

SAN LUIS OBISPO COLLEGE OF LAW

TORTS

FINAL EXAMINATION

SPRING 2023

PROF. R. ALLEN

General Instructions:

Answer Three (3) Essay Questions

Total Time Allotted: Three (3) Hours

SLO
Torts II
Final Exam
Spring 2023
Prof. R. Allen

Question 1

Doc owned and operated Doc's Dry Cleaning Company. He had been permitted to operate his business by the city. He has been at the same location for forty years. To dry clean garments, he uses tetrachloroethylene (PCE). Although it has not been shown to cause cancer in people, the U.S. Department of Health and Human Services (DHHS) has determined that tetrachloroethylene may cause irritation of the eyes and mucous membrane, and is reasonably anticipated to be a human carcinogen based on animal studies.

Over the years, the PCE from Doc's Dry Cleaning has leached into the ground water and contaminated several hundred feet of land around the dry cleaning business. Paula has lived next door to the dry cleaners for two years. Her home is directly above ground that has been determined to be contaminated with PCE. She has long suffered from irritation to her eyes, skin, nose, and throat. She also has had difficulty breathing. She is worried that she may have liver damage or cancer. Her doctor recommends annual tests to determine her health status.

She comes to you to ask if she should file a lawsuit for her current symptoms and her possible future injuries. She is also wondering if she can stop Doc from continuing his dry cleaning business. Please discuss what torts, excepting product liability claims, are implicated. Do not discuss defendant's possible affirmative defenses.

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Question 2

Debbie never liked Peter. There was something rough and unfriendly about his aura. As a result, Debbie began to blame Peter for problems she encountered. She called the police to complain that Peter threatened her teenage son. “He said ‘I have an arsenal and will shoot you’,” she told the police.

A few years later, someone spray painted “Go Back to Israel” on her garage door. Debbie again complained to the police. Although she is not Jewish, Debbie was upset and suspected Peter. She told the responding police officer that Peter was likely the perpetrator.

Most recently, Debbie complained to the police that Peter had killed her cat by breaking its neck. The police officer arrested Peter for making a criminal threat, vandalism, and animal cruelty. The district attorney filed these charges, but soon realized there was no corroborating evidence. As a result, all the charges were dismissed.

Peter senses that all of his neighbors think he is a guilty even though the charges were dismissed. The neighbors avoid eye contact with him. He does not get invited to block parties or neighborhood events. Most problematic, Debbie has begun posting on FaceBook that Peter is a racist and a bully.

Peter comes to you asking if he has a case for defamation or any other tort. He is also very concerned about stopping Debbie from continuing to post on FaceBook.

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Question 3

Car Mfg. designed and built large, heavy-duty trucks with 6.7 liter turbodiesel engines. A component of the truck engine was an Intake Heater Grid Relay. The relays were switches that ensure a quick start in cold weather.

In 2021, Car Mfg. placed about 500,000 trucks into the stream of commerce with defective Heater Grid Relays. Throughout the world, six (6) trucks spontaneously caught on fire due to overheating from the relay. Car Mfg. sent notices to all dealerships and truck owners regarding the defect.

In 2022, Pat bought a used heavy-duty trucks with heavy-duty 6.7 liter turbodiesel engines built by Car Mfg. The defective part had not been replaced by the dealer. Pat was not warned about the defect by the salesman or the dealership. Months after his purchase, Pat received a letter from the manufacturer with notice of a recall. Car Mfg. warned all owners that 6 of the 500,000 trucks in the market had caught fire. Car mfg. recommended owners take their trucks back to the dealership for a replacement part and, in the meantime, park the truck outside.

Pat, however, felt the risk was small and he was too busy to take his truck to the dealership. Shortly thereafter, while parked in his residential garage, the truck spontaneously combusted. The fire burned down his home and burnt his arms and legs as he ran out of his house. Pat sues Car Mfg. and the dealership in strict products liability only. Discuss.

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ANSWER OUTLINE

Question 1

Issue	Rule	Analysis		Points Allotted
Public Nuisance	That defendant action or failure to act created a condition which was harmful to health, indecent or offensive to the senses, obstructed free use of property, obstructed free passage or use of public right of way, or was a fire hazard; That the condition affected a substantial number of people at the same time; That an ordinary person would be annoyed or disturbed by the condition; That the seriousness of the harm outweighed the social utility of the conduct or condition; That Plaintiff did not consent to the conduct or condition; That the harm suffered by Plaintiff was different from the type of harm suffered by the general public; and;	PCE leached into ground water and land. It is harmful to human health, also affected senses. Likely affected many people. Paula seems to have been affected most dramatically as no one else is mentioned	Yes	/15

	That the conduct caused plaintiff's harm			
Private Nuisance	<p>Plaintiff has property interest; Defendant acts or fails to act; Intentionally, recklessly, negligently, or through abnormally dangerous activity; Which causes; Substantial, unreasonable interference with Plaintiff's use and enjoyment of his land.</p> <p>Unreasonable interference determined by the balancing test (RST sec 826(a) and b)) or Significant or substantial harm determined by the objective ordinary prudent person test. (RST, sec. 821F)</p>	Paula owns a house next door; defendant affecting use and enjoyment of house; balance of interests seems to favor Paula	No	/10
Abnormally Dangerous Conditions	The defendant brought some res (thing) onto his land; Nonnatural/artificial use of the land; Res likely to do mischief; The res escapes and causes mischief.	Doc brought the dry cleaning product with the PCE onto his property and used it in his business; it escaped into the ground water and land of others.	(1 pt)	/10

