

Monterey College of Law

Torts -Sec. 1

Final Examination

Spring 2022

Professor B. Soukup

General Instructions:

Answer Three (3) Essay Questions.

Total Time Allotted: Three (3) Hours.

### QUESTION ONE

BILL is nominated for best actor at the annual Movie Awards for his role in a block-buster movie of the year. BILL attends the event with his wife PEDDA. PEDDA is also a famous actress. The couple sits at a table close-up to the stage.

The host of the Movie Awards is DOCK, who is a comedian with a lot of stand-up jokes. DOCK is known to “pick” on members of the audience during his performances which is customary practice for many comedians to do. At the Movie Awards, DOCK takes the stage and first picks on another celebrity star couple also nominated for awards. DOCK then turns his attention onto BILL and PEDDA. In his dialogue, DOCK states:

“Wow, PEDDA. Great look. Cannot believe that you did not get the role in G.I. Jane 2” referring to a movie where the main actress of that movie has a shaved head. PEDDA has her hair completely shaved due to a yet undisclosed medical condition that causes her to lose her natural hair. PEDDA rolls her eyes at this remark. BILL, however, becomes extremely agitated and he strolls up onto the stage and slaps DOCK in the face with his hand. Stunned, all DOCK can say was “Whoa.”

The next morning the STAR, a local Hollywood newspaper, runs a photo of PEDDA with a news story that reads: “Despite the bald look, PEDDA may lose out role of G.I. Jane 2 to Brittney Spears.” No plans for any G.I. Jane 2 movie have even been in the works by any movie producer or studio. Since the news story, PEDDA has not received any new movie offers for six months.

Before the Movie Awards show, DOCK had known the true nature of PEDDA’s medical condition because they both share the same hairdresser. DOCK seizes on his moment of fame after the show and decides to launch a line of a new hair products with PEDDA’s photo on the front of the bottles that he markets under the name:

*“WHOA – SLAP IT ON!”*

#### **Discuss:**

- 1. DOCK v. BILL**
- 2. PEDDA v. STAR**
- 3. PEDDA v. DOCK**

**DO NOT DISCUSS NEGLIGENCE OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.**

\*\*\*\*

## QUESTION TWO

DUFFY'S specializes in novelty items and gifts for St. Patrick's Day. This year they developed a product called "The Flasher" that is a bowler-type hat. The hat has two holders on either side of where beverages can be attached. A connected straw to the holders allows the wearer to sip the beverages at the same time. While the wearer sips the drinks, multiple green LED lights (light emitting) embedded in the hat flash. The faster the hat wearer sips, the more frequently the lights will flash.

On the inside of the hat brim of "The Flasher" is the following label:

***ALL BEVERAGES SHOULD BE SECURELY FASTENED IN THE HOLDERS.  
REMOVE HAT IN CASE OF MALFUNCTION.  
PLEASE DRINK RESPONSIBLY***

PATRICK buys "The Flasher" when he is shopping in a grocery store and shortly thereafter, he heads directly to an Irish pub with his new hat. As soon as he enters the pub, PATRICK orders two Guinness beers in cans and places them in the hat's holders. As PATRICK sips the beers, the green lights flash.

The patrons of the pub cheer PATRICK on and begin to buy him more cans of beer and shots of whiskey. Soon PATRICK becomes very intoxicated. The whiskey spills out from the top of the glasses in the holders and drips down across the hat. The electrical wiring from the LED lights starts to short-circuit and smoke. The patrons yell at PATRICK that he is "on fire" while laughing at him and pointing to his hat. PATRICK glances at himself in the mirror behind the bar but does not remove the hat.

Minutes later, the wires corrode and send electrical current onto PATRICK's head. PATRICK suffers severe electrical burns to his scalp and forehead and is taken to the hospital.

"The Flasher" was produced with 50 embedded green LED lights. DUFFY'S chose LED lights that were water resistant but not highly insulated at a cost of 10 cents per light from an overseas distributor. Better insulated LED lights were available at 20 cents per light, but they were not entirely waterproof. "The Flasher" was marketed at a cost of \$19.99 for quick sale leading up to the St. Patrick's Day holiday.

PATRICK sues DUFFY's for his injuries.

**PLEASE DISCUSS ALL THEORIES OF PRODUCTS LIABILITY THAT PATRICK CAN BRING AGAINST DUFFY'S ALONG WITH DUFFY'S DEFENSES.**

\*\*\*\*\*

Monterey College of Law  
Torts Final Examination  
Spring 2022  
Prof. B. Soukup

### QUESTION THREE

For the past ten years, PAM lived next to DARLA in a semi-affluent neighborhood. While their respective properties were each on an acre, the position of their homes were stacked with DARLA living directly above PAM.

PAM had at least two Labrador dogs. Recently, a third and fourth Labrador dog was acquired by DARLA. The four dogs began to bark for hours at a time. The sound resonated inside PAM's home in every room. PAM reaches out to DARLA who assures her she will take care of the barking. However, the barking continues including the middle of the night at hours such 3 a.m. Repeated attempts to ask DARLA to do something about the dogs' barking fails. As such, PAM files a complaint with the Homeowner's Association (HOA). The HOA meets with DARLA, and they agree to have her put barking collars on the dogs.

The barking continues and a fifth dog (a rescued stray) are added to the dogs at DARLA's house. PAM can see that no barking collars are placed on the dogs. PAM begins to experience extreme stress along with lack of sleep due to the constant barking. She repeatedly contacts the HOA and is met with resistance from DARLA. The barking continues for months.

