew, but they do not bite hard enough give "nasty bites" often enough that a reasonable person would know of a dangerous propensity to give nasty bites. Thus, Carol will not succeed in showing that Dan should be strictly liable on the basis of a known dangerous propensity. Carol will need to claim for her damages under a theory of negligence.

Negligence - Puppy Bite

Prima Facie Case

Carol can claim that Dan owes her damages for her hand injuries because he was negligent in allowing her to become bitten by the puppy. A prima facie case of negligence requires a showing of duty, breach, proximate and actual causation, and damages.

Duty

Carol must prove that Dan owed her a duty of care. A duty of care is owed to all foreseeable plaintiffs. Where defendant's conduct poses a risk to the plaintiff, his duty of care will run to her. Under the majority view, a plaintiff is foreseeable if she is within the zone of danger created by the defendant's conduct. Under the minority view, a plaintiff is foreseeable if she is injured by defendant's conduct, regardless of whether she was in the zone of danger. Here, Dan's conduct was in showcasing puppies for sale in his living room. Under either test, Carol was a foreseeable plaintiff because she was in the living room, and because she was injured while present there. Thus, Dan owed Carol a duty of care. His specific standard of care is determined by the surrounding circumstances.

Standard of Care

The standard of care applicable to the defendant is based on the circumstances. The default standard of care is to act as a reasonably prudent person would under the circumstances. The defendant's standard of care can be increased based on the setting and his relationship with the plaintiff. Owners or possessors of property are subject to stricter standards of care with respect to entrants upon their property. The specifically applicable standard depends upon the nature of the entry, and the nature of the entrant. Licensees are those who enter onto the land of another with permission, for social purposes. Invitees are those who enter with permission, either to bestow an economic benefit upon the owner, or because the premises are held open to the general public. Here, Carol entered into Dan's living room, and onto his property, with Dan's permission, and for the purpose of looking at the puppies that Dan was selling. It is unclear whether Bob and Carol were looking at the puppies with the intent to potentially purchase one, but because of the nature of the setting, the intent to evaluate for purchase can probably be assumed. In any case, Dan allowed them into the living room for the purpose of potentially selling his puppies. Thus, Carol and Bob were invitees and Dan owed them the duty of care required for invitees.

A landowner's duty of care owed to a business invitee requires him to: make reasonable inspections of the premises, warn of any concealed dangers, and make the premises safe for invitees. Here, Dan allowed Carol to be bitten while she was on the premises. Dan would be required to have inspected not only his premises, but to have observed the puppies and known whether any of them had a propensity to bite. Dan would also be required to take the necessary steps to ensure that business invitees would not be bitten by any of the dogs.

Breach

A defendant breaches his duty of care by failing to live up to the requisite standard of care. Carol will argue that Dan breached his duty of care by failing to observe the dogs sufficiently to determine if any of them posed a risk to the potential buyers who would be entering onto his land. Further, Carol will assert that Dan breached his duty by failing to warn Carol that one or more of the puppies was dangerous. Additionally, Carol will claim that Dan breached his duty by failing to remove the dangerous puppies from the pen where the rest of the puppies were, and where they were available for inspection. Dan will counter that he had no reason to know, despite dutifully watching the dogs, that any of them would bite or would bite hard enough to give a "nasty bite," and further, that the dog who bit Carol did so without warning. However, because Carol was bitten on Dan's premises by Dan's dog, it is likely that Carol can demonstrate that Dan breached the duty of care owed to her as a business invitee. Indeed, Carol can demonstrate that Dan should not have allowed the dogs to be in an open pen where Bob and Carol could freely access them because there was a potential for the puppies to pose a biting risk to invitees.

Actual Cause

Actual cause, or legal cause, is determined under the "but for" test. A defendant's breach will be the actual cause of the plaintiff's injuries if the plaintiff can demonstrate

that but for the defendant's breach, her injuries would not have occurred. If the court finds that Dan did indeed breach his duty of care to Carol, this test will be easily met. But for Dan's failure to warn Carol of the puppy's dangerous propensities, or failure to sufficiently observe the puppies to determine whether any of them had such propensities, as well as his failure to separate the dangerous puppy from the rest of the puppies which were available for inspection and sale, Carol would not have put her hands near the biting puppy such that she would have been bit. Indeed, even if the court finds that Dan breached his duties by leaving the puppies in an open pen where visitors could freely access the puppies, and put their hands near the puppies' mouths, but for this breach, Carol would not have been able to put her hands near the puppy's mouth and would not have been bitten. Thus, Dan's negligence was the actual cause of Carol's injuries.

Proximate Causation

The defendant's conduct will be the proximate cause of the plaintiff's injuries where the injuries suffered were within the increased risk created by the defendant's conduct, and were a foreseeable result of the defendant's conduct. The risk that a person would be bitten, and thus injured, was a foreseeable result of Dan's failure to adequately secure the puppies or ensure that they posed no danger to humans. Dan's failure to secure the dogs or ensure that they were not dangerous clearly created an increased risk that someone would be injured by a biting dog. Thus, Carol's injuries were a foreseeable result of Dan's alleged negligence.

Damages

Any personal injury or property damages are sufficient to support a claim of negligence. Here, Carol's hand injury will be sufficient to support her negligence claim.

In conclusion, if the court finds that Dan was negligent in his failure to ensure a safe premises for visitors who came to inspect his dogs for purchase, and as such breached

his duty to business invitees, Carol can demonstrate that Dan's negligence resulted in her dog bite and as such that Dan is liable for tort damages.

Negligence - Solvent Injury

As explained above, negligence requires a showing of duty, breach, causation and damages. Here, Carol will argue that Dan is also liable for whatever increased damage she incurred as a result of Dan's mistaken cleaning of her wound with heavy duty solvent.

Duty

In general, there is no duty to act affirmatively to come to a person's aid when they are injured. However, a land owner owes a duty of aid to injured business invitees on the premises. Further, where one does begin to render aid, he is under a duty to carry out the rendition of aid reasonably. Where a rescuer acts negligently in giving aid, he will be liable for damages caused by his negligence. Here, Dan's duty of care would be to reasonably render aid.

Breach

Dan failed to act reasonably when he mistakenly cleaned Carol's wound with solvent as opposed to antiseptic. This was not reasonable even under the circumstances. Dan will argue that it was a chaotic and hectic emergency situation, and thus that he did not breach his duty of care. However, any minor inspection of the bottle presumably would have led him to realize that it was solvent, and thus Dan failed to render aid reasonably under the circumstances.

Causation and Damages

But for Dan's using solvent instead of antiseptic, Carol would not have suffered any further aggravation of her injuries. Thus, Dan's negligence was the actual cause of her aggravated injuries. Further, Dan's negligence in failing to care for Carol's wounds created an increased risk that her injuries would be aggravated, and the aggravation of

her open wounds was a foreseeable result of Dan's exposing them to corrosive solvent. Thus, the element of causation will be met. As discussed above, Carol's injuries (as aggravated by the solvent) are sufficient to demonstrate damages. Dan will be liable to Carol for failing to render aid reasonably and exacerbating her injuries as a result.

Defenses-

Contributory Negligence

A plaintiff is also required to act reasonably to prevent her own injuries. Contributory negligence will bar the plaintiff from recovery if the defendant can demonstrate that the plaintiff failed to live up to her own standard of care. Here, Dan will argue that Carol was unreasonable in reaching into the puppy pen without consulting Dan as to whether the puppies were dangerous. If they are in a contributory negligence jurisdiction and the court agrees that Carol was negligent in so doing, she will be barred from recovering. However, it is unlikely that Carol was negligent in failing to inquire, because a reasonable person would not assume that puppies, especially those on open display and available for sale, posed a risk of biting such that it would cause a nasty injury. Thus, Dan will probably not succeed under a defense of contributory negligence.

Assumption of the risk

A plaintiff is similarly barred from recovering if the defendant can demonstrate that the plaintiff subjectively knew of the risk and proceeded anyway, despite that knowledge. Dan will argue that Carol knew there was a risk of being bitten in inspecting puppies. However, there is no indication that Carol knew that by inspecting the puppies she risked incurring a "nasty bite" like the one that she suffered. Dan did not warn of any such risk. Thus, Dan will likely fail to show that Carol was subjectively aware of the risk of being bitten with such severity. This defense will not succeed.

Comparative Negligence

Most jurisdictions have abandoned the harsh results of contributory negligence and assumption of the risk in favor of a comparative negligence regime. Under comparative negligence, if the jury finds that the plaintiff was at fault in causing her injuries, the jury will assign a percentage of fault to the plaintiff and her recovery will be reduced proportionately to her percentage of fault. Under pure comparative negligence, a plaintiff will still be able to recover some damages, so long as the defendant is also negligent, regardless of the percentage of fault assigned to her by the jury. Under partial comparative negligence, when the plaintiff's degree of fault exceeds a certain amount, (usually 51%), she will be barred from recovering.

Dan will argue that Carol was comparatively negligent in handling the puppies despite failing to inquire as to whether they were dangerous. As discussed above, it is unlikely that the jury will find Carol's actions to have been negligent under the circumstances. However, if the jury does so find, her recovery will be decreased accordingly.

In conclusion, Carol will likely succeed in suing Dan for damages for his negligence in failing to make his premises safe for business invitees, and for negligently tending to her wound with solvent instead of antiseptic.

2. Bob v. Dan

Strict Liability

As discussed above, the owner of wild animals is strictly liable for all injuries that occur as a result of the animal's dangerous propensities. Dan owned a chimpanzee, which is considered a wild animal. A chimpanzee's wild nature poses a risk of injury from contact inflicted by the chimpanzee. Here, the chimp inflicted a gash on Bob's head as Bob passed it. Thus, Dan will be held strictly liable for the gash that Bob suffered in moving past the chimpanzee.

Defenses

In jurisdictions that apply contributory negligence, contributory negligence is generally not a good defense to strict liability. However, recovery will be reduced according to the plaintiff's degree of fault in comparative negligence jurisdictions. Further, assumption of the risk may bar recovery under strict liability.

Dan will argue that Bob assumed the risk by entering the room that Dan had instructed him not to go into under any circumstances. However, Dan will not be able to show that Bob assumed the specific risk of the chimp attack because Dan told Bob to go into the bathroom "near the end of the hall," without any further instructions, and because Bob was not warned specifically of what was lurking in the room at the end of the hall. Indeed, a reasonable person would not know that Dan was warning of the danger lurking behind the door, a reasonable person could easily assume that Dan warned not to go into the room because it was messy, or because someone was sleeping inside. Thus, because Bob did not subjectively know there was a chimpanzee behind the door that he opened, he cannot be said to have assumed the risk of injury caused by the chimp under the circumstances.