Abnormally Dangerous Activity	Either RST or RTT rule is fine. <u>RTT sec. 20</u> : An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity. An activity is abnormally dangerous if: 1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and 2) the activity is not one of common usage.	Tough call. Probably not reasonably foreseeable when business began; business is very common.	(1 pt)	/15
Causation: Actual (2 points)	But for Substantial Factor (2 points)	No direct fact saying PCE caused injury to Paula (2 points)	(1 pt)	/7
Res Ipsa Loquitor/ circumstantial evidence (2 points)	Prosser Test: Harm does not occur in absence of negligence; defendant controls instrumentality; plaintiff blameless (2 points)	Injury is of the type caused by PCE; Circumstantial evidence suggests the PCE caused the irritation. (2 points)	(1 pt)	/7
Causation: Proximate (2 points)	Direct or Reasonably Foreseeable Harm Intervening acts (2 points)	Again, no direct fact saying PCE caused harm, but it is	(1 pt)	/7

		reasonably foreseeable (2 points)		
Remedies	<p>Damages: legal remedy (money); Injunctive Relieve: equitable remedy requires the court to balance the hardships; Self-help or "abate the nuisance"</p> <p>An injunction is available when: There is no adequate remedy at law; It will prevent multiple lawsuits; Plaintiff will suffer irreparable harm, which money would not adequately compensate; Balance of hardships favors injunction; Public interest favors injunction.</p>	<p>Paula suffers from irritation of head nose and throat. Irritation also of lungs. Cost to be monitored. Paula wants equitable remedy, but do the hardships lean in her favor?</p>	No	/10
Total Points Available				/81

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Question 2

Issue	Rule	Analysis	Concl'n	Points Allotted
Defamation	False, defamatory statement; re plaintiff; published to third party; Causes damage to reputation	Statement or opinion; statements to police officer; no parties or events, being called a racist and bully.		/20
Libel and Slander	Libel is permanent; slander is evanescent	Reports to police spoken out loud; FaceBook is libel		/10
Slander Per Se	Re Serious crime, business or trade; loathsome disease; chastity	Reported crimes that would led to being held in opprobrium		/10
Damages	Special/Pecuniary General compensation; Presumed; Punitives?	Presumed damages because related to crimes. No facts that he lost money. Likely lost reputation		/20
Other Remedies	Mandatory and Prohibitive Injunction	Take down posts claiming he is a racist and bully		/10

Defenses (2 points)	Truth; Qualified Privilege (<u>Watt v. Longdon</u>);	Reporting a crime; perhaps true;		/20
Other possible Torts: EXTRA CREDIT				
Intrusion Upon Seclusions	Intentional intrusion upon plaintiff's private seclusion	Not private area; P invites into the business	Not likely	/10
False Light	Majority: not available; Minority: malicious publication that portrays another in false light	D's opinion; facts are that D may believe P threatened son, wrote racist message on garage and killed cat	Not likely	/10
IIED	Intent or reckless, extreme and outrageous Causes severe emotional distress	No facts indicate he felt emotional distress, but possible;		/10
Total points possible				/90

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Question 3

Issue	Rule	Analysis	Concl'n	Points Allotted
Strict Products Liability				
Proper P; Proper D	Proper P historically required privity, now any reasonably foreseeable end-user; Proper D is all in the chain of commerce, except service providers	Here, P has no privity, but is a reasonably foreseeable end-user; D is a business that sells food and drinks and placed the hot coffee into the stream of commerce	Yes	/10
Defect	Manufacturing Defect: product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product	Not clear, but appears produced as designed	No	/10
	Design Defect: Consumer Expectation Test: product is in an unreasonably	Spontaneous combustion is unreasonably dangerous;	Yes	/30

	<p>dangerous defective condition when it is more dangerous than would be contemplated by the ordinary consumer with ordinary knowledge common to the community</p> <p><u>Danger-Utility Test:</u> a product is defective if the danger is greater than the utility. Danger refers to likelihood, nature and severity of potential injuries; alternative designs</p> <p><u>Hindsight-Negligence Test:</u> assuming the defendant knew of the defect to the product at the time of distribution, would a reasonable prudent person have placed the product into the stream of commerce</p>	<p>risk of serious injury from burns is greater than utility of quick start in cold weather; available alternatives replacement parts available</p>		
	<p><u>Warning Defect:</u> fails to adequately describe the danger of the product; warnings were adequate if "clear and specific</p>	<p>Dealer failed to warn f defect; Dealer failed to replace defective</p>	<p>Yes</p>	<p>/10</p>

	warning." <u>Hood v. Ryobi</u>	part before sale		
Actual Cause	But For defect; But For lack of warning	Car Mfg. placed into stream of commerce, but Dealer failed to replace part before re-sale; Pat failed to heed warnings		/10
Proximate Cause	Direct; Reasonably Foreseeable injury; Intervening act	Spontaneous combustion is not reasonably foreseeable, but was known danger, Dealer intervening conduct; Pat's failure to heed warning		/10
Damages	Specials; General; Punitive Damage (<u>State Farm v. Cambell</u> ; <u>Gore v. BMW</u>)	Medical damages (Present and future); cost of house and personal property lost; pain and suffering; Car Mfg. knew of risk and tried to		/10

		notice owners and dealers of defect; Dealer did not make replacement, knew of risk and placed the truck into the stream of commerce anyway		
Defenses	CN	Not available in SPL cases	-	/5
	Comparative Fault: plaintiff's own negligence, misuse or abnormal use can limit his recovery in apportionment	Pat failed to heed warnings	Yes	/10
Total points possible				/110

1)

PAULA'S CLAIMS

1. **Trespass to Land** is to intentional and non consensual entry onto the property of another. Here, when Doc's Dry Cleaning (Doc's) leached PCE into the ground that subsequently contaminated Paula's home, Doc's has likely committed trespass to land. Because it was a nontrespassory invasion (microscopic particulate matter), Paula will have to show physical damages. If she has not yet been diagnosed for her ailments, it will be difficult to maintain her claim.

