

MONTEREY COLLEGE OF LAW
TORTS FINAL EXAM
SPRING, 2021
PROFESSOR MARTIN

Instructions:

There are three (3) questions in this examination.

Questions 1 and 2 have the same fact pattern.

You will be given four (4) hours to complete the examination.

Recommended Allocation of Time: Equal Time per Question



QUESTIONS ONE & TWO

DAN, a young lawyer employed by the Morgan County District Attorney's Office, posted the following "open letter" on the lunchroom bulletin board within the District Attorney's Office:

District Attorney PETE recently hired an unqualified female Deputy D.A. only because they are having a sexual affair. They are often seen together despite both being married to other partners.

DAN's belief in the truth of the "open letter" was based on information about the academic record of PAM, a female attorney who was recently hired by D.A. PETE. DAN's work mate, DOUG, had gone to PAM's office desk while she was at lunch and saw her private computer. DOUG entered a password written on a Post-It (piece of paper) that was stuck to the computer's screen and he was able to access a file within PAM's computer marked "personal". In that file, DOUG was able to review PAM's academic transcripts and see that PAM's law school grades were very poor.

That same day, DOUG told DAN what he had seen and accurately described PAM's grades. DAN soon afterwards posted the "open letter" and he never discussed his thoughts or concerns with either PETE or PAM.

D.A. PETE had only hired one female attorney during the past year and it was PAM. While PETE and PAM were often seen together, they had never been sexually involved. The "open letter" that DAN posted remained on the bulletin board for an entire day and was seen by several attorneys and staff before it was taken down. PAM was distressed by DOUG's intrusion into her computer and DAN's resulting "open letter". Following those events, PAM took a leave of absence from work.

1. What legal claims should be asserted in a civil suit by D.A. PETE against DAN and how should the claims and defenses be resolved? Discuss.
2. What legal claims should be asserted in a civil suit by PAM against DOUG and how should the claims and defenses be resolved? Discuss.

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Monterey College Of Law
Torts Final Exam
Spring, 2021
Professor Martin

QUESTION THREE

PAUL and PEG are adult friends who agree to meet at an "Exercise Fair" at the Monterey County Fairgrounds. They are attracted to a display by DON, a California fitness celebrity who promotes and sells exercise equipment, including bicycles made by the DASH Corporation and the DINGO Corporation.

The DINGO bike is made in Australia and is a rugged trail bike. PEG pays \$800 to DON and an assembled DINGO bike is delivered to PEG's house in Pacific Grove, one week later. PEG attaches a replica license plate reading "Peg" because she wants the bike's appearance to be unique. Literature accompanying PEG's new bike states that the bike is "perfect for outdoor fitness".

The DASH X-1 bike is made in Spain and is an ultra-lightweight racing bike. PAUL pays \$3,000 to DON and an assembled DASH X-1 bike is delivered to PAUL's house in Pebble Beach, one week later. Literature accompanying PAUL's new bike warns that the DASH X-1 is made with ultra-thin metal and is not to be ridden anywhere but on a smooth pavement.

The next weekend is sunny and both PAUL and PEG go for rides on their new bicycles. Unfortunately, the following happens:

- A. An expert will testify that the frames of DINGO bikes are ordinarily strong but PEG's particular bike frame was incorrectly welded at the factory and any sudden jarring would cause the welds to separate. When PEG is riding on a Pacific Grove beach trail, her bike crosses ruts in the trail and the resulting shocks from the irregular surface cause the bike frame to collapse. PEG is thrown and breaks her left arm.
- B. An expert will testify that the frames of all DASH X-1 racing bikes are very delicate due to being made of ultra-thin metal. When PAUL is riding fast in Pebble Beach, he turns from smooth pavement onto an unpaved road and the resulting shocks from the irregular surface cause the bike frame to collapse. PAUL is thrown and breaks his right arm.

1. Advise PEG about a civil suit against DON, only discussing a cause of action based on Strict Products Liability. How should PEG's suit be resolved, including any defenses DON may assert? Discuss.

2. Advise PAUL about a civil suit against DON, only discussing a cause of action based on Strict Products Liability. How should PAUL's suit be resolved, including any defenses DON may assert? Discuss.

* * * * *

1)

1. PETE V. DAN

When Dan posted an "open letter" claiming that the District Attorney, Pete, was having an affair with Pam, a recently hired female attorney, can he be charged with the tort of defamation?

Defamation

To establish the prima facie case for defamation, there must be publication, of defamatory material, to a third party, who must perceive the communication as defamatory and understand it applies to the plaintiff, causing damages to the reputation of plaintiff without consent or privilege.

Publication

Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed. Here, Dan posted an "open letter" on the lunchroom bulletin board, a location where it can be viewed by all attorneys and employees. It is also noted that the post remained on the bulletin board for an entire day and seen by several attorneys and staff. Given that the post was viewed by several people, I believe the court would find that this is adequate publication.