Dan will also argue that Bob was comparatively negligent in going into the door that Dan had told Bob and Carol not to enter. Bob will counter with the fact that Dan's warning was not sufficiently serious to make Bob aware of the dangerous chimp in the room. Further Bob will argue that Dan's later instructions, to go to the bathroom "near the end of the hall" were so unclear as to nullify his prior warning. Indeed, Dan's failure to instruct Bob as to exactly which room was the bathroom will likely prevent a jury from finding that Bob acted negligently under the circumstances. Further, it was an emergency situation, so a reasonably prudent person under the circumstances would not have paused to question which door "at the end of the hall" was the bathroom and which was the one he was warned not to enter. Thus, Dan will not succeed in arguing that Bob was contributorily negligent and will be strictly liable for the damages Bob suffered.

Negligence

As discussed above, Dan owed a duty to inspect the premises, warn of any dangers, and make the premises safe, to both Bob and Carol. Bob will successfully argue that owning a vicious chimp and not securing the chimp, or warning Bob and Carol of its existence breached this duty of care. However, land owners owe no duty to business invitees where invitees exceed the scope of their invitation, i.e. by entering an area marked "do not enter," or "employees only." Dan will argue that when Bob entered the room, he exceeded the scope of his invitation because Dan had previously told both Bob and Carol not to enter the room with the chimp, "whatever [they did]."

Bob will counter that when Dan told Bob to go to the bathroom near the end of the hall, Dan's prior warning ceased to be effective. Indeed, Bob did not intend to exceed the scope of the invitation, and he was genuinely confused as to which door led to the bathroom. Dan's instructions were confusing and incomplete. Bob did not act unreasonably under the emergency circumstances in exceeding the scope of the invitation. Dan negligently failed to ensure that his premises were safe for visitors, and failed to warn Bob as to what danger lurked behind the bathroom door. Thus, Bob can also assert a successful claim for negligence against Dan.

Dan will argue the same defenses as under strict liability, with the addition of a contributory negligence defense, but for the reasons discussed above, they are unlikely to succeed.

So long as the jury does not determine that Bob exceeded the scope of his invitation, Dan will be liable for Bob's injuries under a theory of negligence. Dan will also be found liable for Bob's injuries under a theory of strict liability because a chimpanzee is a wild animal.

QUESTION 2: SELECTED ANSWER B

1. Claims of C against D

Strict Liability

An animal owner is strictly liable for injuries caused by a domestic pet, only if the owner had prior notice of a dangerous propensity by the animal. Some jurisdictions impose strict liability on owners for dog bites. Here, C received an injury caused by the puppy in the form of a nasty bite that required medical attention. However, it does not appear that D had notice of the puppy's propensity to bite. D is selling eight week old puppies. The puppies are domestic animals. They were very young, giving little opportunity for D to notice if the puppies had any dangerous propensities. The largest puppy bit C "without warning." Thus, it is unlikely that D had notice of the puppy's tendency to bite and D will not be held liable for strict liability in a majority of jurisdictions. D may be liable in a jurisdiction that imposes strict liability on owners for dog bites.

Negligence

A negligence action requires (1) duty; (2) breach of duty; (3) causation; and (4) harm.

Dog Bite

Duty

A landowner or possessor of land has a duty to invitees to inspect for dangerous conditions and take reasonable steps to cure any concealed dangers or warn the invitee of the danger. The landowner must also carry out activities on the land with due care to invitees. In some jurisdictions, a landowner owes a reasonable duty of care to all persons who enter the property. The standard of care depends on what a reasonably

prudent landowner would do under similar circumstances. A person with special knowledge or expertise must use that knowledge and skill in exercising their duty of care. Here, C and B were entering onto D's property as invitees to buy puppies that D had for sale. Thus, D owed a duty of care to C and B.

D also owed a duty of care to C and B as an animal owner. Under the majority (Cardozo) view, D has a duty to all foreseeable plaintiffs within the "zone of danger" created by D's animal ownership. Under the minority (Andrews) view, D had a duty to all plaintiffs. A person who is injured by a dog bite when interacting with a dog is a foreseeable plaintiff within the "zone of danger" of the dog's mouth. Thus, under both views, C was a foreseeable plaintiff.

Breach

Here, D had a duty of care to inspect for dangerous conditions and cure any concealed danger or properly warn C and B. The puppies were not obvious dangers, because puppies are generally considered to be "cute," friendly, and small. Here, D is a dog breeder. D must use his knowledge and skill as a dog breeder in exercising care. If D has learned that some puppies are dangerous, then D must exercise reasonable care in keeping the puppies behind a gate or in a kennel and bringing out puppies one at a time to meet potential buyers so the puppies do not become overexcited. Further, D could have warned C and B how to act around the puppies and how to take care in case the puppies do something unexpected. However, if the dog bite was truly unexpected, then D may not have breached his duty. However, the average dog breeder would likely take steps to keep the puppies calm and warn buyers of potential dangers. Thus D likely breached his duty of care.

Causation

The breach must be both the direct cause and the proximate cause to be the causation of the harm.

Direct Causation

A breach is the direct cause of an injury if the injury would not have occurred "but for" the breach. Here, C's injury would not have occurred if the puppy had been properly restrained. Thus, D's breach is the but for cause of C's injury.

Proximate Causation

Proximate causation requires that the injury not be too remote or attenuated from the breach that is the" but for" cause of the injury. For proximate causation, the harm must be of the type that is foreseeable or a natural or probable cause of the breach. Here, C was bitten by a dog. A dog bite is a foreseeable result of a dog owner's negligence.

Harm

Generally, the harm must be physical or property damage, rather than simply economic harm. Here, C suffered a physical injury in the form of a nasty bite to her hand. Thus, the element of harm is satisfied.

Negligent Rescue

See rules above re negligence cause of action.

Duty

Generally, a person has no affirmative duty to act to assist an injured person. However, a person who originally puts another in peril or who elects to assist a person in peril has a duty to assist the victim non-negligently. The rescuer must avoid any unreasonable harm to the victim by acting as a reasonably prudent person under the circumstances. Here, D arguably put C in peril by allowing her to interact with the puppies without restraints or proper warnings to C. Regardless, D elected to come to C's aid once he saw the dog bite. Thus, D owed a duty of care to C.

Breach

See rule above. Here, D grabbed a bottle of heavy duty solvent thinking it was a bottle of antiseptic and applied it to C's injuries. A reasonably prudent person would check the label before applying the chemical to C's wounds. Further, a reasonably prudent person may not have stored dangerous chemicals next to first aid agents in the first place to avoid such a situation. Thus, D did not act as a reasonably prudent person under the circumstances and breached his duty of care.

Causation

See rule above.

Direct Causation

Where there are two causes of an injury, a cause is a direct cause if it is a substantial factor in the injury. Here, C's initial injury was from the dog bite. D's application of chemical solvent to the wound caused C considerable additional pain and may cause additional damage because it is not meant to be applied to skin, let alone broken skin. Thus, D's action was a substantial factor in C's injury that satisfied direct causation.

Proximate Causation

See rule above. Here, it is foreseeable that application of chemical solvent to a wound will create extreme pain and will likely cause additional damage because it is not meant to be applied to human skin. Thus, causation was proximate.

Harm

See above. This element is satisfied.

In conclusion, C likely has a valid claim for negligence with respect to the dog bite and the subsequent negligent aid by D. C is unlikely to have a valid claim for strict liability due to the lack of notice to D of the particular puppy's dangerous tendencies, unless they are in a minority jurisdiction that holds owner's strictly liable for dog bites.

Defenses

Contributory Negligence

In a jurisdiction that applies contributory negligence, a plaintiff is barred from recovery if the plaintiff's own negligence contributed to her injury. Here, C had no warning the puppy would bite her or that she was in danger. C likely did not have an opportunity to see or object to the application of the solvent. Thus, this defense is unlikely to apply.

Comparative Negligence

In a majority of jurisdictions, the plaintiff's own negligence only reduces the plaintiff's total recovery in the case by the percentage of the plaintiff's own negligence compared to the defendant's. As noted, C likely did not contribute to her own injury. Thus, this defense is unlikely to apply.

Assumption of the Risk

A person who knowingly and voluntarily assumes the risk of her activity will be barred from recovery. In a comparative negligence jurisdiction, assumption of the risk usually only reduces the plaintiff's recovery. Here, C had no warning regarding the puppy's tendency to bite. As described above puppies are considered non-threatening to the average person. Thus, she could not have knowingly assumed the risk. This defense will fail.

Damages

A plaintiff in a tort action is entitled to damages that put them in the position they were in before the harm. Here, C will be entitled to medical expenses, pain and suffering, and lost past and future earnings if the dog bite causes her to miss work or reduces her ability to work.

2. Claims of B against D

Strict Liability

The owner of a wild animal is strictly liable for injuries cause by an unrestrained wild animal. Warnings will not suffice to prevent liability to the owner. Here, D owns a chimpanzee, a wild animal. The chimpanzee was confined to the back room in which the chimpanzee was unrestrained. Confinement to the back room is not restraining the chimpanzee because the door was not locked. As a result Bob, and probably the chimpanzee, was easily able to open the door. Thus, unless a defense applies, D will be strictly liable for the injuries the chimpanzee caused.

Negligence

See rules above. Here, D had a duty to B as a chimp owner and landowner. D breached that duty because D did not give Bob a proper warning because he simply told Bob not to go in the back room without informing him of the presence of a wild animal, which would have made more of an impression on Bob. D could have also locked the door to prevent access to the chimp. Thus, D breached his duty of care which caused B's gash by the chimp. In conclusion, D was negligent.

Defenses

Trespassers

An owner is not strictly liable for injuries by a wild animal to trespassers. Further, a landowner is generally not liable for injuries to an undiscovered trespasser. A trespasser physically invades property without the owner's consent, or exceeding the scope of the owner's consent. Here, B was told not to go into the back room, but he did so anyway. B exceeded the scope of D's consent and was therefore a trespasser. Thus, D is not liable to B because B trespassed into the back room.

Assumption of the Risk

See above. Assumption of the risk is generally not a defense to strict liability for wild animals. Further, Bob did not know about the concealed chimpanzee. Thus, this defense will not apply to either cause of action.

Contributory Negligence

See above. B went into a back room where D told him not to go. B's contribution is likely minimal, given B did not understand why he should not go into the back room. Thus, this defense is likely not to apply.

Comparative Negligence

See above.

Damages

See above.

The State Bar of California

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CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS
February 2020

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Question Number	Subject
1.	Torts
2.	Professional Responsibility
3.	Contracts
4.	Evidence
5.	Business Associations

QUESTION 1

Paul, an actor, had small but memorable roles in two recent Hollywood blockbusters. Paul was also a first-year law student. He began having difficulty keeping up with his studies and became increasingly anxious about failing. He told his Legal Research and Writing professor, Dan, about his anxiety and doubts about his ability to timely complete a research paper Dan had assigned. Dan noticed that Paul appeared unusually anxious and suggested he go see the school counselor.