PAM then receives a letter from the HOA that shows a photograph of PAM's back patio. In that photo are PAM's three pet ducks. Along with the photo is a complaint from the HOA that keeping ducks is a violation of HOA rules. The photo also captures a private view of PAM's backyard including her personal bedroom balcony and windows. The photo could only have been taken from the very edge of PAM's property. DARLA is the only adjoining neighbor with access to that view. PAM feels extremely violated and angry, and she immediately contacts the HOA with demands that they tell her who had taken the photo. The HOA refuses to disclose their source and PAM develops panic attacks at the prospect of possible intruders in her backyard.

After more than of a month, PAM contacts DARLA, who admits to taking the photo of the ducks. PAM is forced to relocate her pet ducks, but DARLA's dogs continue to bark. PAM feels spies on and is now uncomfortable in her back yard.

In the HOA monthly newsletter sent to all the homeowners, the HOA prints the photo of PAM's ducks and back yard that DARLA had taken. In the caption at the bottom, it reads:

"Don't be a quack, keep ducks and other fowl intruders out of your yard."

**Discuss:** 1. PAM v. DARLA  
2. PAM v. HOA

**DO NOT DISCUSS NEGLIGENCE OR DEFAMATION.**

**\*\*\*\*\***

**TORT QUESTION #1 SPRING 2022**  
**PAM v. DARLA & HOA**

ID# \_\_\_\_\_

**EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)**

	Poor		Excellent				
NEATNESS/ORGANIZATION	0	1	2	3	4	5	_____
LAWYER-LIKE	0	1	2	3	4	5	_____

**DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)**

**PAM v. DARLA**

**I. NUISANCE (substantial interference with use and enjoyment of property) and all Defenses:**

25 POINTS=FULL DISCUSSION \_\_\_\_\_  
 15 POINTS=PARTIAL DISCUSSION \_\_\_\_\_

**II. INVASION OF PRIVACY FOR INTRUSION INTO SECLUSION (privilege & consent)**

25 POINTS=FULL DISCUSSION \_\_\_\_\_  
 15 POINTS=PARTIAL DISCUSSION \_\_\_\_\_

**III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS Including defenses of consent and necessity**

10 POINTS = FULL DISCUSSION \_\_\_\_\_  
 5 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**PAM v. HOA**

**IV. INVASION OF PRIVACY FOR FALSE LIGHT (privilege and consent)**

20 POINTS = FULL DISCUSSION \_\_\_\_\_  
 10 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

10 POINTS = FULL DISCUSSION \_\_\_\_\_  
 5 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**TOTAL SCORE:.....** \_\_\_\_\_

**TORT QUESTION #2 SPRING 2022**  
**PATRICK v. DUFFY’S TOYS & DUNCANS**

ID# \_\_\_\_\_

**EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)**

	Poor		Excellent				
NEATNESS/ORGANIZATION	0	1	2	3	4	5	_____
LAWYER-LIKE	0	1	2	3	4	5	_____

**DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)**

**PATRICK v. DUFFY’S TOYS**

**I. STRICT PRODUCT LIABILITY**

20 POINTS = FULL DISCUSSION \_\_\_\_\_  
10 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**II. NEGLIGENCE in Products Liability**

20 POINTS = FULL DISCUSSION \_\_\_\_\_  
10 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**III. WARRANTY (Express & Implied)**

20 POINTS = FULL DISCUSSION \_\_\_\_\_  
10 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**PATRICK v. DUNCANS**

**IV. NEGLIGENCE  
(Duty, Breach, Causation, Damages and Defenses)**

20 PONTs = FULL DISCUSSION \_\_\_\_\_  
10 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**V. VICARIOUS LIABILITY**

10 POINTS = FULL DISCUSSION \_\_\_\_\_  
5 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**TOTAL SCORE:.....** \_\_\_\_\_

**TORT QUESTION #3 SPRING 2022**  
**ROCK v. SMITH &**  
**CADA v. ROCK, & STAR NEWSPAPER**

ID# \_\_\_\_\_

**EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)**

	Poor		Excellent				
NEATNESS/ORGANIZATION	0	1	2	3	4	5	_____
LAWYER-LIKE	0	1	2	3	4	5	_____

**DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)**

**ROCK v. SMITH**

**I. BATTERY (INTENTIONAL TORT AND DEFENSES)**

10 POINTS=FULL DISCUSSION \_\_\_\_\_  
5 POINTS=PARTIAL DISCUSSION \_\_\_\_\_

**CADA v. ROCK**

**II. DEFAMATION (PUBLIC FIGURE 1<sup>ST</sup> AMENDMENT, PUBLIC OR PRIVATE CONCERN & DEFENSES)**

20 POINTS=FULL DISCUSSION \_\_\_\_\_  
10 POINTS=PARTIAL DISCUSSION \_\_\_\_\_

**III. INVASION OF PRIVACY FOR PUBLIC DISCLOSURE OF PRIVATE EMBARRASSING FACTS**

20 POINTS = FULL DISCUSSION \_\_\_\_\_  
10 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**IV. INVASION OF PRIVACY FOR COMMERCIAL MISAPPROPRIATION OF NAME AND/OR LIKENESS**

20 POINTS = FULL DISCUSSION \_\_\_\_\_  
10 POINTS = PARTIAL DISCUSSION \_\_\_\_\_

**CADA v. STAR NEWSPAPER**

**V. DEFAMATION (PUBLIC FIGURE 1<sup>ST</sup> AMENDMENT, PUBLIC OR PRIVATE CONCERN & DEFENSES)**

20 POINTS=FULL DISCUSSION \_\_\_\_\_  
10 POINTS=PARTIAL DISCUSSION \_\_\_\_\_

**TOTAL SCORE:.....** \_\_\_\_\_

1)

Dock v Bill

✓ Assault

Assault is when the defendant acts intentionally to cause the plaintiff the apprehension of a harmful or offensive touching, and the plaintiff does have an apprehension of an offensive touching. In this case, Dock (D) approached Bill (B) while D was on stage and slapped him. Because D was facing B when this happened, he was able to see the slap coming. Seeing the slap happen would give D the apprehension that he would indeed be slapped. While it is possible that D may not have actually though B would follow through with the slap, B would likely not be able to successfully argue this as the slap did, in fact, happen. Because of this, B would likely be liable for assault.

