

MONTEREY COLLEGE OF LAW

TORTS

MIDTERM EXAM

FALL SEMESTER, 2023

Professor J. Martin

Instructions:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

QUESTION ONE

DHARMA is the 75-year old founder and leader of The Way-- a California religion that embraces love-and-peace doctrines. That religion requires its followers to give all of their personal possessions to the religion and those valuable items are stored at the altar of The Way temple.

PAULA is a 25-year old woman who is both an idealistic member of The Way religion and a member of another organization that seeks to protect the ten-toed salamander. In order to donate to the salamander organization, PAULA decides to retrieve a diamond necklace she previously donated to The Way religion, a necklace that now hangs on the temple's altar.

That night, PAULA sneaks into The Way temple through an open window and tiptoes in the dark towards the temple's altar. Just as PAULA touches the necklace, the lights go on, and DHARMA rushes towards her while raising his metal cane. "I'll bash you on the head, you little thief," says DHARMA as he swings the cane.

PAULA dodges the first swing of DHARMA's cane but is struck on the head when DHARMA swings a second time. Due to the blow, PAULA falls to the floor. "Don't move or I'll hit you harder," says DHARMA as he raises the cane again. PAULA remains on the floor while DHARMA calls the police.

Both PAULA and DHARMA now wish to begin civil litigation against the other.

- DISCUSS: 1. PAULA vs. DHARMA
2. DHARMA vs. PAULA

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QUESTION TWO

While walking home after their ninth-grade classes, cousins PATRICK and PAUL pass the DOW Auto Wreckers business -- a fenced yard that contains wrecked autos in the process of being dismantled and salvaged. The boys decide to go searching within the yard as they had previously found money and magazines in the wrecked autos.

The boys enter the yard by crawling under a mesh-wire fence that surrounds the yard and they are unnoticed by three DOW workers on duty. There are no warning signs or "Keep Out" signs posted on the fence.

After they enter the fenced yard, PATRICK and PAUL notice a wrecked van that is placed in an open area. PATRICK walks to the van and opens one of the vehicle's doors, hoping to find items inside. Suddenly, a large German Shepherd dog springs from within the van and attacks PATRICK. Unknown to the boys, the van is a pen for the guard dog during the day. After hours, the dog patrols the DOW yard.

PAUL runs in fear and escapes the dog, but PATRICK sustains deep and painful bites on his left arm and left leg. A physician will testify that PATRICK needs surgery to remove the bite scars.

PAUL sees the dog's attack on PATRICK and is terrified by the event. Afterwards, he is unable to sleep well or attend school for a month, despite taking medication for fear and anxiety.

DISCUSS 1. PATRICK vs. DOW in Negligence.

2. PAUL vs. DOW in Negligent Emotional Distress

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QUESTION THREE

During 2000, Dr. DOAK receives a permit from the town of Monterey to operate a veterinary practice -- a business that provides animal healthcare and euthanasia (the termination of life in a quick and painless manner). DOAK thereafter establishes such a business on the outskirts of Monterey. While safer poisons are available and commonly used by other vets, DOAK uses Toxical --a rare and dangerous poison-- to kill the animals. Toxical can be fatal to humans.

During the next 20 years, Monterey grows in population and suburbs are established. In 2020, PAUL purchases a suburban home very near DOAK's practice. PAUL belongs to a religion that believes all life is sacred and it opposes distress to any form of life. The death of any living being is very traumatic to PAUL.

Soon after moving to his suburban home, PAUL cannot sleep because of animal sounds that come from DOAK's business, described by PAUL as "continuing cries and howling". PAUL is horrified to see the bodies of dead pets thrown into bins and taken to a rendering plant. PAUL also complains about the smells of animal waste and chemicals.

When the bodies of dead animals are transported, fluids can leak from their bodies. An expert will testify that the roadways near DOAK's veterinary practice show traces of Toxical. A physician has tested PAUL and will testify that traces of Toxical are in his body.

PAUL says he does not feel well and is unable to continue living in his home. PAUL comes to you for advice.