Paul returned to the apartment that he shared with Jack, who was also enrolled in Dan's Legal Research and Writing class.

The day before the research paper was due, Jack looked for his paper in his room but could not find it. Later, after Jack returned home from school, he found the paper on his desk where he thought he had originally placed it. After submitting the paper, Jack became suspicious that Paul might have copied parts of Jack's paper on the day that it seemed to be missing. Jack went to Dan's office and told him about his suspicions. Dan pulled from a stack of submitted papers what he thought was Paul's paper. When Jack saw the paper, he recognized the footnotes and said that Paul had "copied all of the footnotes from my paper."

The next day, Dan told Jack and Paul's class that "I hope no other student has copied his footnotes from another student's paper like that two-bit actor Paul." Paul was in class and heard the statement. Deeply humiliated, Paul suffered a severe panic attack, but did not seek medical treatment.

Dan later discovered that he had inadvertently shown Jack his own paper and not Paul's paper and that Paul had not copied Jack's or any other person's materials.

Paul has sued Dan based on his statement to the class.

What claim(s) may Paul reasonably raise against Dan; what defenses may Dan reasonably assert; what damages, if any, may Paul recover; and what is the likely outcome? Discuss.

QUESTION 1: SELECTED ANSWER A

Paul's Claims Against Dan, Dan's Possible Defenses, and Paul's Potential Damages for Each Claim

Defamation

Paul (P) may bring a defamation claim against Dan (D). To prevail on a defamation claim, the plaintiff must prove: (1) defamatory statement; (2) concerning the plaintiff; (3) published to a third party. Additionally, if the defamation claim involves a matter of public concern or a public figure, there are two additional elements that the plaintiff must prove in order to not run afoul of the First Amendment. The plaintiff must also prove: (4) the statement is false; and (5) the intent of the defendant, which will vary depending on the type of plaintiff.

Here, D will argue that the two additional elements–falsity and intent–must be proven because P is a public figure. D will point to P's memorable roles in the two recent Hollywood blockbusters. On the other hand, P will argue that he is not a public figure. P will point to the fact that his roles were small. P may also argue that he's going to law school, which shows that his acting career is not taking off, and, thus, he is not a public figure. Other factors may also impact the court's analysis–the media coverage of P generally, whether P is a household name, and other things about the nature of P's status as a celebrity.

There are no facts to indicate that P's cheating was a matter of public concern. It is not that P has cheated to win a Nobel peace prize or nationally recognized marathon, which might constitute a matter of public concern. Whether P qualifies as a public figure is likely a close call, but given that P was in two blockbuster movies, the court will likely find that P is a public figure, which means that P will need to prove the two additional elements to prevail on his defamation claim.

Defamatory Statement

A defamatory statement is a statement that is reasonably likely to harm another's reputation. The statement generally must be one of fact. Statements of opinion may be actionable if they imply facts about the plaintiff.

Here, D said "I hope no other student has copied his footnotes from another student's paper like that two-bit actor Paul." P will argue that D's statement is a factual statement where D indicates that P copied another student's footnotes. P will argue that this statement constitutes a defamatory statement. P will argue that in the legal profession where honesty and integrity are essential, an allegation of plagiarism and cheating are extremely damaging to one's reputation. P may also try to argue that referring to P as a two-bit actor was also defamatory because it is a disparaging comment about P's acting skills, which impacts P's reputation.

In response, D will argue that the two-bit actor comment is his opinion and, thus, cannot be a defamatory statement. D has the stronger argument here and will likely prevail. D will also argue that his statement, which implied that P cheated, was just that–an implication that is not sufficient to give rise to a claim for defamation. However, D's statement implies the assertion of facts that P cheated. P has the stronger argument here and a court is likely to find that the party of D's statement that implies that P cheated constitutes a defamatory statement.

Concerning the plaintiff

A defamatory statement does not need to name the plaintiff specifically, as long as a reasonable person would know that the statement is referring to plaintiff.

Here, D used P's name in the sentence. And, although D did not specifically say P cheated, he said that he hoped no other student copied another student's paper like Paul. D also made this statement during Jack's and P's class, so the students in the class reasonably knew that D was referring to P. Additionally, although D did not use P's last name, D did refer to P as a two-bit actor, making it even more clear who D was referring to. This is sufficient to notify a reasonable person that D was referring to P. Thus, P is likely to succeed on proving this element.

Published to a Third Party

The defamatory statement must also be published to a third party, which means that a third party must hear or read or perceive the statement. There are two types of defamation: libel and slander. Libel is when the defamatory statement is in a permanent format. Traditionally, libel included defamatory statements that were printed, but modernly, statements that are captured on television or the radio are also considered libel. Slander are spoken statements, not captured in a permanent format.

Here, D said the defamatory statement to the class. If P heard the statement, it is reasonable to conclude that other students in the class also heard the statement. Because the statement was not in a permanent format, like in print or on television, it is considered Slander.

Falsity of Statement

When the plaintiff is a public figure or the statement concerns a matter of public concern, then plaintiff also needs to prove falsity of the defamatory statement. As discussed above, P will likely be considered a public figure.

Here, P will argue that the statement was false. P can prove this through a comparison of P and Jack's paper. The facts indicate that D mistakenly showed Jack Jack's own paper, so there are no facts that definitively prove P copied Jack's footnotes.

D may argue that he had a reasonable belief that the statement was true, so that is sufficient to defeat this claim. However, while that may be relevant for the intent element, as discussed below, it is irrelevant to the falsity of the statement. There could also be an argument that although P did not copy Jack's footnotes word for word, he did use ideas from Jack's paper. D could call Jack as a witness to discuss Jack's missing paper on the day in question and D could

testify about P's anxiety and doubts about finishing the paper.

However, the issue will likely come down to a comparison between the two papers. Since there are no facts to indicate that P actually copied Jack's footnotes, it is likely that P will prevail on proving that the defamatory statement was false.

D's Intent

If the person is a public figure or the matter is of public concern, the plaintiff will need to prove that the defendant acted with malice, which means that the defendant intentionally made the false defamatory statement or made it with reckless disregard for the truth. If the plaintiff is a private figure and the matter is of public concern, the plaintiff will need to prove that the defendant acted negligently when making the false defamatory statement. Here, as discussed above, since P is a public figure, P will also have to prove that D acted with malice—intentional or reckless disregard for the truth.

P may argue that D's defamatory was intentionally false, but the stronger argument is that P acted with reckless disregard for the truth. P will argue that D was reckless because he did not take the care to show Jack the proper paper. P will also argue that D was reckless for not conducting any further due diligence to determine whether P actually did copy Jack's footnotes. D simply took Jack's word for it, after briefly showing Jack the paper in D's office. Based on this inadequate amount of information, D then accused P in front of the whole class of cheating. P will also try to highlight how reckless D was by highlighting how it would have been very simple for D to confirm that P cheated: D could have simply compared P's paper to Jack's paper. And, because D did not take this simple step, D acted with reckless disregard of the truth when he made the false defamatory statement.

On the other hand, D will argue that he was not reckless, but rather had a good faith belief that P cheated. D will say that Jack's statement was sufficient to cause him to believe that P cheated. D will also point to the fact that he knew P was anxious about the assignment and did not think he would be able to complete, which gives P motivation to cheat. D will also point to the fact that Jack explained his suspicions of why he believed P cheated off of Jack's paper to D, which supported Jack's claim that P copied his footnotes. In sum, D will argue that based on the totality of the circumstances, he reasonably believed that P copied Jack's footnotes, and, thus, the statement was not in reckless disregard of the truth.

P has the stronger argument here given that it would have been so simple for D to determine whether P actually copied Jack's footnotes but D did not do that. Such a failure is a gross deviation from what a reasonable professor would do, and, thus, it is likely the trier of fact would find that D acted with reckless disregard of the truth when making the defamatory statement.

Damages

There are different rules regarding pleading of damages for libel and slander. General damages are presumed for libel. For slander, special damages are presumed where the defamatory

statement falls into a slander per se category: (i) about the person's profession or trade; (ii) infers that plaintiff suffers from a loathsome disease; (iii) accuses a woman of being unchaste. Otherwise, if the statement does not fall into the slander per se category, the plaintiff must specifically plead and prove damages.

Here, P will argue that D's statement falls into a slander per se category of being about the person's profession or trade. P will argue that the statement refers to his profession of actor, but since that statement is not considered a defamatory statement, that argument will likely be unsuccessful. P will also argue that the statement about cheating, although not directly about P's ability to be an attorney, is essentially about P's soon-to-be profession.

D, in contrast, will argue that the statement does not fall into the slander per se categories because P is not yet a lawyer so the statement was not about P's profession. And even if P's attending of law school makes lawyering his profession, the statement was not about P's ability to be a lawyer necessarily, but about P's cheating on a paper. This is a close call, but because the statement involves cheating on a law school paper, it seems that would be sufficiently close to pertaining to P's profession to fall into slander per se, and, thus damages will be presumed.

Intentional Infliction of Emotional Distress (IIED)

To prevail on an IIED claim, the plaintiff must prove: (1) defendant's outrageous and extreme conduct; (2) caused the plaintiff to experience severe emotional distress.

D's Conduct

Conduct qualifies as extreme and outrageous if a reasonable person would find that it is offensive and it would cause severe emotional distress in the reasonable person. Additionally, if the defendant has reason to know about the plaintiff's particular sensitivities, then the defendant's conduct even if not offensive to a reasonable person may still qualify as extreme and outrageous behavior.

Here, P will argue that D's behavior was extreme and outrageous because falsely accusing someone of cheating would be offensive to the reasonable person and would cause emotional distress for the reasonable person. Additionally, P will argue that even if the reasonable person standard is not met, D's behavior was extreme and outrageous considering P's particular sensitivities which D knew about. P will point to the fact that he told D about his anxiety and doubts about completing the paper and he was having increasing anxiety about failing. The fact that D noticed P appeared unusually anxious and suggested that P go see the school counselor will support P's argument that D knew of his particular sensitivities, thus making D's behavior outrageous even if not outrageous to the reasonable person. P may also try to compare D's behavior to the behavior of a typical professor and argue that D was acting unprofessionally by announcing P's alleged cheating to the class rather than following the formal channels of reporting a student's cheating.

D, in contrast, will argue that his behavior was not outrageous and extreme because it would not cause a severe panic attack in the reasonable person. D will argue that he made the

statement to a small class of people, not to a wide audience, so it was not reasonably likely to lead to severe emotional distress. P will argue that telling his classmates is even worse than telling a large group of people who don't know P well because his classmates' opinions are even more important than strangers.