Defamatory Material

A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. The allegation made by Dan in the posting claims that Pete and, impliedly, Pam, were having a sexual affair, even though they are both married to other

THIS IS A STRATEGIC QUESTION AND YOU COVERED IT BEAUTIFULLY
- VERY GOOD QUALIFICATION
- NICE WRITTEN EXPRESSION
- A GOOD UNDERSTANDING OF THE TORT PRINCIPLES!

NEED MORE

(1)
GOOD

(2)

partners. This allegation made by Dan that Pete and Pam were having an affair would be highly offensive to the reasonably prudent person. This statement made by Dan would definitely lower him in both the office, in the community, and through the eyes of his colleagues. An allegation of a sexual affair with another colleague is one of the most extreme damage to a person's reputation, especially given Pete's stature as the District Attorney.

(3) Third Party Perception

In order to establish a case for defamation, it must also be demonstrated that a third party must perceive the communication as defamatory and understand it applies to the plaintiff. There is no doubt that the third parties here, who viewed the posting, would understand the allegation to be pertaining to Pete. He was expressly named in the "open letter". Although Pam was not expressly named in the statement, any employee who viewed the bulletin board would be able to identify Pam through extrinsic facts (libel per quod). yes!

It can also be demonstrated that the "open letter" was perceived as defamatory given that it was taken down from the bulletin board, most likely due to its harmful allegations.

(4) Causation

Actual and proximate causation must also be established herein. Actual causation is used to establish a defendant's liability by determining if there is a mechanical connection between defendant's behavior and plaintiff's harm. In order to determine if there is actual causation, the "but for" test is commonly used. Actual causation can be easily met here; but for Dan's posting of the "open letter", no harm would be suffered by Pete.

Proximate causation is a policy determination used to limit a defendant's liability once actual causation has been established. Proximate causation can be established in a few

different ways. Modernly, courts will base decisions on the foreseeability of the harm. Using the test of foreseeability, it must be determined if a reasonably prudent person, in defendant's position, have foreseen the harm to the plaintiff. With the severity of the allegation of sexual affair, a reasonable person in Dan's position would most likely realize and foresee the potential to cause great harm to Pete's reputation. As such, I believe proximate causation can be established herein.

(5) Damage to Reputation

There are two forms of defamation, libel and slander. Slander is when defamatory publication is communicated orally. Libel is when defamatory publication is communicated through writing, picture, or other fixed representation to the eye. Libel is viewed as the greater wrong, and, as such, damages are presumed. In this case, since the defamatory material was in the form of a letter posted on the bulletin board, this would be classified as libel, which is defamatory on its face, or libel per se.

Given the above, it does appear that a prima facie case for defamation may be established by Pete. However, there may be defenses available to Dan, which will be analyzed below.

(6) Common Law Defenses

If the court does find defendant liable for defamation, damages will be imposed, unless defendant can successfully assert one of the following defenses. There are a number of common law defenses, including consent, truth, parody, qualified privilege, absolute privilege, and fair comment.

(A) Consent

There is no evidence that Dan had been given consent by Pete to post this information. As such, this defense will not be available to Dan.

(B) Truth

Dan has alleged that Pete and Pam are having a sexual affair. However, it is noted that they have never been sexually involved. As such, Dan will be unable to the use truth as a defense.

(C) Parody

There is no indication that the posting was meant to be a joke. In order to successfully raise this defense, no reasonably prudent person would understand it to be true. There is no evidence that any third party who viewed the post took it as a joke.

(D) Qualified Privilege

In order to assert the defense of qualified privilege, there must be a duty to communicate, whether it be legal, moral, or to protect an interest, and there must be a common interest and reciprocal duty, such as being in the same business). Dan might be able to raise the defense of qualified privilege if he can establish that he had a moral duty to provide this information and that he felt compelled to do so because they are his colleagues at the Morgan County District Attorney's Office.

(E) Absolute Privilege

Absolute privilege provides immunity from liability for defamatory statements, regardless of the circumstances. Dan does not meet the requirements to assert absolute privilege herein.

(F) Fair Comment

The defense of fair comment can be asserted if defendant can prove that the comment was an honest expression of opinion and free of malice. Based on the wording of the

posting, it does not appear that Dan was providing his opinion. In the post, it states a number of alleged facts and there is no indication that Dan was expressing his opinion. As such, he will most likely be unsuccessful in asserting this defense.

(7) Constitutional Defenses

In New York Times v. Sullivan, it was established that, per the First Amendment, the people have the right to make statements regarding public officials. A public official is a person who is elected into office, was elected into office, or is running for office. Given that Pete is a District Attorney, he can be classified as a public official.

If Dan is unsuccessful with the common law defenses, he may raise this constitutional defense alleging that Pete is a public official, given that he is the District Attorney, and therefore actual malice is required in order for him to be liable for defamation. Actual malice is defined as reckless or knowing falsity. While it is unclear if Dan, in fact, knew that this information was false, I believe Pete may be able to establish that Dan's behavior was reckless. Dan made the "open letter" only after finding out about Pam's academic record and his observation of Pete and Pam being frequently seen together. Dan acted impulsively in posting the "open letter" after just finding out about Pam's credentials. Dan also never discussed any of these allegations with Pete or Pam before posting the letter. I believe Pete will be able to rebut the constitutional defense raised by Dan in proving that Dan acted with actual malice.