- DISCUSS: 1. PAUL vs. DOAK in Nuisance.
2. PAUL vs. DOAK in Ultrahazardous Activities.

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TORTS -- FALL SEMESTER MIDTERM EXAM, 2023
QUESTION ONE -- MODEL ANSWER

PAULA vs. DHARMA

1. BATTERY -- When PAULA was struck by DHARMA's cane, her physical integrity was invaded and she will argue that a Battery took place.
 - A. PAULA must show that DHARMA did an act with intent. The volitional nature of DHARMA's act and his intent is shown by DHARMA "rushing" towards her, raising his metal cane, and speaking a threat.
 - B. PAULA must show DHARMA's act caused harmful and/or offensive contact with her body. Contact is clear from the facts which state PAULA was "struck on the head" which caused her to "fall to the floor".
 - C. Because DHARMA's striking of PAULA was a direct and immediate event with foreseeable consequences, it is near certain that DHARMA's act was the actual and probable cause PAULA's harm.
 - D. PAULA must show there was no Consent or Privilege associated with DHARMA's behavior. DHARMA will likely use the privilege of Defense of Property which allows a measure of force to defend both real and personal property.
 - (1) PAULA will likely contend that DHARMA's use of force was too great and therefore abused the privilege, in that DHARMA used a weapon (his metal cane) with hostile intent ("I'll bash you...), prior to employing words or gentle hands.
 - E. It is concluded that PAULA will succeed in an action based on Battery.

2. ASSAULT -- When PAULA was aware that DHARMA was swinging his cane, she "dodged" the first swing and will contend that an Assault resulted.
 - A. PAULA must show that DHARMA did an act with intent. The volitional nature of DHARMA's act is again shown by his deliberate actions and words.
 - B. PAULA must show that DHARMA's behavior caused her to be apprehensive of imminent harmful or offensive contact with her person. Her apprehension is shown by her dodging the first swing to avoid the blow. She can say that any reasonable person would be apprehensive of being struck by a metal cane swung by an angry man, no matter how old he may be.
 - C. Because PAULA's apprehension was a direct and immediate reaction, with foreseeable results, it is near certain that DHARMA was the actual and proximate cause of PAULA's harm.
 - D. PAULA must show that there was no consent or privilege associated with DHARMA's behavior. DHARMA will likely offer Defense of Property as a defense of his use of force and PAULA will again argue that any privilege was abused by excess force. The universal rule is that deadly force, or force like to create serious bodily injury, cannot be used to defend property. Swinging a metal cane at someone's head is very likely excessive force and in violation of the rule.
 - E. It is concluded that PAULA will succeed in an action based on Assault.

3. FALSE IMPRISONMENT -- When PAULA was on the floor, DHARMA commanded her to remain in place. PAULA will argue False Imprisonment occurred.
 - A. PAULA must show that DHARMA did an act with intent. The volitional nature of DHARMA's acts is shown by his words, "Don't move or I'll hit you again". That language clearly means to keep PAULA in a restricted location without reasonable means of escape.
 - B. PAULA must show that DHARMA's acts caused her to be confined within fixed boundaries, namely forbidden to move and/or get off the floor. She would argue that a reasonable person would comply with DHARMA's command because, even if DHARMA was 75-years old, he possessed a weapon and seemed irate.
 - C. PAULA must argue that DHARMA's acts were done without consent or privilege.
 - D. DHARMA will likely again offer the defense of Defense of Property, or possibly the Shopkeeper's privilege.
 - (1) Both of the above defenses only allow limited force and PAULA will again argue that a metal weapon swung at a person's head would be an abuse of the privileges.
 - (2) Shopkeeper's Privilege would likely be misplaced because The Way is not a retail enterprise. DHARMA might contend that the privilege could apply to a non-retail situation, even to a religious organization, but he would again have a problem excusing his use of extreme force.
 - E. It is concluded that PAULA will succeed in an action based on False Imprisonment.