2. **Public Nuisance** is the intentional and substantially unreasonable interference with the health and interest of the general public. Typically, government officials are the appropriate party to bring a claim under public nuisance, however if an individual can show that she was uniquely harmed by the interference, she may bring a claim. Here, there are no direct facts that elevate her harms from those of the general public. It could be inferred that she was likely damaged more because of her physical proximity to Doc. Paula should proceed with caution on a claim for Public Nuisance.

Private Nuisance occurs when there is an intentional and substantially unreasonable interference with the use and enjoyment of plaintiff's property. The reasonability of the interference is measured by the reasonable person standard. Here, Paula is suffering from eye, skin, nose and throat irritation, she is struggling to breathe and she is concerned about cancer, although she has not taken the diagnostic tests recommended by her doctor. It could be argued that the harm she is suffering would reasonably bother an ordinary person. As such it is likely that Paula will prevail on a claim for private nuisance.

3. **Defenses under Nuisance.** Doc will likely assert the defenses of coming to the nuisance, because he has been practicing his business so long, it is likely that Paula moved next to

him and not the other way around. If that can be established, coming to the nuisance is not a complete bar, but will factor into the equation.

Strict Liability - Abnormally Dangerous Activity. Parties can be found liable even when they use the utmost due care to prevent risk of harm when dangerous activities are in play. Here, it could be asserted that Doc's was engaging in an abnormally dangerous activity by using dangerous chemicals. Although the city permitted him to operate, and he has been conducting his business there for 40 years, because of the nature of the activity (using dangerous chemicals). Doc's will assert that his laundering business is now common to the area and is permitted by the city. On balance, Paula will likely assert that it would cost little to nothing to use alternative laundry products. As such, balancing the equities, it is unlikely that Doc's will be found liable since it is likely he could find an alternative that is less harmful.

4. **Strict Products Liability:**

Proper Plaintiff Proper Defendant. Historically privity was required. Modernly, any end user may bring a suit. Here, Paula is a next door neighbor. Although the facts are silent, if Paula used Doc's services (likely due to proximity), she will qualify as an end user. A proper Defendant is anyone within the chain of commerce. Here, Defendant is not a manufacturer or retailer, but uses the products in the service of his business, entitling him as a proper Defendant.

Manufacturing Defect. A manufacturing defect occurs when the product is created in a way that departs from the intended design, a manufacturing anomaly that creates an unreasonable risk for end users. Here, there are no inferences that the product used by Doc was not meant to contain PCE. As such, further analysis here is not required.

Design Defect. A design defect under products liability occurs when the product is manufactured as designed, but poses an unreasonable risk to end users. Because the product is likely working as the creators intended, Design is a better theory for recovery.

Consumer Expectation Test. When applied this test measures whether the risk was not likely to be anticipated by the end user. Here, it is unlikely that Paula nor the general public who suffered this leach could reasonably foresee the dangers that Doc's business operations posed. On balance the consumer expectation test, although not determinative alone, will weigh in Paula's favor.

Danger Utility. The danger utility test measures the severity and likeliness of harm, and balances it with alternatives available, the cost of those alternative, and the downsides to those alternatives. Here, it is likely that Doc, with notice of the harms of PCE via the Dept. of Health, he could have looked at natural and safer products. Although sometimes natural products are more expensive, the trier of fact must balance those equities.

Failure to Warn. A claim for failure to warn can be made when the π knew of the risk of harm, and failed to adequately warn their end users. Here, if Doc has posted a warning, dangerous chemicals sign (likely required), than customers would at least be on notice and able to make an informed decision to do business with Doc's. There are no facts concerning any warnings, as such it will be difficult to explore this claim. Paula might assert that she would have heeded the warning, she may prevail on a claim here.

Warranty. Strict Products liability under a warranty claim may hold a manufacturer, distributor, retailer, etc liable when an express or implied warranty was made to a person with whom they have privity. Here, there are no facts to support an express warranty, an implied warranty can be explored if Paula was a customer of Doc's. Implied warranties are covered in the Uniform Commercial Code and establish that all members within the chain of commerce, through their expertise in the business, have implied that the product is fit

for the purpose intended. it is likely that Paula, as a customer of Docs did not perceive how risky and the kinds of dangers that were posed by doing business with him.

Negligence. In a negligence theory of products liability a proper plaintiff and proper defendant must be established (see above, including caveat that Paula must be a customer to recover under Strict Products Liability). Duty and a Standard of Care must be breached, causing damage to the end user. All business persons have a duty to conduct themselves as reasonably prudent manufacturers, retailers, etc. Here, by using products that have a reasonably anticipated cancerous effect on humans, Doc's has likely breached his standard of care. Doc's may claim that he was permitted by the city to conduct his business, but that will not eliminate his liability if he goes below the applicable standard of care (Reasonable Prudent Dry Cleaner).

5. **Causation.** Doc's must be both the factual and the proximate cause of Paula's injuries. Here, but for Doc's dangerous use of chemicals, Paula would not be harmed. Proximate cause is a liability limiting device. It asks to what extent we will hold the Plaintiff liable under the totality of circumstances. Here, it may be established that Paula is suffering irritation, and has seen a doctor, but she has not yet been diagnosed with cancer or liver damage. It is likely that Doc's is the cause of Paula's irritation.

6. **Damages.** IF Paula prevails, she may collect for Special and General Damages. Special Damages include any medical costs for care and diagnosis, and for any work lost. General Damages include pain and suffering and loss of enjoyment of life.