Conclusion

A prima facie case for defamation may be established by Pete herein. Dan can assert a few defenses, such as qualified privilege and the public official constitutional defense. It is unlikely that Dan will succeed in the public official constitutional defense as Pete can demonstrate that Dan acted with actual malice. However, Dan may be successful in the

qualified privilege defense if he can establish that he had a moral duty to provide this information to his colleagues.

qualified privilege defense if he can establish that he had a moral duty to provide this information to his colleagues.

ANOTHER NICE PAPER
- INVASION OF PRIVACY HANDLED WELL
- I IED CONSIDERED LAST
- GOOD WRITING

2. PAM V. DOUG

BECAUSE

When Doug went through Pam's private computer and accessed files with personal information, can Pam assert a claim for Intrusion into Seclusion?

(1)

Intrusion into Seclusion

Intrusion into Seclusion is a privacy tort that is defined as one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or their private affairs or concerns, if the intrusion would be highly offensive to a reasonable person. To establish a prima facie case for intrusion into seclusion, there must be an act, done with intent, causing, intrusion into seclusion, that is highly offensive to a reasonably prudent person, injuring their peace of mind, without consent or privilege.

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Act

When Pam was at lunch, Doug went to her desk, opened her private computer using a password that he found on her desk, accessing her files marked "personal", where he went through her academic transcripts. Doug performed a number of acts in order to obtain Pam's personal information.

Intent

In order to be successful in proving her case, Pam must be able to demonstrate that Doug's actions were intentional. Given that Doug performed a number of steps to obtain her personal information, his intent can be demonstrated. He did not perform these acts

by accident; he intended to go through her personal information, which is why he waited for her to leave for lunch.

C **Causation**

See supra. Using the "but for" test, actual causation can be demonstrated herein. But for Doug's actions in accessing her personal information, Pam would not have been in distress, causing her to take a leave of absence. Proximate causation can be determined using foreseeability. It was foreseeable that by Doug gaining access to her personal computer and accessing a folder clearly marked as "personal", it was foreseeable that his actions would be an invasion of Pam's privacy, thereby causing her harm.

D **Intrusion into Seclusion**

As noted above, Doug waited for Pam to leave her office to go through her personal computer and personal files. Given that the folder itself was labeled as "personal" and he proceeded to continue accessing her private information, this element is clearly established.

E **Highly Offensive to RPP**

It is noted that Pam was distressed by Doug's intrusion into her computer. Pam was so distressed that she took a leave of absence. Doug may argue that her password was in plain view, marked with a post-it on Pam's computer screen. However, one's computer holds a great amount of personal information and documents. A reasonably prudent person would be offended if someone accessed their computer, which may hold a number of personal documents, without their consent, especially if it is locked by a password, intending to keep others out.

F **Peace of Mind**

Lastly, Pam must prove that Doug's actions caused injury to her peace of mind. As referenced above, after Doug's intrusion to her computer, Pam was in distress, causing her to take a leave of absence from work.

G Defenses

The only defenses available to Doug would be either consent or privilege. It is clear that Doug did not have consent to access her computer and her personal files. It would also be nearly impossible for Doug to prove that he had a privilege to her personal belongings. If the computer were employer's property, Doug may be able to attempt to assert this privilege. However, given that the computer was her personal device and any files contained in the computer were her personal property, Doug will be unsuccessful in asserting this defense.

Conclusion

Given the above, it is likely that Pam will be successful in her intrusion into seclusion suit.

(2) Public Disclosure of Private Facts

Another tort that Pam may attempt to file against Doug would be public disclosure of private facts. In order to establish a prima facie case for public disclosure of private facts, Pam must establish that Doug committed an act, causing, publicity to others, disclosing of her private facts, which would be highly offensive to community notions of decency, without consent, and without legitimate public interest or concern.

A Act

See supra.

b **Causation**

See supra.

c **Publicity to Others**

Doug's action must cause publicity to others. However, this does not apply to one person, but must be a group of people. Doug conveyed this information only to Dan. However, since Dan included this information in his "open letter", Pam might be able to argue that the private acts obtained from her computer was publicized to her colleagues. >

d **Disclosure of Another's Private Facts**

When Doug went through Pam's computer, he accessed her "personal" folder. In that folder, contained academic transcripts, which contained her poor grades. After viewing this information, Doug disclosed what he read/found on Pam's computer to Dan.

e **Highly Offensive**

As noted above, one's computer contains a multitude of private information and files. Any reasonable prudent person or members of the community would agree that the accessing of personal files and sharing their discovery, especially negative information, would be highly offensive as it would have an effect on your reputation. In this case, Pam's poor grades from law school were disclosed to others in the legal field.

f **Without Consent**

It is clear that Doug did not have consent to access her desk, computer, or personal files contained therein.

g **Without Legitimate Public Concern or Interest**

- ITS A "STAFFED BY PUBLIC SERVICE" ,
DOING A PUBLIC SERVICE.
DOUG SAYS HE IS "GUARDING
THE PUBLIC TRUST."