DHARMA vs. PAULA

1. TRESPASS TO LAND -- When PAULA entered The Way temple, she may have invaded another's possession of real property and be responsible for a Trespass.
 - A. DHARMA must contend that PAULA did an act that was intentional, likely shown by her entry through "an open window" "at night". Also, PAULA proceeded to "sneak" and "tiptoe", all of which show her intent.
 - B. DHARMA must contend that PAULA's act caused entry to the land of another, namely The Way temple.
 - (1) While DHARMA would argue that the temple is his sovereign property, PAULA will say that she has a right to enter because she is a "member" of The Way religion, thereby removing the element of "land of another".
 - C. DHARMA must contend that PAULA's act caused the entry onto the land. Because of the almost-strict liability view of Trespass, it is contended that DHARMA will succeed with that argument.
 - D. It is concluded that DHARMA will succeed in an action based on Trespass to Land.

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TORTS -- FALL SEMESTER MIDTERM EXAM, 2023
QUESTION TWO -- MODEL ANSWER

PATRICK vs. DOW in Negligence

1. Did DOW owe PATRICK a duty of care? At common law, any duty to an entrant depended on categorizing the entrant.
 - A. The boys were likely trespassers to whom the c/l said no duty was owed.
 - (1) They were trespassers because they entered by "crawling under a mesh-wire fence", rather than through a door or gate. Further, their intent was to steal/pilfer mementos, such as money and magazines they found in the wrecked autos.
 - B. An exception to a trespasser status is if the boys were considered known trespassers. The yard had a guard dog, as well as a fence, so DOW may be aware of previous trespassers.
 - C. Another exception to a trespasser status is if PATRICK is drawn to an attractive nuisance.
 - (1) The boys were young (ninth grade = 14 years old) and likely attracted to collections of junk and salvage, as they had foraged there before.
 - D. Modernly, classification of entrants is abandoned and courts now look to modern Negligence principles.
 - (1) DOW owes a duty to act as a "reasonable junk/salvage yard". That duty would include warning of hazards within, such as large, fierce dogs.
 - (2) DOW owes a duty because the danger within the yard is strong and the burden of preventing harm would have only been sufficient warning -- signs on the fence, or an improved fence that couldn't be crawled under.
2. Was DOW's duty to PATRICK breached?
 - (1) The duty was breached when the fence wasn't strengthened, no signs were posted, and the guard dog was not on a tether.
3. Did DOW's breach cause PATRICK's harm?
 - (1) It is argued that both actual and proximate causation are present as the dog's attack was direct & immediate, with near-instant harm. Additionally, PATRICK's harm was foreseeable.
4. DOW's main defense would be that PATRICK was contributorily negligent, in that he ignored his own safety by entering a dangerous workplace.
 - (1) PATRICK's reply would involve his youth (14 years) and his lack of knowledge of the precise risk.

PAUL vs. DOW in Negligent Emotional Distress

1. Was a duty owed to PAUL to avoid psychological/emotional harm?
 - A. At c/l, no duty was owed, absent physical harm, but later cases allowed recovery if there was an impact, and even a small impact, or if Plaintiff was within a Zone of Danger.
 - (1) PAUL suffered no impact but he may be owed a duty because he was likely within a Zone of Danger as he "saw" the dog attack PATRICK.
 - B. PAUL may also be owed a duty by the modern doctrine within Dillon vs. Legg which allows recovery if Plaintiff was beyond the Zone of Danger but witnessed the "spectacle" in a sensory & contemporaneous way. Also, Plaintiff must be a "close relative" of another victim.
 - (1) PATRICK and PAUL are likely close relatives as they are cousins.
 - (2) PAUL was presumably close to the attack on PATRICK as he heard and saw the attack as it happened.
2. DOW's breach of any duty owed to PAUL likely occurred when the guard dog was allowed to make contact with the boys. The dog should have been restrained and the fence should have been posted with "Warning" signs.
3. Causation is present because "But For" the dog attack, PAUL would not have suffered emotional distress.
4. DOW's main defense would be that PAUL was contributorily negligent in that he entered a dangerous workplace.
 - (1) PAUL's reply would involve his youth (14 years) and his lack of knowledge of the precise danger.