D may also argue that he did not know of P's particularities that would make D's conduct particularly outrageous. D may argue that although P appeared unusually anxious, D assumed that P had heeded his advice and gone to see the school counselor. Based on D's belief that P sought treatment, D will argue he reasonably assumed that P no longer suffered from his anxiety.

This is a close call because it does seem that P's reaction may not be the reaction of a reasonable person. But given that D knew of P's increasing anxiety about failing, it is likely a trier of fact would conclude that D's conduct qualified as extreme and outrageous.

P Suffered Severe Emotional Distress

For an IIED claim, the defendant's conduct must not only cause emotional distress in a reasonable person, but plaintiff must have also experienced emotional distress.

Here, the facts indicate that P suffered a severe panic attack. This will likely be sufficient to qualify as severe emotional distress. Although P did not seek medical treatment, so he does not have medical records to back up his claim, P's testimony, if believed, about his panic attack will be sufficient to satisfy this element. However, since there are no medical records, that leaves P open to D's claims that the severe panic attack did not occur.

D's Conduct Caused P's Severe Emotional Distress

For causation to exist, there must be both actual and proximate causation. Actual cause means that the defendant's conduct was either the but for cause or substantial factor. But for cause means that but for defendant's conduct the injury to plaintiff would not have occurred. Substantial factor occurs when there are multiple contributing factors, so it is impossible to determine the but for cause and the plaintiff's injury and defendant's conduct was a substantial factor in causing the injury. Proximate cause exists when the plaintiff's injury was a reasonably foreseeable result of defendant's conduct.

Here, P will argue that D's defamatory statement was the actual cause and proximate cause of his severe panic attack. P will argue that but for D's false statement about cheating, he would not have been deeply humiliated which triggered his severe panic attack. P will also argue that P's panic attack was a foreseeable result of D's statement. P will make similar arguments about why the panic attack was a foreseeable result of making such an outrageous defamatory statement.

In response, D may try to argue that P was prone to anxiety so D's statement could not have been either the but for cause or the proximate cause of P's severe panic attack. D will point to P's increasing anxiety which P stated and D observed. But, that will not be enough to defeat P's claim. Under the eggshell doctrine, a defendant takes his plaintiff as they come. That P may

have been prone to panic attacks will not defeat P's causation element. Thus, it is likely a trier of fact will find that D's statement caused–both actual and proximate–P's severe panic attack given that it occurred close in time to D's statement and D's statement was outrageous. and would either produce a similar result in a reasonable person or D knew or should have known it would produce such a result in P given P's particular sensitivities.

Damages

If P is successful in proving his IIED claim, which is a close call but likely, then P will be able to recover damages from D. In a tort action, the plaintiff may recover compensatory damages, consequential damages and incidental damages. These types of damages must be reasonably certain, caused (both actual and proximate) by defendant's conduct, and unavoidable. A plaintiff has a duty to mitigate damages.

Here, P did not seek medical treatment for his panic attack. Seeking medical treatment is considered a necessary means of mitigating damages that a plaintiff must take if reasonable under the circumstances and would not result in undue burden or humiliation. If D can show that P's damages would have been reduced had P sought medical treatment, then D may successfully be able to reduce P's damages by the amount they would have been reduced had P sought medical treatment.

Negligent Infliction of Emotional Distress (NIED)

To prevail on an NIED claim, the plaintiff must prove that (1) defendant's conduct was extreme and outrageous; (2) plaintiff was in the zone of danger; and (3) although plaintiff did not suffer physical harm from defendant's conduct, plaintiff suffered physical harm as a result of emotional distress. (There is also another circumstance in which a plaintiff may bring an NIED claim that involves harm to the plaintiff's family member, but that is not applicable under these facts.)

Here, there is no evidence that P's severe panic attack caused him physical harm so it is unlikely he will be able to bring an NIED claim.

Conclusion

P will bring a defamation and IIED claim against D. D will argue against the specific elements of those claims as discussed in above in defense of P's claims. If P prevails in his claim, P will be able to seek damages subject to the arguments that D can make to decrease the amount of those damages.

QUESTION 1: SELECTED ANSWER B

PAUL'S CLAIMS AGAINST DAN

Defamation

Paul (P) may assert a claim of defamation against Dan (D) based on Dan's statement. Defamation requires that (i) a defamatory statement was made, (ii) of or concerning the plaintiff, (iii) that was published to a third party, and (iv) that harms P's reputation.

(i) Defamatory statement

A statement is defamatory if it would cast the plaintiff in a negative light or to subject him to public ridicule.

Here, D's statement contains two aspects that would likely be defamatory. First, he states that P has copied the footnotes of another classmate, which is a negative imputation on P's character and would likely subject him to public ridicule as a person who cheats. Second, he directly calls P a "two-bit actor", which demeans and belittles P's acting career and talents, and is likely to subject to him to public ridicule as a bad professional actor.

(ii) Of or concerning P

The statement must be of or concerning the plaintiff such that they are identifiable.

Here, this requirement is met because D identifies P by name as the student who has copied another student and as the "two-bit" actor.

(iii) Published to a third party

In order to prevail, the defamatory statement must have been published to a third party.

In this case, Dan openly said the statement in front of his entire class, in which P was present. Even if P was not present, the statement is considered published to a third party because all of P's classmates in D's class would have heard the statement and understood that D intended to communicate that statement to each of them.

(iv) Harm's P's reputation

The statement must be such that it could harm P's reputation. P does not have to show that it actually harmed his reputation, only that the statement could have done so.

Here, D's statement insinuating that Paul copied another student is likely to be very harmful to his reputation. This is so because Paul is a first year law student, and truthfulness and honesty are critical attributes for law students wishing to join the legal profession. By casting him as a

cheater, D is directly attacking P's character for honesty and therefore may impact his reputation in the university and among his peers and professors.

Further, D's statement that P is a "two-bit actor" also harms P's professional reputation. Since P has made a living acting in two small, but memorable roles in Hollywood blockbusters, it is reasonable that P would consider his reputation as a professional actor important. By calling him a two-bit actor, Dan also directly attacked P's professional reputation.

Therefore, Paul is likely to establish the elements of defamation in relation to Dan's statement.

Matters of Public Concern

If the statement concerns a matter of public concern, then in order to prevail on a defamation claim, P must further show the relevant standard of fault of the publisher. A matter of public concern is one that the public or community would at large be reasonably expected to have an interest in learning about.

Here, D's statement may be of public concern because of P's standing as a Hollywood actor. He may be on the way to achieving celebrity. Therefore, the public may have an interest in how P carries himself and P's character as an honest person.

Assuming the matter is one of public concern, the standard that D will be held to as the publisher of the statement depends on whether P should be considered a public or private figure.

Public vs Private Figure

If the plaintiff is a public figure, the statement must have been made with malice. Malice requires an intention to publish a false statement, or reckless disregard for whether the statement was true or false. A person is considered a public figure if they are generally known to the public or performing a public function. If the plaintiff is a private figure, the standard is negligence such that the defendant is not guilty of defamation if the defendant reasonably believed that the statement was true.

Arguably, P is a public figure because of his status as a movie star in Hollywood blockbusters. Since he had memorable roles, he would likely be known to the public. If so, D's statement must have been made with malice. P might argue that D acted recklessly by failing to properly check whether Jack's paper was actually his. However, D could have the stronger argument if he reasonably believed that Paula's paper was the one he pulled from the stack of voluminous papers. For example, if he had hundreds of papers and Jack and P had very similar student numbers/surnames, it may be reasonable for D to have misidentified the papers.

On the other hand, P may be a private figure because the circumstances of the statement related to his performance as a law student, not a big Hollywood actor. The events occurred at university while P was attending school privately. Thus, P may also argue that P was a private figure and D acted negligently and unreasonably by making that statement without checking all

the facts. However, since D knew that P was feeling anxious about failing, and since another student Jack had alerted D to his suspicions, a court may find it reasonable for D to form the opinion that P was at risk of cheating. However, since D had inadvertently shown the wrong paper to Jack, P would have a stronger argument as a private figure and D's negligence. This is likely to be a stronger claim for P, since the standard for D to meet is lower.

DAN'S DEFENSES

Truth

Truth is a complete defense to defamation.

Here, D's statement was not true because P in fact had not copied Jack's or any other person's materials. Further, there is nothing to show that P was a poor actor, so D's statement as to Paul being a "two-bit" actor is also unlikely to qualify for the truth defense unless D can put on additional evidence to show this.

Consent

Consent by the P is a defense to defamation.

Here, P did not give D any consent, express or implied, to say the things that D said. Therefore, this is inapplicable.

Qualified Privilege

A qualified privilege exists if the publisher had a legitimate interest that it was furthering, or if he made the statement as part of a genuine public comment. This privilege usually applies to newspaper or broadcasters who have an interest in pursuing the truth.

Here, D may argue qualified privilege on the basis that he made the statement under a legitimate interest to discourage other students from cheating. However, this is not a particularly strong defense because it was not necessary to attack Paul in order do so.

DAMAGES RECOVERABLE FROM DAN

Slander

Slander is defamation via spoken word. Generally, special damages need to be proven by the P in order to prevail on a slander claim. Special damages require a showing of pecuniary damage.

Here, P has not suffered any pecuniary damage. He did not seek medical treatment so did (should he be added before did?) not incur any medical expenses. There is also nothing to show that he lost any income from acting based on the statement.

Slander per se

Slander per se are categories of slander where damages are presumed. This includes where a defamatory statement was spoken about P's business or profession.

Here, P may seek damages based on slander per se because D's statement defamed P's profession as an actor.

COMPENSATORY DAMAGES

Compensatory damages are awarded for personal injury or property damages, and aim to place the plaintiff in a position as if the tort had not occurred. These damages will be limited by foreseeability, causation, unavoidability and certainty.

P will likely obtain compensatory damages caused by D's defamatory statement by application of slander per se (see above).

NOMINAL DAMAGES

Nominal damages are awarded when there is no quantifiable specific loss or injury suffered, so it is awarded to the plaintiff as nominal. P would likely seek nominal damages because of his personal injury suffered by the panic attack.

PUNITIVE DAMAGES

P may also seek punitive damages if D's statement is found to be willfully malicious and wanton. A court may likely find that disparaging P's reputation as an actor was willful and wanton, since it was completely unjustified.

CAUSE OF ACTION: INVASION OF PRIVACY

False Light

P may argue that D breached P's privacy by intentionally casting a statement to put P under a false light and misattributing a characteristic of dishonesty to him. False light requires that the act be highly offensive to a reasonable person. The same standard of fault of publisher applies as in defamation (malice vs negligence) where the matter is of public concern.