*imminent*

✓ Battery

Battery is <sup>a voluntary act,</sup> an intentional act that causes a harmful or offensive touching. As discussed above, D intentionally slapped B in the face, which is both a harmful and offensive touching. Because B would no valid defenses for this, B would likely be liable for battery.

*w/out consent/privilege*

*w/out consent or privilege*

Peda v Dock

✓ Defamation

Defamation is the publishing of defamatory material about a person to a third party.

*... that results in damages*

Defamatory Language

Defamatory language is language that holds a person up to shame, disgrace, or ridicule. In this case, D said "Wow Peda (P). Great look. Cannot believe that you did not get the

role for G.I. Jane 2". P will argue that this comment holds her up to shame, disgrace, or ridicule. D will argue that while not common, other famous actresses do shave their heads or where their hair short, and as such there is nothing inherently shameful, disgraceful, or worthy of ridicule regarding a woman having a shaved head. P will argue that this statement was defamatory due to her medical condition. However, because this condition was not public knowledge and people would have no reason to think P had a medical condition when the comment was made, it is not likely this comment would be deemed defamatory.

### Defamation Per Quod

Defamation per quod is when a statement requires extrinsic facts to be known for a statement to have a defamatory affect. Here, P would argue that the extrinsic facts would be her medical condition. However, because this was not publicly known, the audience that heard the joke would not have this extrinsic fact, therefore not satisfying the requirements for the statement to be considered defamatory per quod.

### Defamation per se

Defamation per se is when a comment is so defamatory that it is not possible to innocently interpret, and the person or people the statement was published to know it is regarding the plaintiff. To meet this requirement, a statement must fall in to one of 5 categories: accusation of engaging in criminal activity, ineffective or corruption of public office, prejudice of trade/profession, fornication or adultery, or a venereal disease. P will argue that joking about her losing out on a role for a movie was prejudice of trade. While it does fall under a defamation per se category, it is unclear if a court would deem the comment defamatory, as actors miss out on roles frequently.

### Slander

---

SLANDER is when a defamatory statement is spoken, as opposed to written, which would be libel. Here, D spoke the joke out loud, and as such this would be a case of slander.

✓ Slander per se

Slander per se is when a spoken comment falls in to one of four categories: accusations of engaging in a crime of moral turpitude, imputation of unchastity, having a loathsome disease, or insulting ones trade or profession. Here, P will argue that her medical condition qualifies as a loathsome disease, and as such D's comments are slander per se. D will likely argue two things. First, that while P's medical condition is serious, because the only effect of her condition is hair loss it is not "loathsome". He will also argue that while P's shaved head was due to her condition, D's joke did not actually mention the condition in any way, and instead only about her shaved head. A court would probably not deem D's joke to be slander for either or both of the reasons he would argue.

good -  
but the fact  
is her  
disease"  
is true.

✓ DOES IT? ✓

Publication

To be liable for defamation, a person must publish their comment to a third party. Here, D told his joke to an audience; both in person and broadcasted on TV. It can be inferred that both audiences heard the joke, but even if they did not B clearly heard the joke as it agitated him to the point of slapping D. Because only one third party needs to hear the defamatory statement, B alone hearing the statement would be enough to satisfy the publication requirement.

Of and concerning the plaintiff ✓

To be liable for defamation, the defamatory statement must not only be published to a third party, but that third party but clearly understand that the statement was of and concerning the plaintiff. As discussed above, B clearly heard the statement and knew it

was concerning his wife, P. As such, the statement would be deemed to be of and concerning the plaintiff.

### Defenses

There are a few defenses available to D if his statements were deemed defamatory.

### Truth

For a court to hold D's joke to be defamatory, it would likely have to make the connection to P's medical condition. However, a defamatory statement must be false to be defamatory. Because P does in fact have this condition, if D's statement were deemed to be concerning her condition, it would be substantially true, and he would have a complete defense against a defamation action.

*But what about GI Jane?*

### Consent

D will also argue that by sitting in the front row, P consented to being made fun of. D will argue that it is custom for the hosts of award shows to make jokes about audience members, particularly those sitting close to the stage; P was sitting at a table close-up to the stage. Additionally, D will argue that even if P somehow did not know this custom before the show, she would have been made aware when D made fun of another audience member first, and that P could have simply left if P was afraid D would make a joke at her expense. It is unclear if a fact-finder would except this defense.

*Good -  
Parody -  
Fair  
Comment*

### Constitutional defenses ✓

In the case *New York Times v Sullivan* the supreme court held that public officials had a higher bar to recover damages for defamation. In addition to the elements laid out, they would need to prove the statement was false, and that it was made with actual malice. ✓

---

Actual malice is when a person makes a statement they know to be false, or with reckless disregard as to whether it is true. The supreme court later extended this standard to all public figures.

#### Public figure

✓ In this case, P was a famous actress. Therefore, she would be considered a public figure.