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TORTS -- FALL SEMESTER MIDTERM EXAM, 2023
QUESTION THREE -- MODEL ANSWER

1. PAUL vs. DOAK in Nuisance
 - A. PAUL contends that sounds, sights, smells, and possibly a dangerous poison (Toxical) leave DOAK's business and enter PAUL's property. As Nuisance protects against nontrespassory invasions of another's property, PAUL may use that action.
 - B. Per Restatement 2nd, liability for Nuisance has two main requirements.
 - (1) The invasion must be substantial, in that the harm must be more than trifling or insignificant.
 - (2) The invasion must be unreasonable, in that it cannot be justified.
 - C. Are the sounds, sights, smells, and Toxical a "substantial invasion"?
 - (1) The sounds and smells are things ordinarily associated with a veterinary practice -- those are ordinarily caused by animals because they cry and howl at all hours when kept in pens. Because those invasions are frequent and would affect a reasonable person, they would likely be substantial.
 - (2) The sights of dead animals would not necessarily be frequent or continuous but PAUL claims he is "horrified".
 - (a) A "sight" (or view/spectacle) may not qualify as an invasion of land -- it may not have enough substance to be "substantial".
 - (b) PAUL's reaction may be because of extrasensitivity, due to his religious affiliation and beliefs, while other persons would not be affected.
 1. The harm caused by a Nuisance must be felt by a normal, reasonable person. The harm felt by PAUL may be particular to himself.
 - (3) The presence of Toxical (a "rare and dangerous poison") would be substantial for anyone. If PAUL can show that DOAK's materials entered his land, that invasion would certainly be substantial.
 - D. Are the sounds, sights, smells, and Toxical an "unreasonable invasion"?
 - (1) The test for unreasonableness is to ask whether the gravity of harm outweighs the utility of conduct.
 - (a) Gravity can be decided by the extent, character, suitability, and social value of the invasion. Here, DOAK provides a needed social service when he heals and euthanizes animals. It could be expected that there will be noise and smells. It is also expected that some animals will die and have to be disposed of.
 - (b) Therefore, the suitability of DOAK's enterprise was suited/appropriate for the business at the time it was established in 2000 and it was PAUL who "came to the nuisance" in 2020 when he purchased a home "very near" DOAK's practice.
 1. Further, the business was established under a permit issued by Monterey.
 - (c) Therefore, the smells, sights, and sounds invasions do not appear to be unreasonable.

- E. The presence of Toxical, both on the roadways and in PAUL's body, is likely an unreasonable invasion, as long as it is considered an interference with PAUL's use and enjoyment of his land.
- (1) Toxical is a "rare and dangerous" poison that can cause death -- a characteristic that could be significant.
 - (2) The social utility of the poison has some weight but the facts state that "safer poisons are available", commonly used by other vets. In that light, the utility of Toxical might not outweigh the gravity of Toxical.
- F. DOAK would likely offer a "coming to the nuisance" defense but it might not apply to a dangerous substance. A "locality" defense would likely not apply, due to the significant gravity of Toxical and when public safety is considered. Therefore, any invasion involving Toxical would be unreasonable.
2. PAUL vs. DOAK in Ultrahazardous Activities
- A. PAUL may also contend that DOAK should be strictly liable for foreseeable harm caused by abnormally dangerous/ultrahazardous acts, namely the use of Toxical. PAUL would allege that DOAK allowed the poison to escape his business and pollute the environment and PAUL's body.
- B. The Restatement 2nd, s. 520, provides factors that determine if an activity is abnormally dangerous. With a "dangerous" poison, there is a risk to people and a strong likelihood of harm. The danger may be lessened or eliminated because "safer poisons" are available. Toxical is described as "rare" and not commonly used by other vets. Further, the use of Toxical close to a community that has grown near, may be inappropriate due to many people now being close to the risk.
- C. Does the "community value" of DOAK's business outweigh the above factors? While vets provide useful and necessary services, the value would not outweigh the significant danger of Toxical, a potentially "fatal" poison.
- D. The Restatement 3rd, s. 20, has abbreviated the factors to be considered and finds liability if there is a foreseeable and significant risk of harm and the activity is not common. It is very likely that the escape of Toxical would cause foreseeable and significant harm, as it is a potentially fatal poison. Toxical's use is also not common as "safer" poisons are available and used by other vets. Therefore, an abnormally dangerous activity is shown by both Rest. 2nd and Rest. 3rd.
- E. While DOAK may argue that there was an independent, intervening force (such as Toxical being spread by the wind or 3rd parties), there is liability despite such interventions. If a causal connection can be shown, DOAK will be liable for exposing PAUL to Toxical.