Here, P would argue that, as a private person, D attributed a false character to him by saying he was a cheater and a bad actor. As a private person, D acted unreasonably and negligently when making the statement. Therefore, applying the standard of fault of a private person, D has breached P's privacy by acting negligently and unreasonably.

CAUSE OF ACTION: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional IED

P may claim D caused intentional infliction of emotional distress (IIED) when he made the

statement. IIED occurs when the defendant has made an extreme or outrageous conduct that causes severe emotional distress to the plaintiff. No physical injury is required for P to succeed in a claim for damages. The intention element is met if the defendant acted intentionally (with substantial certainty) that emotional distress would be caused, or if he acted with reckless disregard.

Here, P suffered a severe panic attack when hearing about D's statement. P would argue that D acted intentionally because D knew that P was in the room when he made that statement. He also knew that P had anxiety already about performing poorly on the paper. At the very least, P would argue that D acted recklessly because he should have double checked which paper he showed Jack before making such an allegation against P. The fact that P didn't seek medical treatment would not prevent him recovering damages against D.

Negligent IED

P may also argue that D negligently inflicted emotional distress. Negligent infliction occurs where D has negligently made a statement, which causes severe emotional distress. However, in most jurisdictions, the emotional distress must be accompanied or caused by some physical impact or injury.

Here, P suffered a panic attack directly as a result of D's statement. He did not appear to suffer any physical impact or injury, as proven by the fact that he did not seek medical advice. Therefore, this is unlikely to be established by P.

Conclusion

P is most likely to succeed on a claim for defamation by D. He may also bring claims of invasion of privacy (false light) or intentional or negligent infliction of emotional distress. Since P suffered no pecuniary damages, he may be able to seek compensatory damages based on slander per se. Given the nature of D's allegations, P may also be able to convince a court to award punitive damages.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2021 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Professional Responsibility
3.	Torts
4.	Criminal Law and Procedure
5.	Wills and Succession / Community Property

QUESTION 3

State Hospital, a public hospital funded and managed by State, entered into a contract with Cook's Catering, a business owned and operated by Kimberly Cook, to provide on-site meal service to patients, staff, and visitors.

Recently, Denise Davis, the Chief Executive Officer of State Hospital, received a series of anonymous email messages threatening to carry out "a massive attack" at the hospital. In response to these threats, Davis decided to reassign a security guard from patrolling the kitchen area to patrolling the hospital lobby and entrance area. Davis did not share the information concerning these threats with anyone else at the hospital.

Several days later, Frank, a former patient, entered the hospital kitchen shortly before lunchtime and mixed peanut powder into a serving tray full of mashed potatoes. Neither Kimberly Cook nor any of her employees were present in the kitchen at the time because they had all left to use the restroom. A state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. At lunchtime, Patrick, a patient, consumed the mashed potatoes. Patrick, who had a serious allergy to peanuts, suffered severe injuries.

Patrick sued Cook, Davis, and State Hospital. Cook was found negligent for failing to comply with the state health code.

1. Is State Hospital liable for Cook's negligence? Discuss.

2. Does State Hospital owe Patrick a duty to protect him from Frank? Discuss.

3. What defense(s), if any, may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard from the hospital kitchen? Discuss.

QUESTION 3: SELECTED ANSWER A

PATRICK V. COOK, DAVIS, AND STATE HOSPITAL

(1) State Hospital Liability *for Cook's Negligence*

If State has waived sovereign immunity for negligence actions, then State Hospital may be liable for Cook's negligence under the doctrine of respondeat superior.

Sovereign Immunity

At common law, a State sovereign could not be held liable for the torts of its agents or of itself. However, most jurisdictions have passed statutes that waive sovereign immunity for negligence actions. Thus, a State can be held liable for its torts in most jurisdictions, subject to damage caps in some jurisdictions.

Here, State Hospital is a public hospital funded and managed by State. Thus, Hospital will be considered an agent of the State. Therefore, the traditional rule of sovereign immunity would prevent Patrick from holding State liable for both its own torts and the torts of Hospital's agents. However, since most jurisdictions have waived sovereign immunity for negligence actions, the suit against State can likely proceed.

Respondeat Superior

The doctrine of respondeat superior allows a plaintiff to hold a principal responsible for the torts of its agents so long as the tort was committed within the scope of the agent's employment. Principals are not liable for torts committed by independent contractors unless the principal owed a duty that cannot be contracted out.

Independent Contractor

State will argue that it cannot be held liable for Cook's negligence because Cook is an independent contractor. A principal is not liable for the torts of independent contractors. To determine if an agent is an employee (servant) or an independent contractor, the Court will look to a variety of factors including (i) the business relationship and contract between State and Cook's catering; (ii) whether State had control over the **manners and means** in which Cook performed; (iii) whether the job performance provided by Cook was the kind of performance typically provided by an independent contractor; (iv) whether the parties had thought they were in an employee-employer relationship; and (v) whether the job performed included a **duty that could not be delegated.**

State will argue that Cook is not an employee, but rather an independent contractor. Cook's Catering is an independent company that State has contracted with in order to provide on-site meals. State will also point to the fact that it did not control the **manner and means** of Cook's work -- Cook was free to provide meals however it saw fit. But Patrick will argue that this was more akin to an employee (servant) -- employer relationship because Cook was not just providing a finished product. Rather, Cook was required to be at the hospital daily and worked on-site in preparing meals.

Patrick's strongest argument to hold State liable as master of the servant is to argue that the duty to provide safe meals **could not be delegated.** Patrick will argue that the safety of patients, staff, and visitors required that State provide safe food. A duty for safety of others cannot normally be delegated.

Therefore, the Court will likely conclude that Patrick can hold State liable for the torts of

Cook's Catering Service because the duty to ensure Cook's compliance with the safety code that applies to hospitals could not be delegated.

(2) DOES STATE HOSPITAL OWE PATRICK A DUTY TO PROTECT FROM FRANK?

DUTY

The question of whether a duty exists is one for the Court to decide. In most jurisdictions, a defendant owes a duty to act in a reasonable manner and this duty extends to everybody. However, a minority of jurisdictions have adopted the duty rule from *Palsgraf,* which limits the reasonable duty to only foreseeable plaintiffs.

Generally, there is no duty to protect from third-party tortfeasors / criminals. However, Patrick is a patient of the hospital and it is foreseeable that Patrick is a person that could be hurt if the Hospital is negligent. At common law, this would be a close call, but the court would likely find Patrick to be a foreseeable plaintiff.

The fact that the harm occurred due to a third-party tortfeasor will not be conclusive in determining duty

Premises Liability

Under the traditional approach, a person on premises is categorized as a trespasser, licensee, or invitee. The duty owed depends on the person's categorization. Here, Patrick will be categorized as an invitee and thus Hospital owed him a duty to ensure the premises were safe.

However, many jurisdictions, including California, have abolished categorizations and just hold that a landowner / possessor of real property owes a duty of reasonable care to everybody except **flagrant trespassers.** Here, Patrick would be owed a duty of care.

Inn Keeper

At common law, certain businesses that catered to providing transport and lodging services owed a heightened duty of care. This included businesses like common-carrier and inns. These businesses owed a duty to provide the utmost care.

Here, State is a hospital, which is similar to an inn because people stay at a hospital with the intent to leave. Thus, they are relying on the owner of the premises for basic protection. However, the Court will likely hold that the common law duty of utmost care does not extend to a hospital because there is a statutory basis to find duty.

Statutory Duty

In addition to duties provided by common law, the legislator can create duties via statute. Here, a state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. The legislation is clearly designed to protect those eating in hospitals.

Therefore, Patrick has a strong argument that the legislator created a duty for a hospital to provide safe food to all of those that would eat the food.

(3) WHAT DEFENSES MAY DAVIS ASSERT?

DUTY

See rule above. Here, Davis owes a duty to use reasonable care in managing the Hospital.

NEGLIGENCE / BREACH

Negligence occurs when a party fails to use reasonable care, and as a result, the party breaches the duty it owes to the plaintiff. Negligence is found when the benefits of acting reasonably outweigh the potential harm.

Here, Davis can defend her actions by claiming they were not negligent.

BPL Analysis

The BPL analysis from Judge Learned Hand provides a formula for determining if a party has acted negligently. Under the analysis, a party has acted negligently if the benefits from acting outweigh the potential costs.

Here, Davis will argue that she acted in a reasonable manner by reassigning a security guard. Davis reassigned the security guard after receiving emails about a "massive attack" at the hospital. Thus, Davis will say the reassignment was the prudent action to take given the threat. However, Patrick can argue against this by pointing to the fact that a reasonable CEO would still have security in the cafeteria even if a reassignment was required.

Under a traditional analysis, a jury could come out either way on determining if Davis was negligent.

Emergency Situation

In the event of an emergency, a party will be judged by the reasonable standard a prudent person would exercise *in an emergency situation.* If the Court finds that Davis failed to use reasonable care, Davis will attempt to get an emergency instruction to the jury which would require the jury to judge Davis' actions based on the fact he was acting in an emergency situation.

This argument will likely fail because there was **no present emergency.** Patrick will argue Davis received a series of emails over the course of a period of time. So, there is no reason to suspect that the attack is imminent because the emails keep on coming. Also, Davis did not tell anybody about these emails. If this were a true emergency, then Davis would have called in for backup by telling other hospital staff about the threat and potentially bringing in extra security. But Davis did none of that; all he did was reassign a security guard.

Therefore, Davis will likely be unable to get an emergency instruction to the jury.

CAUSE IN FACT

The breach must be a factual cause of the injury. This is usually easily satisfied with the but-for test. Here, Patrick will argue that but-for the reassignment of security, the food would not have been tampered with. Davis can try to argue that the true but-for cause is that but-for Cook's staff going on a bathroom break, the food would not have been tampered with.

PROXIMATE CAUSE

Proximate cause requires the harm that flows from the breach of duty be foreseeable.

Like with the factual argument above, Davis can further argue that the proximate cause to the incident is the lack of kitchen staff. Davis will argue that the security in the kitchen is not designed to secure the food -- that is Cook's job.

Superseding intervening cause

A superseding, intervening cause is an outside event that cuts one’s liability off from the breach. Here, Davis will argue that the reassignment was not a proximate cause for the harm experienced by Patrick. Instead, Frank's criminal actions are a superseding, intervening cause.

DAMAGES

Patrick can show damages because of his allergic reaction.

QUESTION 3: SELECTED ANSWER B

1. Is State Hospital liable for Cook's negligence?

Employers are generally liable for the torts of their employees conducted within the scope of their employed duties. On the other hand, a party is not generally liable for the torts of independent contractors, unless it concerns a non-delegable duty.