Defenses. Doc's does not have many defenses under product liability theories, except that they were not the manufacturer and that upon inspection, there was no evidence that the chemicals could cause harm. Comparative negligence may be plead against the manufacturer.

2

8 **Estoppel.** Estoppel is remedy available when the risk of harm is substantial, damages are difficult to calculate and that money will not make π whole. Here, Paula will likely want to team up with her government officials to encourage them to bring a claim under public nuisance where the amount of harm done is far more substantial to the general public. An emergency protective order may be issued in dire situations, where it is likely that plaintiff will prevail, and the damage to be done is irreparable. This remedy may be best asserted in a public nuisance claim.

CONCLUSION. Paula should bring a claim and will likely prevail on claims for Trespass to Land, Private Nuisance, and Products Liability. Paula should also reach out to her government authorities to see if they will revisit Doc's Permit or request injunction due to the level of harm to the general public.

END OF EXAM

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Question 1

Doc owned and operated Doc's Dry Cleaning Company. He had been permitted to operate his business by the city. He has been at the same location for forty years. To dry clean garments, he uses tetrachloroethylene (PCE). Although it has not been shown to cause cancer in people, the U.S. Department of Health and Human Services (DHHS) has determined that tetrachloroethylene may cause irritation of the eyes and mucous membrane, and is reasonably anticipated to be a human carcinogen based on animal studies.

Over the years, the PCE from Doc's Dry Cleaning has leached into the ground water and contaminated several hundred feet of land around the dry cleaning business. Paula has lived next door to the dry cleaners for two years. Her home is directly above ground that has been determined to be contaminated with PCE. She has long suffered from irritation to her eyes, skin, nose, and throat. She also has had difficulty breathing. She is worried that she may have liver damage or cancer. Her doctor recommends annual tests to determine her health status.

She comes to you to ask if she should file a lawsuit for her current symptoms and her possible future injuries. She is also wondering if she can stop Doc from continuing his dry cleaning business. Please discuss what torts, excepting product liability claims, are implicated. Do not discuss defendant's possible affirmative defenses.

Issue	Rule	Analysis		Points Allotted
Public Nuisance	That defendant action or failure to act created a condition which was harmful to health, indecent or offensive to the senses, obstructed free use of property, obstructed free passage or use of public right of way, or was a fire hazard; That the condition affected a substantial number of people at the same time; That an ordinary person would be annoyed or disturbed by the condition; That the seriousness of the harm outweighed the social utility of the conduct or condition; That Plaintiff did not consent to the conduct or condition; That the harm suffered by Plaintiff was different from the type of harm suffered by the general public; and; That the conduct caused plaintiff's harm	PCE leached into ground water and land. It is harmful to human health, also affected senses. Likely affected many people. Paula seems to have been affected most dramatically as no one else is mentioned	Yes	12/15
Private Nuisance	Plaintiff has property interest; Defendant acts or fails to act; Intentionally, recklessly,	Paula owns a house next door; defendant affecting use	No	10/10

	<p>negligently, or through abnormally dangerous activity; Which causes; Substantial, unreasonable interference with Plaintiff's use and enjoyment of his land.</p> <p>Unreasonable interference determined by the balancing test (RST sec 826(a) and b)) or Significant or substantial harm determined by the objective ordinary prudent person test. (RST, sec. 821F)</p>	<p>and enjoyment of house; balance of interests seems to favor Paula</p>		
Abnormally Dangerous Conditions	<p>The defendant brought some res (thing) onto his land; Nonnatural/artificial use of the land; Res likely to do mischief; The res escapes and causes mischief.</p>	<p>Doc brought the dry cleaning product with the PCE onto his property and used it in his business; it escaped into the ground water and land of others.</p>	(1 pt)	0/10
Abnormally Dangerous Activity	<p>Either RST or RTT rule is fine. <u>RTT sec. 20:</u> An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity. An activity is abnormally dangerous if: 1) the</p>	<p>Tough call. Probably not reasonably foreseeable when business began; business is very common.</p>	(1 pt)	12/15

	activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and 2) the activity is not one of common usage.			
Causation: Actual (2 points)	But for Substantial Factor (2 points)	No direct fact saying PCE caused injury to Paula (2 points)	(1 pt)	6/7
Res Ipsa Loquitor/ circumstantial evidence (2 points)	Prosser Test: Harm does not occur in absence of negligence; defendant controls instrumentality; plaintiff blameless (2 points)	Injury is of the type caused by PCE; Circumstantial evidence suggests the PCE caused the irritation. (2 points)	(1 pt)	0/7
Causation: Proximate (2 points)	Direct or Reasonably Foreseeable Harm Intervening acts (2 points)	Again, no direct fact saying PCE caused harm, but it is reasonably foreseeable (2 points)	(1 pt)	5/7
Remedies	Damages: legal remedy (money); Injunctive Relieve: equitable remedy requires the court to balance the hardships; Self-help or "abate the nuisance"	Paula suffers from irritation of head nose and throat. Irritation also of lungs. Cost to be monitored.	No	5/10

	An injunction is available when: There is no adequate remedy at law; It will prevent multiple lawsuits; Plaintiff will suffer irreparable harm, which money would not adequately compensate; Balance of hardships favors injunction; Public interest favors injunction.	Paula wants equitable remedy, but do the hardships lean in her favor?		
Total Points Available				50/81