1)

PAULA v DHARMA

VERY WELL ORGANIZED
A VERY GOOD UNDERSTANDING OF THE LAW THAT IS EXPANDED WELL
REALLY AN EXCELLENT PAPER!

Assault: Apprehension with intent of imminent harmful or offensive contact without consent.

1. Apprehension with Intent:

Dharma rushed towards Paula while raising a metal cane, Paula was apprehend by Dharma holding a cane rushing towards stating he will hurt her. Dharma said "I'll bash you on the head, you little thief" verbally showing that he had the intention to hurt her with the cane.

2. Imminent harmful or offensive contact:

Paula saw Dharma holding the cane up high coming towards her, a cane is a solid stick that could cause harm to anyone if you get hit with enough force. Paula was suprised by Dharma and must had felt scared that she was going to get by Dharma in that moment.

3. Without Consent:

Paula had broken into the temple to steal the necklace at nighttime. She was trying to not make any noise so no one could hear her. Dharma came out of nowhere holding the cane and yelling at her, clearly Paula did not consent to Dharma hitting her with the cane as she did not even expect him to be there.

Therefore, Dharma would be liable for Assault on Paula, as he apprehended her with cane and telling her that he was going to hit her without her consent.

Battery: Intentional act harmful or offensive contact without consent.

1. Intentional Act:

Dharma said "I'll bash you on the head, you little thief" verbally showing that he had the intention to hurt her with the cane. Then, Dharma swings the cane at Paula with the intent to hit her but Paula dodges the hit.

2. Harmful or Offensive contact:

After Paula dodges the first swing, Dharma swings the cane a 2nd time and hits her in the head. Due to the blow she falls to the floor. Dharma's cane made contact with Paula's head causing harm.

3. Without Consent:

Paula had broken into the temple to steal the necklace at nighttime. She was trying to not make any noise so no one could hear her. Dharma came out of nowhere holding the cane and yelling at her, clearly Paula did not consent to Dharma hitting her with the cane as she did not even expect him to be there.

False Imprisonment: Requires Confinement without consent by force or fear within fixed boundaries, with no reasonable means of escape.

1. Confinement without consent:

Dharma hits Paula in the head causing her to drop to the floor, and Dharma yells at "don't move or I'll hit you harder" as he raises the cane again. Dharma was threatening

her to use force (hit her with the cane again) if she moved from the floor (fixed boundary).

2. No escape:

Paula remained on the floor because she had been hit in the head and probably felt dizzy enough to stand up. Also, Dharma was standing in front of her with the cane, and Paula believed she was going to get hit again if she tried to move.

Defense of Property: Reasonable force can be used to defend property, but never lethal. Force should be proportional to the threat.

Dharma may argue that he was defending his property (the temple) but Dharma used a cane to hit her. A cane could be deathly weapon if you hit someone with enough force.

Here, Dharma hit Paula in the head causing her to drop to the floor which means the blow was strong enough to make her loose balance. Also, Dharma didn't ask her to leave, instead he hit her on the head which could be a severe injury.

Defense of Shopper keeper's privilege: An owner may retain someone who is believed to be a thief using reasonable force for reasonable period of time.