#### Actual Malice

Here, P will argue that D did in fact know that G.I. Jane 2 was not a movie being made, therefore P could not have been going for the role. However, the first amendment protects loose, figurative, and hyperbolic language. A court would likely deem his language to be both loose and figurative, and therefor not hold his comments to be made in actual malice.

*good*

#### Conclusion for Defamation

D will most likely not be held liable for defamation, as his joke would likely not be deemed defamatory. And even if it were, a court would likely hold D's statements not to be made in actual malice.

✓ Public disclosure of private facts

To be liable for public disclosure of private facts, a person must publish previously unknown facts about a person against their wishes, that would be embarrassing or offensive to the reasonable person. Here, P would argue that as a result of D's jokes, her previously undisclosed medical condition was revealed to the public. D will argue that his joke did not actually disclose her condition. Also, the joke about G.I. Jane 2 was not a fact

---

as the movie was not being made, and therefore could not be a published private fact. The fact must also be published to a substantial amount of people, which D's joke was as discussed above. However, because D did not actually disclose any private facts D would likely not be found liable for public disclosure of private facts.

✓ False Light

False light is when a person publishes false statements about another that would embarrass a reasonable person and be offensive to a reasonable person in the plaintiff's circumstances. Here, P will argue that the joke about G.I. Jane was false and embarrassing because of her condition. A reasonable person in her circumstances would likely feel the same way. Under this cause of action the statement must be published to a substantial number of people, which it was as mentioned above. However, the false statements must also be made with actual malice (see supra). As discussed above, a court likely not hold D's joke to be made with actual malice and therefore D would not be liable for false light.

✓ Appropriation of Name, Image, and Likeness (NIL)

NIL is the unauthorized use of a person's name, image, and likeness for commercial gain. Here, P will argue that when D introduced his line of hair products called "WHOA - SLAP IT ON" it was using her NIL without authorization because P's picture was on the box. D would clearly be liable for NIL as he used P's picture on his line of products and sold them for a commercial gain.

Peda v Star

*no consent*

✓ Defamation

See supra for rule. P will argue that when STAR newspaper (S) ran a news story that she may lose out to Britney Spears for a role in G.I. Jane 2, it was defamatory. As discussed

---

above, it is unclear if a court would deem the story defamatory as actors frequently miss out on roles.

- Constitutional Defenses?
- False Light?

85 Great -  
Missed issues  
on *Pedra v. Star*

**TORT QUESTION #1 SPRING 2022**  
**DOCK v. SMITH & PEDA v. STAR & DOCK**

**EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)**

	Poor	Excellent	
NEATNESS/ORGANIZATION	0	1 2 3 4	5
LAWYER-LIKE	0	1 2 3 4	5

**DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)**

**DOCK v. SMITH**

**I. BATTERY & ASSAULT  
(INTENTIONAL TORT AND DEFENSES)**

10 POINTS=FULL DISCUSSION  
 5 POINTS=PARTIAL DISCUSSION

*defense of  
others?*

9

**PEDA v. STAR NEWSPAPER**

**II. DEFAMATION & FALSE LIGHT (PUBLIC FIGURE 1<sup>ST</sup> AMENDMENT,  
PUBLIC OR PRIVATE CONCERN & DEFENSES)**

20 POINTS=FULL DISCUSSION  
 10 POINTS=PARTIAL DISCUSSION

*MISSED F/L /  
1<sup>ST</sup> Amend.*

10

**PEDA v. DOCK**

**III. DEFAMATION (PUBLIC FIGURE 1<sup>ST</sup> AMENDMENT,  
PUBLIC OR PRIVATE CONCERN & DEFENSES)**

15 POINTS=FULL DISCUSSION  
 7 POINTS=PARTIAL DISCUSSION

14

**IV. INVASION OF PRIVACY  
FALSE LIGHT & DEFENSES**

15 POINTS = FULL DISCUSSION  
 7 POINTS = PARTIAL DISCUSSION

14

**V. INVASION OF PRIVACY:  
PUBLIC DISCLOSURE OF PRIVATE EMBARRASSING FACTS & DEFENSES**

15 POINTS = FULL DISCUSSION  
 7 POINTS = PARTIAL DISCUSSION

14

**VI. INVASION OF PRIVACY  
COMMERCIAL MISAPPROPRIATION OF NAME AND/OR LIKENESS & DEFENSES**

15 POINTS = FULL DISCUSSION  
 7 POINTS = PARTIAL DISCUSSION

14

**TOTAL SCORE:.....**

85

**TORT QUESTION #2 SPRING 2022**  
**PATRICK v. DUFFY'S**

**EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)**

	Poor		Excellent				
NEATNESS/ORGANIZATION	0	1	2	3	4	5	<u>5</u>
LAWYER-LIKE	0	1	2	3	4	5	<u>5</u>

**DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)**

**PATRICK v. DUFFY'S**

**I. STRICT PRODUCT LIABILITY  
(DEFECT IN DESIGN/INADEQUATE WARNINGS, DBCD,  
RISK/UTILITY & FEASIBLE ALTERNATIVES)**

30 POINTS = FULL DISCUSSION  
15 POINTS = PARTIAL DISCUSSION

30

**II. DEFENSES TO STRICT PRODUCT LIABILITY  
(~~C/N~~, ~~COMP. NEG.~~ AND A/R)**

10 POINTS = FULL DISCUSSION  
5 POINTS = PARTIAL DISCUSSION

10

**III. NEGLIGENCE in Products Liability  
(DUTY, BREACH, CAUSATION, DAMAGES)**

20 POINTS = FULL DISCUSSION  
10 POINTS = PARTIAL DISCUSSION

20

**IV. DEFENSES TO NEGLIGENCE  
(C/N, COMP. NEG. AND A/R)**

10 POINTS = FULL DISCUSSION  
5 POINTS = PARTIAL DISCUSSION

9

**V. WARRANTY (Express & Implied)  
(Including defenses)**

15 POINTS = FULL DISCUSSION  
7 POINTS = PARTIAL DISCUSSION

7

**VI. MISREPRESENTATION**

5 POINTS = FULL DISCUSSION  
2 POINTS = PARTIAL DISCUSSION

2

**TOTAL SCORE:.....**

88

2)

Patrick has multiple claims under products liability that he may bring against Duffy's.