Employee vs. Independent Contractor

First, a court will need to determine whether Cook's is more similar to an employee of State Hospital or an independent contractor. The principal factor a court considers in determining whether a party is an independent contractor or an employee is whether, and the degree to which, that party was subject to the control of the employer. The more control, the more likely that party is to be an employee. Courts also consider whether the party conducts business regularly in the area in which it was contracted to perform, whether the employer supplied the tools and equipment, and other factors.

The facts do not indicate with sufficient detail the level of control that State Hospital had over Cook's. If State Hospital dictated the menu, for example, that would indicate an employer-employee relationship. But the facts only indicate that Cook's was to provide on-site meal service. Presumably, Cook's could decide which meals to prepare. On the other hand, if the hospital dictated meal- times, when staff had to arrive or leave, etc, that would indicate greater control.

The fact that Cook's Catering is in the business of catering (as evidenced by its name) and providing meals, indicates that it might be more of an independent contractor. On

the other hand, State Hospital seemed to have provided the kitchen that Cook's Catering used, since Cook's Catering was operating in the hospital kitchen. Moreover, the staff used the hospital restrooms. This seems to indicate more of an employer-employee relationship.

The question as to whether Cook's Catering is an employee or an independent contractor is a close one. But on balance, Cook's Catering is likely to be an independent contractor.

However, just because Cook's Catering is an independent contractor does not mean that State Hospital is not liable for the negligence of Cook's. Some duties are non-delegable. In such situations, a party will be liable for the breach of its non-delegable duties because it cannot delegate those duties away to an independent contractor to insulate itself from liability. For example, when a property owner invites the public onto its property, it is responsible for the safety of the public on its property, and for the negligence of independent contractors that create unsafe conditions on the property.

Non-Delegable Duty

Here, it is likely that State Hospital's provision of food to its patients is a non-delegable duty. Although the patients do not constitute the "public," by accepting the patients, the hospital has accepted them into its care, including providing them food. It is therefore likely that the hospital cannot delegate this duty to a catering company in order to avoid its duty of care to its patients.

Moreover, a statute may establish a duty, and here, the state health code likely established a non-delegable duty (see analysis below).

Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against the states without the states' consent. It embodies the concept of sovereign immunity. Thus, if the State Hospital can be properly characterized as an arm of the state, it likely cannot be liable in tort to Patrick unless the State has consented to such suits (e.g. with something similar to the Federal Tort Claims Act).

Here, the State Hospital likely can be characterized as an arm of the state. It is a public hospital, and it is funded and managed by the State. The funding and management are prime indicators that it is not separate from the State (e.g. compare with a municipality, which may be sued if its funding does not come from the state).

Therefore, unless the state has consented, State Hospital is not to be liable on a negligence claim. It is unlikely that the state health code, which imposes a duty on hospitals (see below) constitutes an acquiescence to liability. The Supreme Court has held that any consent to be sued under the Eleventh Amendment must be clear and unequivocal. The statute is not such an unequivocal statement of consent. It can easily be interpreted to allow liability only for private hospitals.

2. Does State Hospital owe Patrick a duty to protect him from Frank?

General Duty

By taking in Patrick as a patient, State Hospital assumed certain duties with respect to Patrick. In general, hospitals owe patients a reasonable standard of care in medical treatment. More generally, they owe patients a duty to act reasonably to protect them from foreseeable harms.

Here, whether State Hospital owed Patrick a duty to protect him from Frank likely turns on whether Frank's actions were foreseeable. Frank was a former patient. If Frank had a propensity to try to harm other patients and the hospital knew about it, or if Frank had come to the hospital in the past to harm other patients, then the hospital would owe its patients a duty to protect them from Frank. Even if the hospital was not aware that Frank, in particular, would likely attempt to harm its patients, but was aware that former patients or others in general have in the past tried to tamper with the hospital food, the hospital would have such a duty.

A minority of jurisdictions will find that the hospital had a duty to act reasonably to prevent harm that occurred, regardless of whether the harm was ultimately foreseeable (although the foreseeability of the harm affects proximate cause analysis in a negligence action).

Statutory Duty

But independent of the above analysis, a statute or other law can give rise to a duty. A statute may give rise to a duty to protect a certain class of plaintiffs against a certain class of harms. If the statute is silent as to tort liability, then most jurisdictions will allow a finding of negligence per se based on the violation of the duty laid out in the statute if: a plaintiff in the class of plaintiffs the statute was designed to protect is harmed, and the harm is in the class of harms that the statute was designed to prevent.

Here, the state health code provides that food served in a hospital must never be left unattended before, during, or after meal service, in order to prevent contamination or tampering. The statute was likely designed to protect consumers of the food, e.g. the

patients. Here, Patrick was such a patient who ordinarily consumed the hospital's food. So, Patrick was in the class of plaintiffs the statute was designed to protect. Second, the statute was likely designed to protect against poisoning or other effects caused by "contamination or tampering." Here, Patrick suffered an allergic reaction, and this is likely in the class of harms that the statute was designed to protect against. So, the Hospital likely owed Patrick a duty to protect him from food contamination, whether from Frank, or someone else. This duty is also likely non-delegable (see above for analysis).

3. What defenses may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard?

Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against a state without a state's consent. However, state officials performing official duties may be sued under the stripping doctrine. But this doctrine only allows suits for an injunction, applying prospectively, and not for retrospective damages.

Davis will argue that since she is the CEO of State Hospital, she is an employee of the state. Her decision to reassign the security guard was made as part of her official duties. She will therefore argue that a negligence suit against her is really a negligence suit against the state, that any damages would be paid out of state coffers since she was acting in her capacity as an employee of State Hospital (State Hospital is funded by the State), and that the Eleventh Amendment immunizes her against a suit for damages.

Public Necessity

Davis may further argue that her actions in reassigning the security guard was in response to a public necessity. Where a party has a reasonable belief that actions need to be taken to protect the public interest, and reasonable actions are taken in response to such a belief, the doctrine of public necessity is a complete defense against negligence (as opposed to private necessity, which only provides a partial defense).

Here, Davis received email messages threatening to carry out "a massive attack" at the hospital. Davis will argue that there was a public need to re-assign the security officer to prevent or mitigate the consequences of such an attack. The harm arising from "a massive attack" could far exceed food contamination or tampering. And the re-assigning of a security officer was a reasonable response to such a threat.

However, Patrick will counter that the threats were all anonymous and therefore Davis' belief of a massive attack was not reasonable. Moreover, Patrick will argue that it is much more likely for food contamination or tampering to occur, since such occurrences are more frequent than "massive attacks."

It is unclear how a court would rule on this defense, but the court will likely side with Davis.

No Breach of Duty

A breach of duty requires that the benefits of an action are outweighed by the risk and magnitude of the harm caused by the action. Using similar reasoning to the public necessity argument above, Davis can argue that she did not breach any duties at all. The benefits of preventing a "massive attack" likely outweighs the risk of re-assigning a

security officer, because presumably the people from Cook's Caterer would still be in the hospital kitchen. Moreover, any harm from food tampering is likely to be small. So, Davis did not believe she was leaving the hospital unattended and was justified in acting reasonably in doing so.

Comparative Fault

Davis can also further argue Cook's Caterer was contributorily negligent. Most jurisdictions allow a reduction of damages for the comparative fault of another party, e.g. if that party's negligence contributed to the damages. Davis' re-assigning of the security guard was not the sole contributor to Patrick's injury, Cook's Caterer also contributed by leaving the hospital kitchen unattended. In fact, Cook's Caterer was found negligent. Davis may therefore be able to seek contribution against Cook's Caterer against any award against her.

Davis can further argue that Frank's intentional tort constitutes an intervening action that was not foreseeable. If anything, Frank was the most culpable, having committed an intentional tort, while David and Cook's were only negligent. Most jurisdictions will allow a reduction for an intervening intentional tort, and some jurisdictions will eliminate negligence liability altogether for another's intervening intentional tort if it was not foreseeable. Because Frank intentionally contaminated and tampered with the food, leading to Patrick's injury, Frank is at least partially, and possibly fully liable.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

QUESTION 3

Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue. On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene. When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater.

Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family.

As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise. Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end.

Pedro approached Diana. She explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything.

Pedro intends to sue Diana.

1. What claims may Pedro reasonably assert against Diana? Discuss.

2. What remedies may Pedro reasonably seek? Discuss.

QUESTION 3: SELECTED ANSWER A

Pedro v. Diana

1. Pedro's Claims Against Diana

The issue is which claims that Pedro may assert against Diana.

Private Nuisance

The issue is whether Pedro may assert a claim for private nuisance against Diana due to the excessive noise and vibration from the open-air theater. A claim for private nuisance can be established by demonstrating that the defendant is causing a substantial and unreasonable interference with the plaintiff's use and enjoyment of the property. Interference is considered substantial when a reasonable person would find that there has been a significant deprivation of his or her ability to enjoy the property. A plaintiff's hyper-sensitivities are ignored when a court is adjudicating whether a nuisance exists.

Here, the facts describe the noise level coming from the rock concerts as "horrific." The floor shakes and Pedro is precluded from having even a normal conversation in his own home. Pedro purchased the home because he thought it was going to be a perfect place to raise a family. Much to his horror, the loud noise from the rock concerts coming from the open-air theater constitute a substantial and unreasonable interference with his use and enjoyment of his residence. Pedro does not appear to be hypersensitive to the noise, given that his neighbors have also complained to Diana about the noise level on the property. Further, a reasonable person would find a substantial and unreasonable interference with the enjoyment of his or her own home if the floor was shaking every weekend and conversations could not be had. Diana may argue that no reasonable

person would see this as a substantial interference because she has taken steps to mitigate the noise and resulting inconvenience as a result of the rock concerts (e.g., she only hosts rock concerts on weekends, the concerts must be done by 11:00 p.m., and she has set a maximum noise level). Diana also appears to be considering installing sound-deadening equipment as evidenced by her taking measurements in Pedro's backyard. But Diana's arguments are not likely to be availing given the significance of the disruption that Pedro is suffering.

Thus, Pedro can assert a viable claim for private nuisance against Diana.

Public Nuisance

The issue is whether Pedro may assert a claim for public nuisance against Diana. A claim for public nuisance can be established by an unreasonable interference with the health, safety, and morals of the community at large. To recover under a theory of public nuisance, the plaintiff must suffer unique damages.

Here, Pedro will argue that the public health and safety is being threatened by horrific loud noise coming from the rock concerts at the theater every weekend. However, Pedro's claim for a public nuisance suffers because he cannot identify that he has suffered unique damages. In particular, Pedro's neighbors have already complained about the noise. Pedro also lives in a subdivision located adjacent to the theater. Pedro's interest as a homeowner of one home in this subdivision that is experiencing noise is not unique as compared against to any other member of the residential community. Further, Diana will likely entirely contest that the theater is a public nuisance at all because the community thrives upon the inclusion of the theater; it is a cornerstone of the community and a focus of the cultural scene.