1. It was not anticipated by the call of the question that students would discuss Trespass to Land. There are no facts that implicate willful action which is required for an intentional tort.
2. Your Rule for Public Nuisance should also include the test is objective, and there should be a balancing of interests.
3. The call of the question told you NOT to discuss affirmative defenses.
4. The call of the question told you NOT to discuss products liability. I made it clear so that students would not try to force these facts into a products liability discussion. A much better use of your time would have been to discuss Abnormally Dangerous Conditions, Causation, and Remedies.
5. I was hoping students would address the need for ongoing testing to determine if an injury had occurred. This is an Actual Causation discussion based on Exxon Mobile v. Albright. But for the exposure, testing would not be required.
6. Proximate Causation issues fall into two main categories. First, was the act the direct cause of the harm (In re Polemis) or was the harm reasonably foreseeable at the time it was done (Wagonmound II)? Second, is the harm too attenuated for the defendant to be held liable? Attenuation takes the form of time, distance, or other intervening acts. Your Rule and your analysis are insufficient.
7. The call of the question anticipated a discussion of general and special damages, but also of injunctive relieve. Paula wants to know if she can shut down defendant's dry cleaning

business. She is asking you if she can get an injunction. Thus, a discussion of the process for an injunction was necessary.

8. You mention "Estoppel" at the end of your essay. This word is never mentioned in our text book. I do not recall ever using this word in class. It has been a million years since my Civil Procedure class, but I believe Estoppel refers to Issue Preclusion. In other words, a person cannot re-litigate an issue that has previously been decided. Regardless, it is not on the matrix. To the degree you touched on injunctive relieve, I gave you a few points.

Overall: You failed to discuss numerous major issues. You wrote about many issues that were not anticipated and some that you were told not to discuss. I recommend that you read the call of the question carefully and often. 70

2)

Defamation

Defamation is a false/defamatory statement, of or concerning the plaintiff, published to a third party, with intent level (malice-negligence), that causes damage to the plaintiff's reputation. Defamation usually presents via libel, which is permanent or slander which is ephemeral (per se or per quod).

Here, the facts indicate that Debbie made statements regarding Peter both to police officers and on Facebook, so an examination of each of these scenarios is warranted.

Slander Per Se and Per Quod

Slander per se usually consists of statements involving crimes of moral turpitude, trade/business matters, loathsome diseases, or unchastity/unfaithfulness. Statements of those natures are generally considered slanderous on their face, where slander per quod requires extrinsic facts to prove.

Here, the facts state that Peter was arrested and charged with criminal threat, vandalism, and animal cruelty. If these are considered crimes of moral turpitude, then Peter could potentially assert a claim for Slander per se.

Statements Made to the Police

False/Defamatory Statements

Here, the facts indicate that Debbie complained to the police about Peter three separate times. Once, she claimed that he threatened her by saying "I have an arsenal and will

shoot you", then by claiming that he painted "Go Back to Israel" on her garage door, and then by complaining that Peter killed her cat by breaking his neck.

Of/Concerning the Plaintiff

Here, the facts indicate that Debbie made these statements directly about Peter and therefore they concern him.

Published to a Third Party

Here, the facts indicate that the Debbie made complaints to the police which qualifies as publishing to a third party.

With Intent Level (malice-negligence)

2. The facts state explicitly that Debbie never liked Peter and began to blame him for problems she encountered. The facts also state that when police investigated her claims, they found no corroborating evidence. It could be asserted that these facts lend themselves to the inference that Debbie complained about Peter not because she honestly believed that he had done these things, but out of her dislike for him. If that is the case, then Debbie likely made her complaints to the police with malice.

Causes Damage to Plaintiff's Reputation

In this instance, the facts state that Peter senses that all of his neighbors believe he is guilty because they avoid eye contact and don't invite him to neighborhood events. If this is a marked change in behavior from how his neighbors treated him before he was investigated by the police, Peter could have grounds to assert that Debbie's claims hurt his reputation.

Defenses

The defenses to a claim of defamation available to Debbie are truth (which is an absolute defense), absolute privilege, and qualified privilege. There are no facts to support that Debbie's complaints to the police were true (on the contrary, Peter was investigated and cleared). However, these claims may fall under qualified privilege since they were made to law enforcement as part of an investigation (criminal proceedings since Peter was charged) so Debbie may be able to assert a defense of qualified privilege successfully. Absolute privilege does not apply in this instance.

Based on the facts as presented, Peter could bring a claim against Debbie for defamation based on the complaints she made to the police, provided it is not barred by a successful assertion of the defense of qualified privilege.

Damages

3. Peter may be able to collect special damages if he can prove that Debbie's claims and the damage to his reputation caused him emotional pain and suffering. He could also possibly collect general damages if he could prove that he was economically impacted by her claims (i.e. lost job prospects or things of that nature).

Statements Posted on Facebook

Defamation

See definition above.

Slander Per Se and Per Quod

See definitions above.

Does not apply regarding the posts Debbie made on Facebook because they are not dealing in loathsome diseases, crimes of moral turpitude, unchastity/unfaithfulness, or trade/business matters.

False/Defamatory Statement

A. The facts state that Debbie made posts on Facebook claiming that Peter was a racist and a bully.

Of/Concerning Plaintiff

Here, the facts indicate that Debbie made these statements directly about Peter and therefore they concern him.

Published to a Third Party

Here, Debbie posted on Facebook which qualifies as publishing to a third party.

With Intent Level (Malice/Negligence)

The facts state explicitly that Debbie never liked Peter and began to blame him for problems she encountered. It could be asserted that these facts lend themselves to the inference that Debbie complained about Peter not because she honestly believed that he had done these things, but out of her dislike for him. If that is the case, then Debbie likely created her Facebook posts with malice.