✓ **Products Liability**

*good* | Where a commercial seller is engaged in the regular business of providing a product, they may be held liable for harm caused by that product to any foreseeable user or plaintiff if the product is unchanged since it left their possession (Restatement 402A).

There are multiple theories of products liability that apply here. Patrick may bring a claim of strict liability, negligence, and implied warranty.

✓ **Strict Liability**

*yes* A commercial seller owes a strict liability to ensure that any product they release into the stream of commerce is not unreasonably dangerous, whether in design, manufacture, or required warnings.

✓ **Duty**

If a party is engaged in the regular business of manufacturing or selling a product they are a commercial seller, and have a duty to any foreseeable user or person in the zone of danger to ensure that the product is not unreasonably dangerous, and to warn of any inherent danger in using the product. This duty extends not just to intended use of the product, but also to any foreseeable use of the product.

✓ **Breach**

A commercial seller has breached their duty and may be strictly liable for harm if they are responsible for a design defect, manufacturing defect, or a failure to warn.

---

### ✓ **Design Defect**

Design defect occurs when a product, by its design--meaning all products made to the specification--are unreasonably dangerous (see below). Here, Patrick has a claim for design defect because the product was made as designed, yet was arguably unreasonably dangerous in its regular use. An unreasonably dangerous product is inherently defective. Here, it seems that the product was used as intended, but this will be a critical point for both sides to argue.

### ✓ **Manufacturing Defect**

Manufacturing defect occurs when a single item is made differently from the base design and as a result causes harm to the plaintiff. Here, there is no indication that Patrick's "The Flasher" was any different than any other "The Flasher" so there is no manufacturing defect. Any strict liability or negligence will be based on either the design or a failure to warn.

### ✓ **Failure to Warn**

Failure to Warn occurs when a commercial seller has an obligation to warn about a potential danger and does not provide adequate warning. Here, there was a label that included a warning. The trier of fact will evaluate whether this warning is adequate. The text of the warning specifies how the product should be used, but does not warn of any danger. Therefore, there is some cause to bring an action on failure to warn.

*good*  
In particular, if the potential for harm from the LED lights becoming corroded by alcohol (a foreseeable use), was known, then the manufacturers and sellers (including Duffy) had an obligation to warn of this risk. The label on the brim of "The Flasher" contains some instruction, however Patrick will argue that it is not sufficiently specific to the actual risk and subsequent harm that he suffered.

---

## Unreasonably Dangerous

A product will be found to be unreasonably dangerous if it fails one or more of the following tests:

1. Consumer Expectation Test--Where a product fails to meet basic consumer expectations for functionality and safety it is unreasonably dangerous. Here, Patrick had a reasonable expectation that he could use "The Flasher" without any physical harm to himself. Even though his use of the product may have exceeded the intended use, it was certainly foreseeable. The fact that it caused him to suffer severe burns while engaged in a foreseeable use suggests the Consumer Expectation Test is met.

*met*

2. Feasible Alternative Test--If a feasible alternative that is cost-effective is available, then a product could be found to be unreasonably dangerous. Here, the alternative of better insulated LED lights was available at twice the cost but they were not entirely waterproof. Duffy has a strong case here that there was not a feasible alternative. If Duffy can show that waterproof was an essential required characteristic of the product, then the better-insulated LEDs would not be a feasible alternative, since the alternative must not render the product any less useful. If this is not an absolute, then we must look next to the risk-utility test

*Excellent*

3. Risk-Utility Test--The risk utility test is an evaluation that compares the harm to the utility and cost of making safe. Specifically, it states that: if the cost of making safe plus the utility is less than the risk and gravity of harm ( $Utility + Cost\ to\ Make\ Safe < Gravity + Risk\ of\ Harm$ ), then the product is unreasonably dangerous. "The Flasher" was manufactured as it was and marketed at a correspondingly low price specifically for "quick sale leading up to the St. Patrick's Day holiday." This is not sufficient justification for failing to make a product safe. If Patrick can show that the mere ten cents (\$0.10) out of

---

the list price of \$19.99 was a relatively minimal cost to make safe, he will have a strong case under the risk-utility test that the product was unreasonably dangerous.

### ✓ Causation

To bring a prima facie case for products liability, Patrick will also need to show both actual and proximate causation.

The actual cause is the "but for" cause of the plaintiff's harm. To show this, Patrick must demonstrate that if not for the defective nature of "The Flasher" that he would have suffered no harm. This is clearly established. Any actions of Patrick that may have been a part of the harm will be part of Duffy's defenses, discussed below. Regardless of any defenses, there can be no doubt that if Patrick was not wearing "The Flasher" at the time he would not have suffered electrical burns or had to go to the hospital.