Here, Dharma could have retained Paula until the police arrive because she had broken into the temple with the intent to steal the necklace but he did use reasonable, and the facts do not state how long she had to wait for the police to arrive.

WAS THE "TEMPLE" THE SAME AS A "STORE" ?

DHARMA v PAULA

Trespass to Land: Requires intentional entry into someone else's property without consent.

1. Intentional Entry:

Paula snuck into the temple through an open window to get to the altar at nighttime. She had the clear intent to come into Dharma's property (the temple)

2. Without consent:

Paula had broken into the temple to steal the necklace at nighttime. She was trying to not make any noise so no one could hear her. Dharma came out of nowhere holding the cane and yelling at her, clearly Paula did not consent to Dharma hitting her with the cane as she did not even expect him to be there.

Therefore, Paula would be liable by entering to Dharma's land without his consent.

Trespass to Chattels: Requires intermeddling with market interest in the item, making the item less valuable

Here, Paula touched the necklace right before the lights went on.

→ WAS THIS AN INTERMEDDLING THAT AFFECTED AN ECONOMIC OR SOCIAL INTEREST?

2)

Patrick v. DOW in Negligence

VERY NICE ORGANIZATION
A GOOD UNDERSTANDING OF THE LAW

LOOK AT THE MODEL ANSWERS

Negligence is defined as conduct falling below the standard of care, required by law, for the protection of others against unreasonable risk of harm. Negligence encompasses a duty, a breach of duty, causation, and damages.

DUTY

1. Reasonably Prudent Person

As reasonably prudent business owners, DOW has the responsibility to take steps to ensure that children approaching the salvage yard were aware of the danger and were unable to enter the premises. Additionally, DOW has a responsibility to ensure that there are adequate warning signs which warn pedestrians of the dangers inside the salvage yard, and that their yard is not able to be easily assessable by the general public.

Therefore, because DOW is presumed to be a reasonably prudent business owner, they have a duty of care.

2. Owner/Operator

In the common law, there were three levels of duty required by owners/operators of an establishment:

1. Invitee: These were business invitations and were typically owed the highest level of care, including the protection against known and unknown hazards.
2. Licensee: There were invited social guests and were owed the next level of care, including the protection against known hazards.
3. Trespasser: Under the common law, trespassers were owed no duty of care except:

- WOOD*
- Known trespasser: A known trespasser would be a person (usually a child) who is known to the business owner to have trespassed previously. The fact pattern states the boys had previously found money and magazines inside the vehicles and therefore it is reasonable that DOW should have been aware the boys were known trespassers.
 - Attractive nuisance: This rule applies to children who would be enticed by the nature of the restricted area. Here, it is reasonable to consider a salvage yard an attractive nuisance, especially considering the boys had recovered money and magazines from the abandoned vehicles previously.
- A MORE PRECISE DEFINITION IS IN THE RESTATEMENT*

Under modern owner/operator principles, duty is determined by simple negligence principles.

Therefore, because DOW did not take reasonable steps to abate the attractive nuisance, did not identify the boys as known trespasser, and were negligent under simple negligent principles, they had a duty of care.

BREACH OF DUTY

1. Reasonably Prudent Person

DOW had the responsibility to act as a reasonably prudent business owner by taking steps to ensure that children approaching the salvage yard were aware of the danger and were unable to enter the premises.

Here, DOW failed to put warning signs or "Keep Out" signs posted on the fence. Additionally, the fact pattern indicates the boys had previously found money inside the vehicles indicating they had entered the salvage yard before. DOW should have taken reasonable steps to ensure their busies could not have been entered, such as installing video recording equipment or reinforcing the fence to ensure children could not simply

slip under it. Finally, DOW made no attempt to warn individuals of vicious guard dogs which sleep inside the vehicles during the day and patrol the premises at night.

In all of these ways, DOW breached their duty by failing to act as a reasonably prudent business owner.