Causes Damage to Plaintiff's Reputation

Here, although the facts do not indicate how people reacted to her Facebook posts (likes, comments, etc..) it is reasonable to infer that Debbie was likely friends with some of her neighbors online who saw her posts, which in turn could have contributed to Peter's

sense that his neighbors think he is guilty and treat him differently by not inviting him to neighbor events. If this is the case, it could be asserted that Debbie's post caused harm to Peter's reputation.

Defenses

5. The defenses to a claim of defamation available to Debbie are truth (which is an absolute defense), absolute privilege, and qualified privilege. Here, there are no facts to indicate that Debbie's posts about Peter were true. Posts on Facebook are also not eligible for absolute or qualified privilege. Therefore, there are no defenses available to Debbie based on the facts as presented. However, Debbie could assert that her online posts are protected under her First Amendment right to free speech. In this scenario, the court would need to balance the harm done to Peter with Debbie's right to free speech.

Based on the facts as presented, Peter could bring a claim against Debbie for defamation based on the posts she made about him on Facebook.

Damages

6. Peter may be able to collect special damages if he can prove that Debbie's claims and the damage to his reputation caused him emotional pain and suffering. He could also possibly collect general damages if he could prove that he was economically impacted by her claims (i.e. lost job prospects or things of that nature).

✓ Injunctions

7. If Peter wishes to stop Debbie from posting about him on Facebook, he could seek an injunction from the court. This could be either be temporary or permanent, and would mean that the court would order Debbie to stop posting about Peter.

Other Possible Torts

Portrayal In a False Light

8

Portrayal in a false light occurs when someone attributes to another things they did not say, opinions/ideals they do not hold, or actions they did not take.

Here, Debbie claimed that Peter threatened her, vandalized her home, and killed her cat. Since he was charged and the charges were dismissed because the police found no corroborating evidence. Since no corroborating evidence for any of Debbie's claims was found, it could be inferred that Peter was likely not the culprit. If that is the case, then Peter could potentially assert a claim for portrayal in a false light.

Intentional Infliction of Emotional Distress

9

IIED is intentional conduct, rising to recklessness, that foreseeably causes emotional distress.

Here, as stated above, it could be asserted that Debbie made her complaints and Facebook posts about Peter out of malice since she never liked him and blamed him for her problems. There are also no facts to indicate that there is evidence to corroborate any of her claims. If it is found that Debbie making claims against Peter without supporting facts rises to the level of recklessness, and Peter suffered emotional distress as a result, then Peter could potentially assert a claim for IIED.

Conclusion

Peter could bring claims of defamation against Debbie for both her complaints to the police and her Facebook posts. However, for the complaints made to the police, Debbie may be able to assert a defense of qualified privilege. Peter may be entitled to collect

damages if his claims are successful. Other torts implied include Portrayal in a False Light and IIED.

END OF EXAM

95

excellent
work!

Final Exam

Spring 2023

Question 2

Debbie never liked Peter. There was something rough and unfriendly about his aura. As a result, Debbie began to blame Peter for problems she encountered. She called the police to complain that Peter threatened her teenage son. "He said 'I have an arsenal and will shoot you'," she told the police.

A few years later, someone spray painted "Go Back to Israel" on her garage door. Debbie again complained to the police. Although she is not Jewish, Debbie was upset and suspected Peter. She told the responding police officer that Peter was likely the perpetrator.

Most recently, Debbie complained to the police that Peter had killed her cat by breaking its neck. The police officer arrested Peter for making a criminal threat, vandalism, and animal cruelty. The district attorney filed these charges, but soon realized there was no corroborating evidence. As a result, all the charges were dismissed.

Peter senses that all of his neighbors think he is a guilty even though the charges were dismissed. The neighbors avoid eye contact with him. He does not get invited to block parties or neighborhood events. Most problematic, Debbie has begun posting on FaceBook that Peter is a racist and a bully.

Peter comes to you asking if he has a case for defamation or any other tort. He is also very concerned about stopping Debbie from continuing to post on FaceBook.

Issue	Rule	Analysis	Concl'n	Points Allotted
Defamation	False, defamatory statement; re plaintiff; published to third party; Causes damage to reputation	Statement or opinion; statements to police officer; no parties or events, being called a racist and bully.		20/20
Libel and Slander	Libel is permanent; slander is evanescent	Reports to police spoken out loud; FaceBook is libel		10/10
Slander Per Se	Re Serious crime, business or trade; loathsome disease; chastity	Reported crimes that would led to being held in opprobrium		10/10
Damages	Special/Pecuniary General compensation; Presumed; Punitives?	Presumed damages because related to crimes. No facts that he lost money. Likely lost reputation		14/20
Other Remedies	Mandatory and Prohibitive Injunction	Take down posts claiming he is a racist and bully		5/10

Defenses (2 points)	Truth; Qualified Privilege (<u>Watt v. Longdon</u>)	Reporting a crime; perhaps true;		20/20
Other possible Torts: EXTRA CREDIT				
Intrusion Upon Seclusions	Intentional intrusion upon plaintiff's private seclusion	Not private area; P invites into the business	Not likely	0/10
False Light	Majority: not available; Minority: malicious publication that portrays another in false light	D's opinion; facts are that D may believe P threatened son, wrote racist message on garage and killed cat	Not likely	8/10
IIED	Intent or reckless, extreme and outrageous Causes severe emotional distress	No facts indicate he felt emotional distress, but possible;		10/10
Total points possible				97/90

1. Your analysis does not touch upon the relevant issue: are the statements false and defamatory?
2. Good analysis.
3. Special damages are for pecuniary losses like wages, medical expenses, et cetera. General damages are for emotional damages, loss of consortium, and pain and suffering. So, just the opposite of what you wrote. Also, defamation is

interesting because "reputation" is a "soft" injury like emotional distress, so is often described in our cases as "general damages."