To show that Duffy is the proximate cause is a slightly more challenging issue. Here, Patrick will need to prove that there were no independent intervening circumstances that resulted in his harm. Duffy will argue that the patrons of the bar cheering Patrick on and encouraging him to drink more and more beer and whiskey constitutes an intervening circumstance. However, this argument is not likely to succeed since this is an issue of the product's fitness and Patrick will argue that the additional causes of his harm were foreseeable, and dependent causes. That he never would have had beer and whiskey in a hat on his head if not for the product itself, regardless of the behavior of the other bar patrons.

✓  
✓  
good!

### ✓ Strict Liability Defense--Assumption of Risk ✓

In a claim for strict liability, the only defense that Duffy may claim is assumption of risk. Assumption of risk is available when a defendant engages in an unreasonably dangerous use of the product. Here, Duffy will argue that Patrick's behavior at the bar constitutes an

---

assumption of risk. He continued to drink to excess, even when whiskey was spilling from the top of the hat. He also failed to remove the hat even though bar patrons were pointing out the fire. If the court finds that Patrick's drinking and related behavior was excessive, and far outside the purpose of the product, then Duffy's defense for Assumption of Risk will have merit.

However, the purpose of this product is for the consumption of alcohol. Therefore, Duffy will need to prove major excess, and not just that Patrick was drinking to the expected degree for someone wearing "The Flasher."

### ✓ Negligence

For a prima facie case of negligent products liability, Patrick will need to show Duty, Breach, Causation, and Damages. Here, these will be as discussed above (*supra*). However, there are some key differences, namely in defenses and damages.

### ✓ Negligence Defense--Contributory Negligence ✓

Where there is contributory negligence on the part of plaintiff--meaning their actions directly contributed to the harm suffered--there is a complete defense against negligence. Duffy has a strong defense against a negligence claim by Patrick based on Patrick's contributory negligence. Duffy will present evidence that Patrick was drinking to excess, and that this behavior contributed to his harm. If the court agrees on this point, there will be no liability for Duffy.

### Negligence Defense--Comparative Negligence ✓

Under comparative negligence Patrick's ability to recover would be proportionate to whatever part of the harm was not based in his own negligence. If a court found that his behavior was 30% negligent, for example, he would only be able to recover 70% of his

damages. Duffy has a strong case to argue comparative negligence based on Patrick's behavior.

At the same time, Patrick will argue that everything that he did was foreseeable use. It was a holiday, and the purpose of the product was to have fun while drinking alcohol. If the court agrees that his use was foreseeable and not negligent, then he will be able to recover full damages.

Based on his behavior, it is likely that at least some comparative negligence would be found by the trier of fact and Duffy would at a minimum have the cost of damages reduced accordingly.

### **Negligence Defense--Misuse** ✓

Misuse is not a defense per se, but if there is misuse then the prima facie case fails. Here, Duffy may try to argue misuse but at most it was an excessive use. Patrick was using the product as designed--wearing it on his head, placing alcoholic beverages in it, and watching the LED lights.

NR

### **Negligence Defense--Disclaimer**

There was a disclaimer on "The Flasher" and this provides a strong defense for Duffy. The disclaimer that beverages should be secured, and to please drink responsibly, are relatively ineffective here. The beverages were, as far as we can tell, correctly secured. An argument could be made, and Duffy will argue this, that Patrick was not drinking responsibly. However, under the circumstances there is no way to show this. Patrick was not necessarily drunk and not acting in any way that was otherwise irresponsible.

The critical disclaimer here is the instruction to remove hat in case of malfunction. Duffy will argue that when the hat began to smoke there was clear indication of malfunction,

---

and that Patrick ignored not only the disclaimer printed on the hat, but even the warnings of the other bar patrons. This, combined with either contributory or comparative negligence, will provide Duffy with a strong defense against damages.

### ✓ Damages

Patrick suffered physical injury so any damages he argues will be special damages. He will need to argue that his hospital bill, and any pain and suffering, are the direct result of the injury and the strict liability and/or negligence of Duffy.

### ✓ Conclusion

Patrick will bring a case of products liability against Duffy and likely succeed on the grounds of SL and negligence, especially as regards the risk-utility test and feasible alternative. Duffy will argue assumption of risk against SL, and comparative and contributory negligence against the negligence claim. Most likely there will be some finding for Patrick reduced by his comparative fault.

- Express & Implied Warranty?  
- Misrepresentation?

BB Excellent & well written.  
See notes for review in essay.