2. Risk Analysis (Hand formula)

The formula developed by Learned Hand dictates that a duty is breached when an entity ignores a burden that is less than the harm multiplied by the probability of harm. Here, the probability of harm is very high as DOW utilizes large German Shepherds to guard their business at night. The chance of one of the dogs inflicting serious harm to a trespasser is very high, evidenced by Patrick sustaining deep and painful bites on his arm and left leg.

Inversely, the burden by DOW to prevent this harm would have been relatively minor and certainly less than the harm sustained by Patrick. DOW would have needed to post signage warning of the danger of dogs, as well as possibly reinforcing the fence and installing security cameras.

Therefore, because DOW did not take reasonable steps to alleviate their risk of harm, they breached their duty in conducting proper risk analysis.

CAUSATION

Causation requires both actual and proximate causation.

Actual

- But For Test: Here, an analysis can be conducted determining that, but for Patrick not entering the salvage yard and encountering the dogs, he would have not suffered injury.

- Substantial Factor: Although still a boy, Patrick was in ninth-grade and capable of understanding some level of risk. Had Patrick known of the risk of the large German Shepherds inside the vehicle, he would have likely not decided to trespass. Therefore, DOW's negligence was a substantial factor in Patrick's injury.

Proximate

To determine proximate cause, issues such as reasonableness and foreseeability need to be examined. It is reasonable to believe that children, attracted by the prospect of finding items in abandoned cars, would be tempted to enter the salvage yard. It is also reasonable to believe that failing to warn potential trespassers of the dangers of guard dogs (or not including any "keep out" signs whatsoever would further entice the trespassers to enter the property.

Because the result (the dog bite) was a natural and foreseeable cause of DOWs' behavior, they are proximately responsible for the injury to Patrick.

DAMAGES

The unintentional tort of negligence requires damages. Here, Patrick sustained deep and painful bites on his left arm and left leg. A physician will testify that Patrick needs surgery to remove the bite scars. Due to the facts laid out in the fact pattern, the requirement of damages has been met.

DEFENSES

Good

Contributory Negligence: Under the old common law, a plaintiff's case would fail if they were at all contributorily negligent with the exception of:

1. The defendant not contributing towards causation
2. The defendant was impaired (an addict)

3. Last clear chance

The modern law uses the principal of comparative negligence which assigns a percentage of liability based on the facts of the case. Here, Patrick would likely be found to be minimally negligent because there were no warning signs whatsoever, and DOW took no steps to prevent the children from entering the salvage yard.

Assumption of risk: Assumption of risk requires an individual be aware of the risk and consciously decide to proceed regardless of the risk. As Patrick was unaware of the risk (no signs were posted) this defense would most likely fail. *

Paul v. DOW in Negligent Emotional Distress

Paul saw the dog's attack on Patrick and was terrified, unable to sleep or attend school for a month despite taking medication for fear and anxiety. Although Paul ran away from the vehicle and was therefore outside of the zone of danger during the incident, he can still recover using modern principles of negligent emotional distress.

Dillon v. Legg

Under the aforementioned case, a plaintiff can recover damages despite being outside of the zone of danger if:

ZONE of DANGER

1. The plaintiff was close enough to see the events happen in real time AND
2. the plaintiff was a close family member with the victim.

Here, Although Paul ran from the vehicle, the fact pattern mentions he was still close enough to see the dog's attack on Patrick in real time. Additionally, Paul and Patrick are cousins which fulfills the second requirement. Therefore, Paul would be able to recover under a theory of negligent emotional distress.

3)

Paul v. Doak in Nuisance

*- THIS PAPER IS BETTER THAN AVERAGE ★
- CHECK YOUR ORGANIZATION AGAINST THE SUGGESTED ORGANIZATION IN THE ANSWER*



In this case, Paul has complained of an inability to sleep because of continued animal noises. Paul also feels personally horrified in seeing the bodies of the dead pets taken to a rendering plant. Finally Paul has complained about the smell of dead animals, and not feeling well.