To raise this defense, Doug would have to demonstrate that the public interest outweighs Pam's embarrassment. While Pam's law school grades might be of interest to some colleagues at the District Attorney's Office, it would be difficult for Doug to assert that the public interest is so great that it outweighs Pam's distress and embarrassment.

Conclusion

If Pam is able to demonstrate that the private facts taken by Doug from her computer was publicized to others, more than only Dan, she may be successful in her suite for public disclosure of private facts.

3) Intentional Infliction of Emotional Distress

Lastly, Pam might be able to assert a claim for intentional infliction of emotional distress.

In order to establish a prima facie case for intentional infliction of emotional distress, the plaintiff must establish that there was an act, done with intent, amounting to extreme and outrageous conduct, causing, severe emotional distress, without consent or privilege.

Act

See supra.

Intent

See supra.

Amounting to Extreme and Outrageous Conduct

After Doug had hacked into Pam's computer using her password, went through her electronic files, contained in the "personal" folder, he proceeded to share the information with coworker, Dan. Dan subsequently used this information in his defamatory "open

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2)

1. PEG V. DON

When Peg purchased a DINGO bike from Don, which resulted in a crash, can she bring a lawsuit against Don for Strict Products Liability?

Strict Products Liability

In order to establish a prima facie case for Strict Products Liability, Peg must demonstrate that there was a sale, from a seller in the business of selling that product, a product, that was defective, used without a substantial amount of change, causing physical harm, to the consumer.

Sale

Peg attended the Exercise Fair, where she met Don, who sold her a DINGO bike for \$800.00.

Seller

Don is a fitness celebrity who promotes and sells exercise equipment, including bicycles made by DINGO Corporation and DASH Corporation. It appears that Don is in the business of selling exercise equipment including the company that manufactured the bike Peg had purchased from him.

Product

As noted above, Peg purchased a DINGO bike from Don. The DINGO bike is a rugged trail bike.

Defect

There are three classifications of product defect, manufacturing defects, design defects, and informational defects.

Manufacturing Defect

A manufacturing defect is when a product departs from its intended design. It is noted that an expert stated that DINGO bikes are ordinarily strong, but Peg's bike frame was incorrectly welded. The expert also noted that any sudden jarring would cause the welds to separate. Peg was riding her bike on a beach trail and when crossing the trail, the shocks caused her bike frame to collapse. Given that the expert has noted that Peg's bike was incorrectly welded, Peg may assert a manufacturing defect for her bike.

Informational Defect

In addition to the manufacturing defect, Peg may assert an informational defect. An informational defect is when there is a foreseeable risk of harm posed by the product that could have been avoided by the provision of reasonable instructions or warnings. The only literature that came with the purchased DINGO bike indicated that the bike was perfect for outdoor fitness. The information provided to Peg appears to be rather vague. Had DINGO Corporation, or Don, provided Peg with a detailed warning on use of the bike, the injury sustained by Peg may have been avoided. The company should have reasonably foreseen the different terrains that the bike may be used. Peg used the bike outdoors, which DINGO Corporation indicated as the intended use in the literature.

Used without Substantial Amount of Change

VERY
NICE
ANALYSIS

Here, it is noted that Peg did perform a modification on her bike after receiving it. Peg attached a license plate with her name on it for a unique appearance. It may be argued by Don that peg's modification affected the bike's PERFORMANCE & SAFETY BUT NO SUCH EFFECT COULD BE FORESEEN FROM THAT SLIGHT ADDITION.

Causation

Actual and proximate causation must also be established herein. Actual causation is used to establish a defendant's liability by determining if there is a mechanical connection between defendant's behavior and plaintiff's harm. In order to determine if there is actual causation, the "but for" test is commonly used. But for the defective product, Peg would not have sustained an injury to her left arm.

Proximate causation is a policy determination used to limit a defendant's liability once actual causation has been established. Proximate causation can be established in a few different ways. Modernly, courts will base decisions on the foreseeability of the harm. Using the test of foreseeability, it must be determined if a reasonably prudent person, in defendant's position, have foreseen the harm to the plaintiff. Given that the DINGO bike is classified as a "rugged trail bike", it is foreseeable that it would be used on all terrains. It should have been foreseeable to DINGO Corporation that the bike would be used in this capacity.

As such, I believe actual and proximate causation can be established herein.

Physical Harm

As noted above, Peg sustained an injury to her left arm. While she was riding the incorrectly manufactured bicycle, the shocks from riding on the trail caused the bike frame to collapse. When the bike collapsed, Peg was thrown and broke her left arm.

To Consumer

As noted above, the physical harm was sustained by Peg, who was the consumer herein.

Defenses

It appears that Peg will likely be able to assert a strict products liability claim for the defective DINGO bike. However, Don/DINGO Corporation may assert a defense that Peg should be partially responsible for the injuries resulting from the use of the DINGO bike under a comparative fault theory. Comparative negligence may be applied when the plaintiff's actions contributed to or caused the harm in connection with the product. It is noted that Peg made a modification to the bike once it was delivered. She attached a license plate to her bike.