Thus, Pedro is not likely to assert a viable claim against Diana for public nuisance.

Trespass to Land

The issue is whether Pedro may assert a claim for trespass to land against Diana. A trespass to land is an intentional tort. Trespass to land requires the showing of: (i) an intentional act on the part of the defendant, (ii) a physical invasion of real property, and (iii) causation, meaning that the defendant's conduct was a substantial factor in causing the injury.

Here, Diana went to Pedro's house without his permission. She intended to come onto Pedro's property to determine whether sound-deadening materials might be added. She then voluntarily let herself into Pedro's backyard, which constituted a physical invasion of Pedro's real property. Moreover, Diana caused the action to occur because her letting herself into the backyard was the substantial factor in causing the trespass.

Thus, Pedro can reasonably assert a claim against Diana for trespass to land.

Conclusion

Therefore, Pedro can assert claims for private nuisance, public nuisance, and trespass to land against Diana.

2. Remedies that Pedro May Seek

The issue is which remedies Pedro may seek against Diana.

Compensatory Damages

The issue is whether Pedro may obtain compensatory damages from Diana for the nuisance claims. Compensatory damages are meant to compensate the plaintiff for foreseeable losses and may be pecuniary or non-pecuniary (such as pain and suffering). Compensatory damages must also be certain and unavoidable. Traditionally,

the method of damages calculation for a nuisance claim is the loss of use and enjoyment of the property plus any costs incurred while attempting to abate the nuisance. Courts will also offer an additional award to the plaintiff for the discomfort incurred as a result of the nuisance. Modernly, some courts are applying the doctrine of "permanent nuisance" when calculating a damages award in order to reduce the multiplicity of lawsuits that are being filed. Under this damages model, the plaintiff is entitled to recover as damages the diminution in value of his or her land.

Here, if the court applies a traditional damages calculation, Pedro will be entitled to his loss of use and enjoyment in his residence. The facts do not indicate that Pedro incurred any costs in an attempt to abate the nuisance. In fact, the only action that he took to abate the nuisance was when he approached Diana and explained to her the complaints about the nuisance. Pedro did not incur any costs as a result of having this conversation. The court will make a reasonable award of damages to compensate Pedro for the discomfort caused. Diana may argue that Pedro's damages award should be reduced by his knowing purchase of a residence in close proximity to a theater that is known to host rock concerts.

If the court applies the "permanent nuisance" doctrine, then Pedro will be entitled to recover the value of the diminution in his land as a result of the rock concerts. Diana will similarly argue that Pedro's recovery will need to be reduced by virtue of his assumption of the risk of coming to the nuisance.

Thus, Pedro can recover compensatory damages under either of the models above.

Nominal Damages

The issue is whether Pedro may obtain nominal damages from Diana for the trespass to

land. Nominal damages are those that are obtainable by a plaintiff when no harm was actually suffered (as in a simple trespass to land case).

Here, Pedro did not suffer any damages as a result of Diana entering his property without his permission. The facts indicate that Diana left without disturbing anything in the backyard; thus nothing was damages as a result of Diana's conduct. Pedro can only be entitled to nominal damages from Diana for the trespass to land.

Thus, Pedro can recover nominal damages from Diana for her trespass to land.

Punitive Damages

The issue is whether Pedro may seek punitive damages against Diana. Punitive damages are designed to punish a defendant for intentional conduct arising out of an intentional tort. Here, Pedro will not likely be able to recover punitive damages from Diana because she has acted in good faith by establishing reasonable parameters to confine the impact of the noise from the rock concerts. Thus, Pedro will not be able to seek punitive damages from Diana.

Permanent Injunction

The issue is whether Pedro may obtain a permanent injunction against Diana enjoining rock concerts at the open-air theater. An injunction is an equitable remedy. A permanent injunction will last for the amount of time imposed by the court. A negative injunction enjoins the defendant from engaging in a specified activity. A mandatory injunction orders the defendant to perform an affirmative act. The elements of a permanent injunction are (1) inadequate remedy at law, (2) the injunction is feasible, (3) the balancing of hardships weighs in favor of granting the injunction, and (4) no defenses apply. Each element will be discussed in turn below.

Inadequate Remedy at Law

The issue is whether there is an adequate remedy at law. If a violation if continuing, a court will deem that there is no adequate remedy at law.

Here, the nuisance is continuing. In fact, on weekend evenings, Diana hosts rock concerts at the theater. The theater is a large open-air theater and Diana explained that the loud rock concerts will need to continue.

Thus, there is no adequate remedy at law.

Feasibility of Enforcement

The issue is whether an injunction is feasible. The feasibility of enforcement turns on whether the injunction will be mandatory or negative. See above for the definitions of mandatory and negative injunctions. There are no feasibility issues with negative injunctions because the court can merely exercise its contempt power and hold the defendant in contempt of court if the defendant commits an act that it is enjoined from engaging. There are feasibility issues with a mandatory injunction, however, because it requires the court to supervise the defendant in ensuring that the defendant is complying with the injunction. Generally, the scarcity of judicial resources precludes courts from acting as supervisors to enforce mandatory injunctions.

Here, Pedro will request a negative injunction in that the theater be enjoined from hosting further rock concerts. This will be feasible to enforce because the court can simply hold Diana in contempt of court if it learns that she sponsors a rock concert in violation of the injunction order.

Thus, enforcement of the injunction is feasible because it will be a negative injunction.

Balance of Hardships

The issue is whether the balance of hardships will favor the granting of injunctive relief. In effectuating the balancing test, the court will balance the interests of the plaintiff in obtaining the injunction against the interests of the defendant and the public. If the burden to the defendant and the public outweighs the benefit to the plaintiff, then damages will be deemed an adequate remedy and an injunction will not be proper. Here, Pedro will argue that the balance of hardships tip in his favor because the noise from the rock concert is horrific and causing the floor to shake. Pedro cannot even maintain a conversation in his home due to the severe noise. Moreover, Pedro will argue that the public interest weighs in his favor because Pedro's neighbors have complained to Diana about the noise and vibration, and they received no meaningful response from Diana. Further, the theater is also rented to local dance companies during the week and generates revenue that way; it cannot be said that the theater is wholly dependent upon rock concerts for revenue generation.

On the contrary, Diana will argue that her interests and the public interests will be significantly burdened if an injunction is issued against her. With respect to Diana, she has owned the facility for 30 years; in fact, she built it. At the time that she built the facility, it was near the edge of the city, and it was only as time went by that the city development expanded to include housing in the vicinity of the theater. The theater cannot survive economically without rock concerts and thus Diana's financial interests could be wholly, negatively impacted. Moreover, Diana will argue that the public interest will lie against granting injunctive relief because the theater employs 200 people and has been a focus of the city's cultural scene for many years. Without the rock concerts, the theater will become bankrupt, and 200 citizens will be out of work.

Moreover, Diana has already taken steps that will work to mitigate the amount of the nuisance. Not only are rock concerts only on the weekend, but she requires that all concerts end by 11:00 p.m.; Diana also set a maximum noise level. Pedro's neighbors further dropped their complaints about the noise and Diana is taking reasonable measures to ensure that the nearby housing is only minimally impacted by the nuisance.

In consideration of all of this evidence, a court will likely side with Diana in concluding that the public interest and her interests outweigh the burden on Pedro. An injunction would have an overall negative impact of the economy and the culture of the community, force numerous people out of jobs, forfeit revenue brought in by the rock concerts, and cause the theater to close its doors.

Thus, on balance, the balance of hardships weighs against granting a permanent injunction.

Defense - "Coming to the Nuisance"

The issue is whether Diana can raise the defense of "coming to the nuisance" in precluding Pedro from obtaining injunctive relief. "Coming to the nuisance" means that the plaintiff voluntarily encountered the nuisance and decided to live near the nuisance anyway. "Coming to the nuisance" is generally not a defense to equitable relief.

Here, Diana may argue that Pedro came to the nuisance and thus assumed the risk because he knew about the theater when he purchased the house. But that will not be a successful defense in the injunction action. (Diana could assert this in response to the damages award so that Pedro's damages can be mitigated by those that would have been avoidable.)

Thus, "coming to the nuisance" is not a defense to the injunction.

Conclusion

Thus, it is likely that Pedro may reasonably seek a permanent injunction from Diana, but it will likely be denied on the basis of hardship.

Overall Conclusion

Therefore, Pedro may reasonably seek injunctive relief and damages remedies against Diana.

QUESTION 3: SELECTED ANSWER B

I. PEDRO'S CLAIMS AGAINST DIANA

Trespass to land

Trespass to land is intentional physical invasion of the land of another. Knowledge of legal title or intent to legally invade is not necessary; only the intent to physically invade suffices.

Here, "A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything." As such, D physically entered P's backyard, which is P's land, without consent. Although D did not intend to interfere with P's rights, D intended in fact to enter P's backyard physically. This satisfies the intent requirement.

In conclusion, D committed trespass to land and is liable

Defense of consent or private necessity fails

Consent is a defense to trespass to land. Consent may be express or implied. Necessity is also a defense that exists when the action was justified because the trespass was done to prevent an imminent harm. Private necessity is when trespass was necessary to prevent harm to a private interest. Public necessity applies when the imminent or threatened harm was to the public. Public necessity is immune to damages caused by trespass. Private necessity claimant is still responsible for damages caused by trespass.

Here, D may raise the defense of consent or private necessity. Consent defense fails

because D did not seek P's consent expressly. Further, the mere owning of land does not imply consent to let others enter the backyard, even if they seek to enter to help the landowner. Further, any private necessity argument is weak. D could argue that it was necessary for D to measure P's land to help P. However, D could simply have asked P before entering. Since D forgot, D could have called P or returned at some other time. Since D simply entered P's backyard without seeking any form of consent, and since D had alternatives available and no imminent threat existed to make D's immediate entrance necessary, D will not establish these defenses.

Only nominal damages available

A physical trespass presumes that harm existed, and as such P does not have to prove that P suffered a specific pecuniary harm. However, based on the facts, D did not disturb anything and so it is unlikely P suffered any significant pecuniary damages. P will likely recover nominal damages, which are little amounts of damages that are awarded to vindicate the plaintiff's rights when not much harm was incurred in fact.

Conclusion

In conclusion, D committed trespass to land against P, and is liable. However, P can recover nominal damages, but will likely *only* recover nominal damages unless P can prove that P suffered some facts that indicated in the facts.

Pedro approached Diana. she explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

Pedro intends to sue Diana

Private nuisance

Private nuisance occurs when the defendant substantially and unreasonably interfered with another private person's possession or use of private property. An interference is substantial when it would be offensive to a reasonable person. A hardened plaintiff who is subjectively not bothered by the interference can still recover if that interference is "substantial." An interference is unreasonable when the harm it causes is outweighed by the value it provides.