**TORT QUESTION #2 SPRING 2022**  
**PATRICK v. DUFFY'S**

**EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)**

	Poor		Excellent		
NEATNESS/ORGANIZATION	0	1	2	3	4 5
LAWYER-LIKE	0	1	2	3	4 5

5
5

**DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)**

**PATRICK v. DUFFY'S**

**I. STRICT PRODUCT LIABILITY  
 (DEFECT IN DESIGN/INADEQUATE WARNINGS, DBCD,  
 RISK/UTILITY & FEASIBLE ALTERNATIVES)**

30 POINTS = FULL DISCUSSION  
 15 POINTS = PARTIAL DISCUSSION

30  
 \_\_\_\_\_  
 \_\_\_\_\_

**II. DEFENSES TO STRICT PRODUCT LIABILITY  
 (C/N, COMP. NEG. AND A/R)**

10 POINTS = FULL DISCUSSION  
 5 POINTS = PARTIAL DISCUSSION

10  
 \_\_\_\_\_  
 \_\_\_\_\_

**III. NEGLIGENCE in Products Liability  
 (DUTY, BREACH, CAUSATION, DAMAGES)**

20 POINTS = FULL DISCUSSION  
 10 POINTS = PARTIAL DISCUSSION

20  
 \_\_\_\_\_  
 \_\_\_\_\_

**IV. DEFENSES TO NEGLIGENCE  
 (C/N, COMP. NEG. AND A/R)**

10 POINTS = FULL DISCUSSION  
 5 POINTS = PARTIAL DISCUSSION

10  
 \_\_\_\_\_  
 \_\_\_\_\_

**V. WARRANTY (Express & Implied)  
 (Including defenses)**

15 POINTS = FULL DISCUSSION  
 7 POINTS = PARTIAL DISCUSSION

6  
 \_\_\_\_\_  
 \_\_\_\_\_

**VI. MISREPRESENTATION**

5 POINTS = FULL DISCUSSION  
 2 POINTS = PARTIAL DISCUSSION

4  
 \_\_\_\_\_  
 \_\_\_\_\_

**TOTAL SCORE:.....**

90  
 \_\_\_\_\_  
 \_\_\_\_\_

10  
 30  
 ---  
 40  
 10  
 ---  
 50  
 20  
 ---  
 70  
 10  
 ---  
 80  
 10  
 ---  
 90  
 ---  
 10  
 30  
 ---  
 40  
 20  
 ---  
 60  
 10  
 ---  
 70  
 + 6  
 ---  
 76  
 + 4  
 ---  
 80

10  
 30  
 ---  
 40  
 + 10  
 ---  
 50  
 20  
 ---  
 70  
 9  
 ---  
 79  
 9  
 ---  
 88

3)

### **Pam v. Darla**

#### ✓ **Nuisance**

For a prima facie case of nuisance, the plaintiff must establish that defendant's actions created a <sup>"Substantial"</sup> significant interference with their enjoyment and use of their private space. ✓ *land.*

Here, Darla's dogs would bark for hours at a time, and the sound resonated inside Pam's home. Pam attempted to mitigate the situation by contacting Darla and giving her an opportunity to abate <sup>GOOD</sup> the nuisance. This barking continued for months even after Pam's complaints. A cause of action for nuisance is clearly established.

#### ✓ **Defense-Nuisance**

*private v. public  
nuisance?*

The best defenses that Darla can raise here are consent and necessity. For consent, she must show that Pam, by virtue of living inside the HOA, was consenting to a certain degree of interference by activity of neighbors. This defense will only succeed if the court finds that Pam knew that she was consenting to the noise of dogs barking when she joined the HOA.

For necessity, Darla will claim that she had no choice because she was rescuing stray dogs and that the barking was a necessary consequence. This defense fails on its face because Darla was giving multiple opportunities, and even specifically instructed, to place anti-barking collars on the dogs. Pam observed that the dogs did not have these collars, so Darla clearly failed in any mitigation of the nuisance.

#### ✓ **IIED**

---

intentional infliction of Emotional Distress exists when there is extreme and outrageous conduct on the part of defendant that results in some physical manifestation of emotional harm to plaintiff. Here, Pam lost sleep and suffered extreme stress as a result of Darla's behavior--specifically, allowing the dogs to bark unabated. If Pam can prove to the trier of fact that Darla's behavior was extreme and outrageous, then she has a strong case for IIED. Here, the repeated attempt by Pam in talking with both Darla and the HOA shows that she made a concerted effort and that Darla must have been aware of the situation as it was affecting Pam.

There is clearly an outward manifestation of Pam's emotional harm, not only in lost sleep and stress but later in the panic attacks. *Is loss of sleep = Severe emotional distress?*

Therefore, any subsequent behavior by Darla is most likely to be seen as egregious, or at the very least, willful. Because the court will use the reasonable person standard in evaluating the question of "extreme and outrageous," and there is extensive evidence of Darla's willful disregard of Pam's well-being, Pam will likely be able to bring an action on the cause of IIED.

→ Defenses to IIED? *Consent or privilege?*

✓ **Invasion of Privacy-Intrusion Upon Seclusion**

Pam will likely bring a claim against Darla for Invasion of Privacy--Intrusion Upon Seclusion. To prove this, she must only show that there was a physical or electronic intrusion upon her private space of where she had a reasonable expectation of privacy. When the HOA sent Pam a photo that was clearly taken by Darla, she was aware of an intrusion upon her privacy. In particular, the photo captured a private view that included her personal bedroom balcony and windows. If these were not visible from the street or other public area, there was a reasonable expectation of privacy that Darla violated when she took the photo.

### ✓ Invasion of Privacy--Intrusion Upon Peace of Mind

In addition to the intrusion upon seclusion, Pam has a claim against Darla for intrusion upon peace of mind. For a claim of intrusion upon peace of mind the plaintiff need not show any harm beside the fact that their privacy/secretcy has been invaded. Pam feels "extremely violated and angry," and later develops panic attacks. Although the harm is not necessary to show cause, it certainly helps to show that there was definitely an intrusion upon Pam's peace of mind committed by Darla.

### ✓ Defenses--Intrusion Upon Seclusion and Peace of Mind

Darla will raise the defense of public interest and public access. First, she will claim that she took any photos from either her own property or public property. This will shift the burden of proof to Pam to show that there was some trespass or invasion of her privacy where she could not be observed by the public. Because the photo is of Pam's back patio, and there is no way to get such a vantage point from a publicly accessible area, this will be a difficult defense for Darla to raise. It is likely that the court will reject this, especially because the photos included Pam's bedroom balcony and windows.

Darla will also claim that her actions were in the public interest, that she was taking the photos to benefit the people of the HOA. Because Pam is not a public person in any way, and there is no direct public interest outside of the immediate neighborhood, it is highly unlikely that this defense will carry any weight with the court.