Peg may then assert that the license plate did not have an affect on the welding that was done in manufacturing. Even though Peg did attach the license plate, there is no indication that this had an effect on the bike's structure, unless Don/DINGO Corporation has an expert that can testify otherwise.

Damages

If Peg is successful in her strict products liability claim, she may receive damages as a result of her injury. If so, she will likely be provided compensation for medical expenses incurred due to the use and collapse of the DINGO bike.

2. PAUL V. DON

When Paul purchased a DASH X-1 bike from Don, which resulted in a crash, can he bring a lawsuit against Don for Strict Products Liability?

Strict Products Liability

See supra.

Sale

Paul attended the Exercise Fair, where he met Don, who sold him a DASH X-1 bike for \$3,000.00.

Seller

Don is a fitness celebrity who promotes and sells exercise equipment, including bicycles made by DINGO Corporation and DASH Corporation. It appears that Don is in the business of selling exercise equipment including the company that manufactured the bike Paul had purchased from him.

Product


As noted above, Paul purchased the DASH X-1 bike from Don, which was manufactured by DASH Corporation. This bike was classified as an ultra-lightweight racing bike.

Defect

See supra.

Design Defect

A product's design is defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by an alternative design. Here, the expert claims that all of the DASH X-1 bikes are delicate due to being made of ultra thin metal. To establish a design defect, this may be done in a number of ways, including the Alternative Design Test. The plaintiff must be able to establish that an alternative design for the product could be designed to avoid injury. Paul, or his expert, may be able to

↑
REST
3RD


demonstrate that the metal could be improved to enhance stability and lessen their fragility.

Informational Defect

See supra.

OK
While Paul did receive literature indicating that the bike is not to be ridden anywhere but on smooth pavement, he may be able to argue that the warning was insufficient in only the book. The warning could have been placed on the bike itself, or somewhere visible to the consumer to avoid injury.

Used without Substantial Amount of Change

There is no indication that Paul made any changes or modifications to his bike before the incident.

Causation

See supra.

With regard to actual causation, but for the delicate design of the bike, Paul would not have sustained physical injury. Even if additional causes contributed to Paul's harm, such as not adhering to the instructional warning, the defective design of the bike is a substantial factor.

With regard to proximate causation, using the test of foreseeability, it should have been foreseeable by DASH Corporation that the bike would be used or come into contact with other surfaces, aside from smooth pavement.

Physical Harm

Due to the shocks from the irregular surface, the bike frame collapsed, causing Paul to be thrown from the bike, where he broke his right arm.

User/Consumer


As noted above, the bike was in use by the purchaser/consumer, Paul, at the time of the incident.

Defenses

Given that Paul was provided with literature instructing him not to use the bike on anywhere but a smooth pavement, Don/DASH Corporation may assert that Paul should be responsible for part of the injury incurred. Don/DASH Corporation may argue that Paul assumed the risk when riding on an unpaved road, rather than smooth pavement as instructed.

~~Defendant~~ may also assert that due to Paul's negligence, he should be

END OF EXAM

A PRETTY GREAT EXAM RESPONSE!
NICEY ORGANIZED
A GOOD GRASP OF SPL
GOOD CHOICE OF LANGUAGE
I'M GLAD YOU TOOK NOTES


letter' which was posted on the bulletin board. While there were other allegations in the "open letter", the personal information, in the form of academic transcripts that were accessed by Doug, led to her being described to the office as "unqualified".

Doug intentionally intruded upon Pam's private area and personal effects in an attempt to obtain information to cause harm.

Doug may argue that his conduct is not extreme and outrageous; however, the court may rule in Pam's favor on this issue.

Causation

See supra.

Severe and Emotional Distress

After the post made by Dan, as a result of Doug, claiming that Pam is unqualified in her position, she was "distressed" by Doug's intrusion into her computer. Pam was so distressed that she had to take a leave of absence from work. Doug's actions caused Pam emotional harm to the point where it is also affecting her occupation and income.

Without Consent or Privilege

There is no evidence that Doug had consent or privilege to intrude upon Pam's personal effects and use this information against her.

Conclusion

Pam may file the claim alleging intentional infliction of emotional distress. However, it is unknown if she will succeed for this tort. This will depend on whether the trier of fact will conclude if the conduct of Doug was extreme and outrageous, and whether the

emotional distress suffered by Pam is severe enough to establish the prima facie case for intentional infliction of emotional distress.

END OF EXAM

82 ~~82~~

2)

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Informational Defect

In addition to the manufacturing defect, Peg may assert an informational defect. An informational defect is when there is a foreseeable risk of harm posed by the product that could have been avoided by the provision of reasonable instructions or warnings. The only literature that came with the purchased DINGO bike indicated that the bike was perfect for outdoor fitness. The information provided to Peg appears to be rather vague. Had DINGO Corporation, or Don, provided Peg with a detailed warning on use of the bike, the injury sustained by Peg may have been avoided. The company should have reasonably foreseen the different terrains that the bike may be used. Peg used the bike outdoors, which DINGO Corporation indicated as the intended use in the literature.