Whether interference is substantial

Here, "As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise." It appears that the shaking is physical as P can feel the vibrations of the sound. This likely offends reasonable persons because although whether loud noise by itself offends a reasonable person is arguable, when the sound physically vibrates and causes movement the reasonable person is likely to be offended by it and be annoyed by it, and the reasonable person's life will be interfered by it and their enjoyment of their home is likely reduced, possibly significantly. Further, "Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end." As such, it appears that people other than Pedro were in fact offended by the noises and vibrations to the point that they instituted a good faith lawsuit. D will highlight that they decided to live with it, and this shows that the interference is not substantial. Had it been substantial, D will argue, then the neighbors could objectively not decide to live with it. Although whether

interference is substantial is a fact intensive inquiry, given the fact that the venue is surrounded by residences and the noise physically vibrates and quakes the neighbors, the court will likely deem the noise and vibrations substantial and offensive to a responsible person.

Whether interference is unreasonable

Here, "D operates a large open-air theater. "On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene."" As such, it appears that D produces a lot of value to the community. Local dance companies likely need D's venue to do their performances and make their living. Further, rock and culture are important benefits to the community. It appears that culture is a major economic drive for the city. Further, the theater employs 200 people, which is a great benefit and contribution to the community. D will highlight that D's venue allows 200 people to make a livelihood while promoting the city's culture and fostering social ties and community bonds through art. Although P will counter that the harm is significant because it makes the lives of people around the venue difficult to live, to sleep, etc., D will counter that the very fact that the neighbors can decide to live with the noises attest to the fact that the harm is not significant, especially considering the great magnitude of value to the community - 200 jobs, cultural focus, tourism, economy, dancers, and musicians, etc.

Conclusion

In conclusion, the court can rule either way, if this were a case of first impression and

preclusion was not a consideration. Although it appears that the interference is substantial, it also appears that an organized group of people can decide to live with it. Also, it appears that the venue provides a great amount of value to the public that cannot be denied. As such, the court may legitimately determine that the interference is not unreasonable and thus there is no private nuisance here.

Coming to the nuisance is not a defense

Coming to the nuisance is typically not a defense. Such consideration only is a defense when a party intentionally comes to the nuisance for the sole purpose of harassing or instituting a lawsuit. In general, coming to the nuisance is one of many factors considered in the overall analysis.

Here, "Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue." Then, "Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family." As such, it appears that P not only came to it, P knew of the theater and its potential consequences and P did not investigate at all. Since the neighbors had already brought a lawsuit before, a simple asking of questions around would likely give P notice of the theater's activities. As such, it appears that P was on inquiry notice to inquire into the theater's activities but failed to do so. However, coming to the nuisance is not dispositive in any way because P did not come to the nuisance solely to harass with a lawsuit; P genuinely came in good faith because P believed that it was a perfect place to raise a family. As such, the court will not outright dismiss P's private nuisance. However, the court may use the fact that P came to the nuisance and the fact that P

failed to inquire at all into the theater's activities to conclude on the substantial/unreasonableness analysis in favor of D.

Neighborhood creeping into D's venue

Another factor is the neighborhood's creeping into D's venue. As mentioned above with P's coming to nuisance, the "neighborhood" coming to the nuisance will not be a dispositive factor and may merely be one of many other factors. However, it appears that the court should at least give some weight to the fact that "When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater." As such, D was operating D's venue in good faith.

Conclusion

In conclusion, the court will likely side with D based on the totality of circumstances and find that the value of D's operation outweighs harms that apparently were accepted to by the neighbors. Further preclusion may or may not be a consideration as discussed below.

Public nuisance

Public nuisance is substantial and unreasonable interference with health, safety, morals, or other rights of the community. When a private party seeks to bring a lawsuit for public nuisance, that party must have suffered a harm distinct from the harm suffered by the community.

Here, the harm as mentioned above might be ruled not unreasonable. Further, P has not suffered any harm from the noise or vibration that is unique from the harm suffered by other neighbors. P suffered the same exact harm that everyone around P suffers. As such, P cannot bring a public nuisance claim.

Preclusion

Preclusion bars the re-litigation of issues already litigated. Claim preclusion and issue preclusion exist.

Claim preclusion

Claim preclusion bars re litigation of same claims when there is a final valid judgment on the merits, asserted by same parties in same configuration, and the claims are the same.

Here, the parties are different because P was not part of the earlier lawsuit for relief. As such, claim preclusion does not apply.

Issue preclusion

Issue preclusion bars re-litigation of same issues when 1) in a final valid judgment on the merits exist; 2) the issues was necessarily determined; 3) the issue was essential to the judgment; and 4) no mutuality problems exist.

Here, the prior parties were unsuccessful in obtaining relief, and they decided to live with it. As such, the prior lawsuit likely ended, and the plaintiffs decided against appealing. As such, the decision is final. It appears that the claim was not unsuccessful because of personal jurisdiction or other issues, and so it appears that the prior lawsuit went into the merits. The vibrations and noise are the whole point of the prior lawsuit and of this lawsuit as well. As such, the issue was both necessarily determined and essential to prior judgment. Finally, mutuality problems must not exist. First, D was party to the prior action and had a chance to defend D's self. Further, P was not party to the prior action. However, in this case since D was successful in the prior action, D will seek to assert issue preclusion against P. Since P was not party to the prior action, P had no

chance to be heard. As such, D cannot assert issue preclusion against P.

Conclusion

In conclusion, D will not be able to assert issue preclusion against P. P will not want to assert preclusion because D prevailed (it appears) in the former action.

Negligent infliction of emotional distress

Defenses: defense (self, property, others); consent; arrest; necessity

Other torts (negligence, strict liability)

II. REMEDIES PEDRO CAN SEEK

Remedies for trespass to land was discussed earlier and is likely to be limited to nominal damages, especially since D will probably not come against and against and cause a multiplicity of suits problem. The remedies here will concern the case that P wins on the nuisance claim.

Money damages

Tort money damages are primarily "compensatory damages" which seeks to compensate the plaintiff put make the plaintiff whole. Sometimes there are "nominal" damages that seek to vindicate a plaintiff who basically has not been harmed, as discussed above. There are also "punitive" damages which will punish the defendant for willful and wanton conduct.

Here, punitive damages should not be available because D is not engaged in willful and wanton conduct to harm P or others. Rather, D is engaged in a legitimate business that benefits the entire community which happens to also harm nearby neighbors, who came to the nuisance because both the neighborhood crept towards D's venue and the neighbors decided to purchase the homes or rent the homes (in which case it would not

be that costly for them to relocate or move away).

Further, P was seeking to raise a family here and live a quiet life here with P's family. However, the value of what P is unable to do this because of the noise and vibrations. First, it is not certain that P will win damages because of reasons discussed above - no nuisance might exist. Second, even if P wins on the private nuisance claim, it is possible that P did not suffer much pecuniary harm. Perhaps P actually got the land for a cheaper price because the seller reduced the price because of the noise and vibrations. As such, P might not have suffered harm in decrease of land value (P might have *gotten* the land cheaply to begin with). Third, it is possible that P will be culpable as well because P failed to inquire at all, as described above, when a simple few questions would have revealed the problem, or even a visit on a weekend.

If P's land value did go down because of the noise and vibrations, then P may be entitled to the difference between the value of the land as P purchased it without the noise and vibration issues.

Temporary restraining order, preliminary injunction, permanent injunction

P may also seek equitable relief. Although P might go through temporary restraining orders and preliminary injunction, ultimately it is a permanent injunction that P would seek to try to enjoin D from having such loud noises.

Permanent injunction is appropriate when 1) legal damage is inadequate; 2) enforcement is feasible; 3) property right exists; 4) balance of harms and equities; 5) no defenses.

1) legal damage is inadequate

Legal damages might be inadequate when the conduct at issue might be repeated or

occur in the future; or when damages would be speculative or uncertain; or when the defendant is insolvent so a judgment would be meaningless.

Here, damages would be speculative because it would be difficult not only to measure the harm of constant noises and vibrations. Further, D seeks to play noises every weekend into possibly likely decades into the future. But D might stop the operation next year. As such, damages are speculative and uncertain. It can be argued that the decrease in value of land with the noises is a sufficiently certain measure of damages, however.

2) enforcement is feasible

A negative injunction prohibiting an action is easier to enforce than affirmative injunctions. One single act is easier to enforce than series of acts. An act requiring skills or personal taste is harder to enforce than objective acts. Involuntary servitudes are disfavored if not unconstitutional.

Here, the injunction sought is negative, which is not hard to enforce. Every time D engages in the making of noise, every neighbor would hear. As such, it would be noticed, and someone can make a complaint to the court and the court can issue contempt order. Further, since the land is in the state and city of the court, there are no jurisdictional issues and the injunction, and its enforcement is feasible.

3) property right exists

Traditionally, a protectible property right was needed. Modernly and in CA, property right is not necessary. Here, however, there is right in use and enjoyment of land property, quiet enjoyment, without the noise and vibrations. As such, this element would be satisfied.

4) balance of harms and equities

The harms and equities must be balanced, including benefit to the public. Here, the harm to public would be high because 200 people would lose their jobs. The harm to P would be high as well because on every weekend P would suffer loud noises and vibrations until 11pm, which is arguably very late and offensive to reasonable ordinary persons. The harm to D would be significant, although perhaps D can still operate during weekdays because dance performances seem not to be the issue, only rock concerts.

5) no defenses

It appears that P did not unduly delay and cause D prejudice (no laches). It also appears that P did not act in a culpable manner even if failure to inquire was a little neglectful (no unclean hands)

Conclusion

In conclusion, the analysis for permanent injunction does not appear to be one sided. As such, the court may likely refuse to grant it, as it did in the prior action by neighbors against the same D.

TROs and preliminary injunctions

The analysis for TROs and preliminary injunctions is similar to that for permanent injunctions. The major difference is that they require the necessity of maintaining status quo until a preliminary hearing can be held because of imminent harm (TRO) and until a full trial (preliminary injunction).

Here, it appears that neighbors can decide to live with the noise and vibrations. The neighbors had organized to file a lawsuit. As such, they would not merely decide to "live

with it" out of shyness, since they could commiserate with each other and feel free to complain and such feelings would avalanche and not be reduced. As such, it appears that there is no imminent irreparable harm that would justify TROs and preliminary injunctions.

Further based on the analysis above on private nuisance especially, likelihood of success does not appear to be great; It might be 60% at most.

other remedies

Other remedies such as constructive trust and equitable lien do not apply and are not relevant. Permanent injunction is the only relevant one and even that is unlikely.