NUISANCE (NOISE AND SIGHTS)

Nuisance is defined as an interference with the use and enjoyment of land. The nature of the interference must be substantial and extreme. *UNREASONABLE*

In determining if Doak's business constitutes a nuisance, the benefits of his business must be weighed against the drawbacks. Doak operates an animal healthcare business and provides an essential service to dying animals. Paul is an abnormally sensitive individual, due to being a member of a religion which opposes distress to any form of life. While seeing the bodies of pets being taken to a rendering plant and hearing the cries of animals may be particularly distressing to him, an ordinary person may not feel the same trauma that Paul does. Therefore, the argument that the sounds and sights being emitted from Doak's business constitute a nuisance would most likely fail.

NUISANCE (SICKNESS RESULTING FROM TOXICAL)

Here, Toxical from the dead animals has leaked from their bodies and an expert will testify that the roadways near the practice show traces of Toxical. Because Doak has been negligent in preventing his dangerous chemical of choice from leaking out into the community at large, his conduct constitutes a public nuisance. Presumably, because other roadways in the area tested positive for Toxical (which is fatal to humans), there will likely be additional people in the area who have been negatively affected by the dangerous

chemical. In order to recover damages due to a public nuisance, Paul must prove individual damages. As an expert has tested Paul and determined the chemical to be in his system, and because Paul has said he is feeling unwell, Paul will likely be able to recover under a theory of public nuisance caused by Doak.

DEFENSES TO NUISANCE

Coming to the nuisance

Here, Doak was in business in Monterey for over 20 years. Paul, as a reasonably prudent prospective homeowner, should have conducted simple market research to determine which businesses were in close proximity to his home. As Doak ran an established animal healthcare business, Paul should have been aware that he was purchasing a house right next to Doak's business. Therefore, Paul objectively chose to come to the nuisance when he purchased his residence. However, Paul was unaware of the use of a dangerous chemical and would likely have made a more informed decision had he been aware of Doak's business practices.

Live and let live

Doak runs an animal healthcare business whose purpose is to help dying animals. As such, Doak is providing an important and humane service to pets throughout the town of Monterey. While Paul is inconvenienced by the sights and noises he hears being in close proximity to the animal healthcare business, his inconveniences do not compare to the ultimate good which Doak's business set out to do. However, Doak's use of Toxical (a chemical fatal to humans) when other, less dangerous poisons are readily available, far outweighs the public good of his business.

CONCLUSION

Despite the defenses of "live and let live" and coming to the nuisance which Doak will attempt to raise, his outrageous conduct is far more egregious than the public good performed by his business. Therefore, Paul will likely be able to recover under the strict liability tort of public nuisance.

Paul v. Doak in Ultra-hazardous Activities

In this case, Paul decided to use Toxical, a rare and dangerous poison which can be fatal to humans, despite safer poisons being available and commonly used by other vets.

ULTRA-HAZARDOUS ACTIVITY

If the tortfeasor is involved in an ultra-hazardous activity, they will be held strictly liable for any resulting harms. In deciding whether or not an activity is to be considered as ultra-hazardous, there are several criteria which must be taken into account including:

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1. How common is the activity?
 2. Is a public good being accomplished?
 3. How likely is a resulting harm?

Here, the fact-pattern indicated that Toxical is a rare and dangerous poison that can be fatal to humans. Doak decided to use Toxical despite other, less dangerous, poisons being available. Therefore, the use of Toxical is an uncommon activity.

Doak is participating in a public good by running an animal healthcare business which humanely euthanizes dying animals. Although his business is good for the general public, his conduct in choosing a dangerous poison far outweighs the positive aspects of his business.

Because Doak chose a poison which is fatal to humans, a massive amount of care must be used to ensure that none of the poison is let out into the surrounding environment. The fact pattern indicates that Doak was clearly negligent in this responsibility because Toxicol leaked from the bodies of the dead animals and seeped into the surrounding roadways. Additionally, an expert tested Paul and will testify that traces of Toxicol were found in his body.

Due to the factors listed above, Doak's business will likely be considered an ultra-hazardous activity and he will be strictly liable for any damages suffered by Paul.

END OF EXAM