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Proximate causation is a policy determination used to limit a defendant's liability once actual causation has been established. Proximate causation can be established in a few different ways. Modernly, courts will base decisions on the foreseeability of the harm. Using the test of foreseeability, it must be determined if a reasonably prudent person, in defendant's position, have foreseen the harm to the plaintiff. Given that the DINGO bike is classified as a "rugged trail bike", it is foreseeable that it would be used on all terrains. It should have been foreseeable to DINGO Corporation that the bike would be used in this capacity.

As such, I believe actual and proximate causation can be established herein.

Physical Harm

As noted above, Peg sustained an injury to her left arm. While she was riding the incorrectly manufactured bicycle, the shocks from riding on the trail caused the bike frame to collapse. When the bike collapsed, Peg was thrown and broke her left arm.

To Consumer

As noted above, the physical harm was sustained by Peg, who was the consumer herein.

Defenses

It appears that Peg will likely be able to assert a strict products liability claim for the defective DINGO bike. However, Don/DINGO Corporation may assert a defense that Peg should be partially responsible for the injuries resulting from the use of the DINGO bike under a comparative fault theory. Comparative negligence may be applied when the plaintiff's actions contributed to or caused the harm in connection with the product. It is noted that Peg made a modification to the bike once it was delivered. She attached a license plate to her bike.

Peg may then assert that the license plate did not have an affect on the welding that was done in manufacturing. Even though Peg did attach the license plate, there is no indication that this had an effect on the bike's structure, unless Don/DINGO Corporation has an expert that can testify otherwise.

Damages

If Peg is successful in her strict products liability claim, she may receive damages as a result of her injury. If so, she will likely be provided compensation for medical expenses incurred due to the use and collapse of the DINGO bike.

2. PAUL V. DON

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Strict Products Liability

See supra.

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Product

As noted above, Paul purchased the DASH X-1 bike from Don, which was manufactured by DASH Corporation. This bike was classified as an ultra-lightweight racing bike.

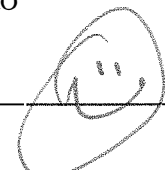
Defect

See supra.

Design Defect

A product's design is defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by an alternative design. Here, the expert claims that all of the DASH X-1 bikes are delicate due to being made of ultra thin metal. To establish a design defect, this may be done in a number of ways, including the Alternative Design Test. The plaintiff must be able to establish that an alternative design for the product could be designed to avoid injury. Paul, or his expert, may be able to

↑
REST
3RD



demonstrate that the metal could be improved to enhance stability and lessen their fragility.

Informational Defect

See supra.

OK
While Paul did receive literature indicating that the bike is not to be ridden anywhere but on smooth pavement, he may be able to argue that the warning was insufficient in only the book. The warning could have been placed on the bike itself, or somewhere visible to the consumer to avoid injury.

Used without Substantial Amount of Change

There is no indication that Paul made any changes or modifications to his bike before the incident.

Causation

See supra.

With regard to actual causation, but for the delicate design of the bike, Paul would not have sustained physical injury. Even if additional causes contributed to Paul's harm, such as not adhering to the instructional warning, the defective design of the bike is a substantial factor.

With regard to proximate causation, using the test of foreseeability, it should have been foreseeable by DASH Corporation that the bike would be used or come into contact with other surfaces, aside from smooth pavement.

Physical Harm

Due to the shocks from the irregular surface, the bike frame collapsed, causing Paul to be thrown from the bike, where he broke his right arm.

User/Consumer

As noted above, the bike was in use by the purchaser/consumer, Paul, at the time of the incident.

Defenses

Given that Paul was provided with literature instructing him not to use the bike on anywhere but a smooth pavement, Don/DASH Corporation may assert that Paul should be responsible for part of the injury incurred. Don/DASH Corporation may argue that Paul assumed the risk when riding on an unpaved road, rather than smooth pavement as instructed.

~~Defendant~~ may also assert that due to Paul's negligence, he should be

END OF EXAM

A PRETTY GREAT EXAM RESPONSE!
- NICEY ORGANIZED
- A GOOD GRASP OF SPL
- GOOD CHOICE OF LANGUAGE
- I'M GLAD YOU TOOK TRIES
☺

MONTEREY COLLEGE OF LAW
TORTS FINAL EXAM-- SPRING, 2021 -- PROFESSOR MARTIN
QUESTIONS ONE & TWO-- MODEL ANSWERS

I. PETE vs. DAN

Defamation

Introduction: When DAN's "open letter" was posted and seen by other individuals, PETE's reputation may have been harmed and PETE should utilize a cause of action based on the tort of Defamation.

1. Publication

The posting of an "open letter" on a lunchroom bulletin board displayed the letter in a conspicuous location and the facts relate that during the entire day it remained on the board, it was seen by several people. The element of Publication is clearly met.