4/5. In this section, I think it would be appropriate to tell the grader that you understand that opinions are protected speech and not statements of fact. You can then explore further in your subsequent Defenses section. The First Amendment does not protect false defamatory speech, but it does protect the right of a person to hold and pronounce his/her opinion. Could words like "racists" and "bully" be reasonably described as her opinion. Would a court hold, as in Carr v. Hood, that the writer is doing us a favor by giving us all a heads up on this guy? Or, if she did not believe what she was writing, is she malicious?

6. If you conclude that Debbie is false and defamatory, then would not punitive damages be appropriate for her malicious acts?

7. Procedurally, a plaintiff will need to work through the three types of levels of injunctive relieve: emergent, temporary and permanent. There are different requirements for each level of injunction and you should take the time to learn what those are before you seat for the Bar Exam. In addition, there are two difference types of injunction: mandatory and prohibitive. A mandatory injunction from the court requires the party to do something. A prohibitive injunction from the court requires the party to stop doing something. Here, Peter seeks a Prohibitive Injunction and would likely pursue that through the entire course of the pending litigation.

8. The critical thing to mention about False Light is that it is unavailable in most jurisdictions. This tort protects a plaintiff's "personal integrity" as opposed to "reputation." For most courts, that is a distinction without much of a difference.

9. IIED is conduct that is intentional or reckless, extreme and outrageous, that causes severe emotional distress. Take pains to craft clear and concise Rules.

Overall: Excellent. I was impressed by how you used the facts verbatim. That definitely helped you provide clear analysis. 95

3)

Pat (P)

Car Mfg (CM)

Dealership (D)

Strict Products Liability

Commercial manufacturers and retailers owe a strict duty of care to ensure the products placed in the stream of commerce are safe for ordinary, foreseeable use. Persons may recover under a strict liability claim for harm caused by defective products.

✓ **Proper Plaintiff--YES**

✓ At common law, privity was required in order for a plaintiff to have a products liability claim. Modernly, all end users and bystanders are proper plaintiffs.

Here, the plaintiff is P, a purchaser of a used diesel truck, that contained a defective component. P is an end user of the truck and thus is considered a proper plaintiff.

✓ **Proper Defendant--YES**

A cause of action for product defect may be brought against anyone in the chain of commerce, manufacturer, distributor, wholesaler, and retailer. (note, one time sellers do not qualify.)

Here, the defendants are the truck manufacturer (CM) and the retailer (Dealership, D). Both parties have put the truck into the stream of commerce and thus, they are proper defendants.

Breach/Defective Product

Product defect may be determined in three ways: manufacturer, design, warranty.

Manufacturer Defect--MAYBE

A manufacturer defect is a product that deviated from the intended design. The defect is unique to this product.

Here, the facts indicate a defective component part of the truck caused the trucks to catch fire. Because there are only 6 out of 500,000 trucks with this issue, so far, a manufacturer defect may be implied. There are no facts that indicate the defective part was unique in some way to the other manufactured trucks' intended design. Thus, there are not enough facts to support a theory of manufacturing defect.

Design Defect--YES, multiple

A design defect is a defect that is present in the design itself. A design defect is determined by three tests: the Consumer expectations test, the risk-utility test, and the hindsight-negligence test.

The **consumer expectation test** requires that a product be reasonably safe for the ordinary or foreseeable use by an average consumer.

Here, ordinary use by the average customer is simply parking the car indoors. If diesel trucks need to be kept warm in order to start is a reasonable that a consumer would park/store them inside of a garage. Thus, the product does not meet the minimum safety expectations for ordinary use.

The **risk-utility test** measures a product defect by assessing whether the risk of harm outweighs the utility of the product for society. A product is defective when it is

unreasonably dangerous and when there is a reasonable alternative design that is cost effective and does not impair product utility.

Here, the risk of a truck spontaneously catching fire outweighs the utility of being able to drive a truck. There is serious harm likely to occur in personal injury and property damage to any nearby structures if a truck catches fire. The CM indicated there is a replacement part that would fix the fire hazard defect. This indicates there is a reasonable alternative design available and that because the trucks continue to operate, that it does not impair the utility of the truck/product.

The **hindsight-negligence test** applies when if the manufacturer knew of the danger of the product would a reasonable person still have put the product into the stream of commerce.

1. It is unclear whether P purchased the truck from the dealership or a private person. (A private person is a one time seller and is not a proper defendant, thus would not be liable.) If P purchased the truck from the dealership is 2022, this would be *after* the CM sent notice to the dealership informing about the defective product that caught fire. No reasonable person would put a truck back into the stream of commerce knowing that it may spontaneously catch fire. If P purchased from the dealership then the product would be defective under a hindsight-negligence theory, against the dealership.

2. **Warranty Defect--NO**

A warranty defect is present when there is either inadequate warnings or the warning fails to notify the user of a harm that is not obvious to the use of the product.

Here, the CM sent notice to the dealerships and owners notifying them of the specific harm and provided direction as to how to protect from the fire better...to store the truck outside. There is no warning defect.

Causation

3. ✓ Actual (product was in the same condition as when it left the defendant's control, if moved through ordinary chain of distribution, then the defect it is presumed to have occurred during manufacturing.)

Here the truck seems to have moved through the ordinary chain of commerce, through a dealership, thus the defect is presumed to have been the actual cause of P's body catching fire and destroying his home.

✓ Proximate (foreseeable)

4. ✓ P's harm is foreseeable because the CM warned consumers about the dangers of the truck catching fire due to a product defect.

Damages

✓ P may collect for Special Damages such as present and future medical expenses and lost future wages if he misses work.

✓ P may collect for General Damages for pain and suffering because he was so badly burnt.