Most likely, Pam will have a strong case against Darla for intrusion upon seclusion and intrusion upon peace of mind, as well as intentional infliction of emotional distress.

~~False Light~~

*Does not hold out beliefs/facts that are not true*

Pam may also try to raise a claim of portrayal in a false light against Darla, however this requires elements that are not present in the facts. For portrayal in false light, a statement must be widely disseminated, and the publisher must know that it is false. Darla seems to believe what she says about Pam, and sharing the photo with the HOA as a support for her position in a dispute does not constitute wide publication.

At the same time, if Darla knew that it was likely that the HOA would publish the photo, and she knew that it would portray Pam in a false light, there could be action on this claim. Pam would need to prove these elements.

Darla might try to defend against such a claim on the basis of public interest, but such a defense would fail. If the court found that Darla knew the photo would be published widely and knew it would paint Pam in a false light, she could be found liable under false light.

### ~~Publication of Private Fact~~ *Embarrassing Fact.*

*N/A*  
The widespread publication of a private fact that a reasonable person would find highly objectionable establishes the tort of publication of a private fact, a form of invasion of privacy. Here, Darla did share photos that disclosed a private space of Pam. However, publication of a private fact must usually deal with finances, health, or a similarly objectionable type of information. It is unlikely that an action for publication of private fact would succeed if Pam were to raise this in her claims against Darla.

### ~~Trespass to Land~~

*N/A*  
Trespass to land is established when there is an intentional act of entering and remaining on another person's property. Here, it is not well established if Darla actually entered Pam's land or was on the edge of her own. If Pam is able to establish that Darla's photo could not have been taken from her own land, that it was actually inside Pam's land (no

---

matter is on the very edge), then Darla is liable for a trespass to land. She may claim a defense of necessity, but such a defense would fail. Key to this claim would be Pam proving that Darla had entered her privacy. If she can show that even for as long as it took to take the photo that Darla was on her land, she will have a strong claim on this action.

### Pam v. HOA

#### ✓ False Light

False light, as defined above, exists when there is wide publication of information that paints the plaintiff in a false light. When the HOA published its newsletter containing the photo of Pam's ducks and back yard, and stated "don't be a quack," there was some potential for people to view Pam in a false light. This implies that she is "a quack"-- synonymous with mental health problems. The HOA paper is widespread among the community, and could even be shared beyond. Because the information is false, and it is widespread, and the HOA has good reason to know that Pam is not "a quack" or at least could be shown to be reckless with regard to that label, Pam has a strong action for false light against the HOA.

Does photo prove Pam was the quack?

very good

Excellent

#### IIED

In addition to the false light, the HOA's refusal to disclose who took the photo, and the subsequent publication and caption, raises a claim for Pam on the grounds of intentional infliction of emotional distress.

good

Intentional infliction of emotional distress requires extreme and outrageous conduct that results in some outward manifestation of emotional disturbance. Here, Pam suffers panic attacks, feels spied upon, and is uncomfortable in her backyard. She fears the prospect of

intruders. These are all manifestations of an extreme emotional disturbance, and they can be tied back to the intentional actions of the HOA in publishing the photo. ✓yes

→ Defenses / ILED?  
**Publication of Private Fact**

Similar to above for Darla, if Pam can show that the publication of the photo reveals or makes public some private embarrassing fact, she may have a claim on this cause. However, because the photo has nothing to do with illness, finances, or anything that would be reasonably objectionable other than her private space, it is unlikely that this will succeed.

W Keeping ducks embarrassing private fact?  
W being part of HOA consent?

✓ **HOA Defenses**

The HOA's main defense against Pam will be public interest. Their newsletter serves the community, and for the cause of false light they will argue that Pam needs to show some actual malice. Namely, that they knew the statement was false or acted in reckless disregard for its truth. Although this qualified privilege could apply, the specific caption does not seem to pertain to any legitimate public interest so it is unlikely this defense would succeed.

good!

**END OF EXAM**

93 - Excellent job.  
- Very good w/ headings  
- Good analysis  
- Defenses on ILED needed

**TORT QUESTION #3 SPRING 2022**

**PAM v. DARLA & HOA**

**EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)**

	Poor	Excellent	
NEATNESS/ORGANIZATION	0 1 2 3 4	5	<u>5</u>
LAWYER-LIKE	0 1 2 3 4	5	<u>5</u>

**DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)**

**PAM v. DARLA**

**I. NUISANCE (substantial interference with use and enjoyment of property) and all Defenses:**

25 POINTS=FULL DISCUSSION  
15 POINTS=PARTIAL DISCUSSION

*private  
v. public*

24

**II. INVASION OF PRIVACY FOR INTRUSION INTO SECLUSION (privilege & consent)**

25 POINTS=FULL DISCUSSION  
15 POINTS=PARTIAL DISCUSSION

*define*

24

**III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS Including defenses of consent and necessity**

10 POINTS = FULL DISCUSSION  
5 POINTS = PARTIAL DISCUSSION

*define*

9

**PAM v. HOA**

**IV. INVASION OF PRIVACY FOR FALSE LIGHT (privilege and consent)**

20 POINTS = FULL DISCUSSION  
10 POINTS = PARTIAL DISCUSSION

*Consent as  
Pam being homeowner*

18

**V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

10 POINTS = FULL DISCUSSION  
5 POINTS = PARTIAL DISCUSSION

*Consent by  
keeping ducks/  
breaking HOA rules*

8

**TOTAL SCORE:.....** 93