2. Defamatory Material

The "open letter" contained information that could easily be interpreted as defamatory-- that PETE engages in extra-marital sexual behavior and that his professional conduct has been influenced by sexual behavior.

That information would make members of the community shun and avoid him, as well as hold him up to contempt and ridicule. That type of information could adversely affect PETE if he participated in an election, namely, voters could be influenced by information that PETE was unprofessional.

Importantly, the accusation of a sexual affair between PETE and PAM is false. Also, the "open letter" was a libel as it was a more permanent form of expression-- a writing. The falsity is required of defamatory material and a libel means that PETE does not need to show actual damages, such as the loss of an election -- his damages are presumed.

3. To 3rd Parties Who Know It Pertains to PETE, etc.

The "open letter" names PETE and there can be no mistake to whom it refers. Further, the individuals who saw DAN's letter would certainly be aware of PETE and the "recent" hiring of PAM. Those individuals would very likely perceive the content of the letter as defamatory as it speaks to professional conduct.

4. Common Law Defenses/Privileges

DAN may allege that a Conditional/Qualified Privilege applies to his letter, in that his actions were to protect both private and public interests. He would say he had a duty to speak about those interests.

As for private interests, all attorneys working for the District Attorney's Office have an interest in career advancement, and the hiring policies are of interest to them, as well as the character of their employer.

As for public interest, the Morgan County D.A.'s Office is a public institution, funded by public money, and those involved with that institution are accountable to the public. All members of society, including DAN, would have standing to comment about the hiring process of a public institution. Again, DAN would assert a duty to inform the public of its interests.

DAN would assert that he had an honest belief in the truth of his "open letter" and that the one-time publication was not excessive.

PETE would assert that DAN posted/published recklessly, in that he based his belief on one, unchecked source of information about PAM's grades, and that the belief was untrue. Because DAN's publication does appear to be reckless for those reasons, and because the letter was more than factual reporting with a small error-- DAN's "open letter" contained a significant falsity that was created by DAN -- the Conditional Privilege will likely fail.

5. Constitutional Privileges

PETE is likely a public figure (because he is the District Attorney of a county and he makes decisions about serious public matters), and he might be a public official (because he presumably conducted a campaign to be elected to public office). In either case, PETE would have to make out a prima facie case of Defamation and also show that the posting/publication was done with Malice, per N.Y. Times.

Malice can be defined as reckless or knowing falsity. While DAN may claim an honest belief in what he wrote, and while it would be difficult to prove that DAN deliberately lied, PETE should be able to show that DAN's publication was reckless. DAN relied on a single source of information and made a quick judgment without checking or discussing his thoughts with either PETE or PAM.

DAN may reply that, given the private nature of hiring, he did all the investigation that was possible, that his conclusion seemed logical, and that his "open letter" had important social content.

Despite DAN's post-N.Y. Times ability to discuss public figures and public officials within the scope of their duties, PETE would likely succeed in showing Malice through DAN's reckless behavior and therefore be successful in his claim for Defamation.

II. PAM vs. DOUG

Invasion of Privacy

1. Intrusion Into Seclusion

A. Intrusion

When DOUG went to PAM's office desk, then used her private computer, then found a password and entered a file marked "personal", he was well within an area of PAM's privacy/seclusion. All computer owners know that computers contain private

information -- the owner's searches and files -- and nobody should enter another's computer without permission.

B. Highly Offensive to RPP

DOUG's intrusion into PAM's computer is highly offensive because it delved into her private matters, within a location that involved an expectation of privacy, in a substantial way. Some might argue that while DOUG's single intrusion involved only the virtual world, it could also be argued that DOUG actually committed a Trespass into a private area.

A reasonable person would find DOUG's intrusion to be highly offensive because of the private nature of the facts and that reaction would be shared by any person of ordinary sensibilities-- a large majority of modern society.

C. Resulting in Injury to Peace of Mind

The facts relate that PAM was "distressed" by the intrusion and her distress was enough that it included some absence from work.

D. Defenses

There are no facts indicating that DOUG intruded into PAM's seclusion with Consent or by a Privilege. He did not act under a duty, nor due to an emergency, nor did he appear to have a legitimate interest in PAM's "personal" file, or her academic record.

Without Consent or Privilege, PAM would very likely succeed in an action against DOUG based on Intrusion Into Seclusion.

2. Public Disclosure of Private Embarrassing Facts

A. Publicity

When DOUG told DAN what he had seen in PAM's computer, he might have given publicity to another person but it is uncertain if that meets the requirement of a widespread disclosure. If "publicity" is considered to mean more than one person, PAM may have trouble with this element.

B. Disclosure of Private Embarrassing Facts

PAM's "personal" file is presumably intimate and private and the disclosure of her "very poor" grades would also likely be embarrassing and humiliating. A professional person, such as a lawyer, wants to have a reputation of being educated and accomplished and the disclosure of low grades would hurt a professional reputation.