✓ Punitive Damages

Punitive damages are to impose a penalty upon the defendant. There are no egregious actions that rise to a level of punitive damages.

DEFENSES

5. ✓ Assumption of the risk

The dealership and CM may assert that P assumed the risk because he was notified of the serious danger and ignored the warnings.

✓ Misuse/Alteration of the product

P did not alter the truck but he did park it inside knowing of the risk of fire.

✓ Comparative Fault

The defendants may be able to lower their liability by asserting comparative fault. P knew of the risks of fire and didn't even take minimum care to park his truck outside. P's actions contributed to his own harm.

END OF EXAM

85

very good
discussion

Final Exam

Spring 2023

Question 3

Car Mfg. designed and built large, heavy-duty trucks with 6.7 liter turbodiesel engines. A component of the truck engine was an Intake Heater Grid Relay. The relays were switches that ensure a quick start in cold weather.

In 2021, Car Mfg. placed about 500,000 trucks into the stream of commerce with defective Heater Grid Relays. Throughout the world, six (6) trucks spontaneously caught on fire due to overheating from the relay. Car Mfg. sent notices to all dealerships and truck owners regarding the defect.

In 2022, Pat bought a used heavy-duty trucks with heavy-duty 6.7 liter turbodiesel engines built by Car Mfg. The defective part had not been replaced by the dealer. Pat was not warned about the defect by the salesman or the dealership. Months after his purchase, Pat received a letter from the manufacturer with notice of a recall. Car Mfg. warned all owners that 6 of the 500,000 trucks in the market had caught fire. Car mfg. recommended owners take their trucks back to the dealership for a replacement part and, in the meantime, park the truck outside.

Pat, however, felt the risk was small and he was too busy to take his truck to the dealership. Shortly thereafter, while parked in his residential garage, the truck spontaneously combusted. The fire burned down his home and burnt his arms and legs as he ran out of his house. Pat sues Car Mfg. and the dealership in strict products liability only. Discuss.

Issue	Rule	Analysis	Concl'n	Points Allotted
Strict Products Liability				
Proper P; Proper D	Proper P historically required privity, now any reasonably foreseeable end-user; Proper D is all in the chain of commerce, except service providers	Here, P has no privity, but is a reasonably foreseeable end-user; Mfg is a business that manufactures vehicles and D sells vehicles into the stream of commerce	Yes	10/10
Defect	Manufacturing Defect: product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product	Not clear, but appears produced as designed	No	10/10
	Design Defect: Consumer Expectation Test: product is in an unreasonably dangerous defective condition when it is more dangerous than would be contemplated by the ordinary consumer with ordinary knowledge common to the	Spontaneous combustion is unreasonably dangerous; risk of serious injury from burns is greater than utility of quick start in cold weather;	Yes	28/30

	community <u>Danger-Utility Test:</u> a product is defective if the danger is greater than the utility. Danger refers to likelihood, nature and severity of potential injuries; alternative designs <u>Hindsight-Negligence Test:</u> assuming the defendant knew of the defect to the product at the time of distribution, would a reasonable prudent person have placed the product into the stream of commerce	available alternatives replacement parts available		
	<u>Warning Defect:</u> fails to adequately describe the danger of the product; warnings were adequate if "clear and specific warning." <u>Hood v. Ryobi</u>	Dealer failed to warn f defect; Dealer failed to replace defective part before sale	Yes	7/10
Actual Cause	But For defect; But For lack of warning	Car Mfg. placed into stream of commerce, but Dealer failed to replace part before re-sale; Pat failed to heed warnings		8/10

Proximate Cause	Direct; Reasonably Foreseeable injury; Intervening act	Spontaneous combustion is not reasonably foreseeable, but was known danger, Dealer intervening conduct; Pat's failure to heed warning		4/10
Damages	Specials; General; Punitive Damage (<u>State Farm v. Cambell</u> ; <u>Gore v. BMW</u>)	Medical damages (Present and future); cost of house and personal property lost; pain and suffering; Car Mfg. knew of risk and tried to notice owners and dealers of defect; Dealer did not make replacement, knew of risk and placed the truck into the stream of commerce anyway		9/10
Defenses	CN	Not available in SPL cases	-	0/5
	Comparative Fault: plaintiff's own negligence, misuse or abnormal use can	Pat failed to heed warnings	Yes	9/10

	limit his recovery in apportionment			
Total points possible				85/110

1. I think the facts make it clear that Pat purchased his truck from a Dealer. The facts state: "In 2022, Pat bought a used heavy-duty trucks with heavy-duty 6.7 liter turbodiesel engines built by Car Mfg. The defective part had not been replaced by the dealer. Pat was not warned about the defect by the salesman or the dealership." The question then tells you that Pat is suing the manufacturer and the Dealership. Obviously, if he had purchased the vehicle from a private party, all of these facts would be superfluous.
2. I assume you meant to discuss Warning Defect, not Warranty. What about the Dealer's failure to warn? Is that a warning defect as against the Dealer?
3. Is the Dealer's failure to replace the defective part a But For cause? Is the Plaintiff's failure to heed the warnings a But For cause?
4. The question contemplated a discussion of the intervening acts following the manufacturers placing the truck into the stream of commerce. For instance, the Dealer's failure to warn P or failure to replace the defective product; D placing the product into the stream of commerce knowing of the defect; P not returning the vehicle for a replacement part; or P not parking the vehicle outdoors as recommended? Which of those could be deemed reasonably foreseeable and which could be deemed unforeseeable?
5. Discuss and dismiss contributory negligence in a strict product liability case on the paper, not in your head. Also, be sure to provide a clear and concise Rule for each legal issue.

Overall: very good discussion. 85