C. Highly Offensive to Community Notions of Decency

The legal community and the general community would likely be highly offended by the disclosure of a person's private academic record. That information, PAM would argue, is similar to financial records and intimate conversations, which are usually protected from discovery and disclosure. To take that information in the manner DOUG used would create more than minor displeasure -- it would be highly offensive.

D. Privilege of Public Concern

Because PAM is a part of an important public office, DOUG could say that the information he learned was of legitimate interest to all members of the public, including DAN. That legitimate interest would invite and excuse examination and discussion.

DOUG could say that he felt a discussion with DAN about the qualifications of a fellow worker was appropriate, as long as the privilege was not abused. The facts state that DOUG only told DAN, that he discussed the information with DAN soon after finding out the information, and that his reporting was "accurate". From those facts, DOUG would say, no abuse of privilege is apparent.

DOUG could claim that his disclosure was, in fact, laudable because people holding a position of public trust must be accountable. A discussion of PAM's qualifications was socially valuable and important to both DOUG and DAN, as well as other attorneys in the D.A.'s Office. With that privilege likely in place, and with concerns about whether PAM could prove the element of "publicity", PAM would have only a small chance of success in an action based on Public Disclosure of Private Facts.

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MONTEREY COLLEGE OF LAW
TORTS FINAL EXAM-- SPRING, 2021-- PROFESSOR MARTIN
QUESTION THREE (ONE HOUR) --MODEL ANSWER

1. PEG vs. DON in Strict Products Liability

Because PEG's injury was caused by a product, she may resort to a cause of action based on SPL. There would be liability by DON if:

A. There is the sale of a product.

DON is described as a seller of exercise equipment, including bicycles, and PEG does not have to sue the foreign manufacturer of the DINGO bike. The facts clearly state that PEG paid \$800 to DON and that sale activates consumer protection.

A bicycle is a tangible product and not a service or intangible idea.

B. The product contains a defect.

While the DINGO bike has a reputation of being "rugged" and "strong", the facts also state that an expert believes PEG's bike was "incorrectly welded" at the factory. That would mean that PEG's bike contained a Manufacturing Defect.

C. The product is used without change.

PEG purchased the new product at an Exercise Fair and an assembled model was delivered to her house. PEG attached a license plate with her name on it and the issue is whether that was a "change" in the product. It cannot be said that PEG altered the structure or performance of the bike, nor did she assemble the bike, so that small addition would not amount to the type of change that would nullify SPL

D. The defect in the product causes physical harm.

Actual Causation is apparent because the facts state that the defect in the bike frame, when confronted with shocks, "causes" the frame to collapse. Proximate Causation is apparent because the facts state the DINGO bike is "perfect for outdoor fitness" and it is therefore foreseeable that the DINGO bike will be ridden on trails with ruts.

The facts also state that PEG is thrown and suffers a broken arm.

E. Without Plaintiffs contributory negligence.

There are no facts that indicate PEG misused the product. Instead, PEG was riding in an intended, foreseeable style and no contributory negligence is apparent.

F. Conclusion: PEG will be successful against DON

2. PAUL vs. DON in Strict Products Liability

Because PAUL's injury was caused by a product, he may resort to a cause of action based on SPL. There would be liability by DON if:

A. There is the sale of a product.

PAUL paid \$3,000 to DON and all other circumstances discussed above (sale & product) apply to PAUL.

B. The product contains a defect.

Unlike the Manufacturing Defect in PEG's bike, PAUL's bike appears to have a Design Defect in that "all" DASH X-1 bikes have ultra-thin metal that cannot withstand shocks from irregular surfaces.

Using a Negligence test, it can be argued that the DASH Corporation had a duty to market and sell a "safe" bike that would not collapse at speed when confronted with shocks. The collapse of PAUL's bike is the breach of that duty.

Using a Consumer Expectation test, it can be argued that the purchaser of a bike expects that product to withstand foreseeable shocks during riding.

Using a Benefit vs. Danger test, it can be argued that the benefit of an ultra-light frame is outweighed by the risk of riding a bike with a "delicate" frame.

Using an Alternate Design test, it can easily be shown that a bike with a sturdier frame would be much safer and still be a racing bike.

It may also be argued that the DASH X-1 contained an Informational Defect in that the consumer was insufficiently warned to remain on smooth pavement.

C. The product is used without change.

There are no facts that indicate PAUL modified or changed the bike. The DASH X-1 was delivered assembled.

D. The defect causes physical harm.

As above, Actual Causation is apparent because the facts state that the collapse of the bike frame results in PAUL being thrown and breaking his arm. Proximate Causation would also be met using a foreseeability test, in that PAUL is not a professional rider and it would be likely that he would ride on pavement that was not smooth.

E. Without Plaintiffs contributory negligence.

It was stated above that PAUL's riding on an "unpaved road" would be foreseeable but DON would use that behavior as misuse of the product. DON would argue that the literature accompanying the new bike "warns" about the ultra-thin metal and forbids the use of the product on anything but "smooth pavement". It is believed that PAUL did misuse the bike but the misuse would be forgiven as foreseeable.

F. Conclusion: PAUL will be successful against DON.