

MONTEREY COLLEGE OF LAW

TORTS

FINAL EXAMINATION

SPRING 2016

Professors L. Walther & J. Strong

Instructions:

There are three (3) questions in this examination.

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

Question 1

This year's Presidential election was unlike any other election in the nation's history- the country was shocked by the insults being exchanged between the candidates. At the last Presidential debate, Candidate **A** claimed that Candidate **B** was unfit to run the country because he had a close relative that was a criminal, claiming that Candidate **B**'s brother, Bob, had been convicted of statutory rape (engaging in sex with a minor). In truth, Candidate **A** had learned only that Candidate **B**'s brother, Bob had married his girlfriend when he was 18 and she was 17 year old, but wanted to tarnish Candidate **B**'s family as much as possible, so he embellished the story.

Candidate **B** was shocked by this claim about his brother, Bob, and flatly denied this allegation. Candidate **B**'s brother Bob had married his girlfriend when he was 18 years old, and she was 17. Both families had fully supported and consented to this marriage, and the two have been happily married for over twenty years. Bob has never been charged with or convicted of any crimes.

Candidate **B** then retaliated by revealing that Candidate **A**'s mother, Alice, had undergone two abortions in her lifetime. Candidate "**A**" is strongly against abortion. Candidate **A**'s mother did undergo two abortions during her lifetime, but has never revealed this information to anyone other than her health care providers. Candidate **B** learned this by wrongfully invading candidate **A**'s family medical records. Candidate **A**'s mother lives in a nursing home, is a very private person, and was horrified that this information was publicized.

This single debate was aired 75 times because of the high public demand to witness these Presidential Candidates misbehaving so badly.

Please identify every tort that Alice and Bob may assert based on what occurred at this debate, against whom they would make their claim, and analyze the likelihood of their success on each claim.

Question 2

Rachelle Jones, a 5'9" strongly-built, acclaimed black belt karate instructor, purchases her 15-year-old son Donnie a battery-powered golf cart. Donnie is employed by the Evening Times, Inc. to deliver its newspapers in the Jones' neighborhood. Although Donnie is ordinarily a capable and responsible golf cart driver, he sometimes uses poor judgment in taking friends around the neighborhood on "thrill rides." Rachelle is aware of Donnie's reckless tendencies but brushes things off to youthful excess. Under Public Safety Ordinance No. 1025, it is a misdemeanor for anyone under the age of 16 to operate a golf cart on any street.

Donnie's best friend, Sam, is dropped off after school at the Jones house by his father, Jerry, so the two friends can spend time together. Jerry is aware of Donnie's irresponsible tendencies and has told Rachelle, Donnie and Sam on several occasions that Sam is not to go on any golf cart rides with Donnie.

Later in the day, as Jerry safely approaches the Jones residence to pick up Sam, Donnie (driving) and Sam (a passenger) recklessly careen out of the Jones driveway in the golf cart and onto the street. Donnie has chosen this moment to take Sam on a "thrill ride" while delivering the newspapers at the beginning of his evening newspaper route.

In order to avoid an accident with the boys, Jerry swerves and smashes into a tree, suffering a broken nose along with other scrapes and bruises. Jerry emerges from the car bleeding from the nose and furious at Rachelle, who has watched the entire incident from the front porch.

Jerry, a diminutive 5'2" tall, confronts Rachelle in a tirade of cursing and shouting about her lax parenting and her failure to control Donnie's irresponsible behavior. He continues: "You could've gotten our boys killed! What's the hell's the matter with you?" With Jerry's minute-long tirade still in full swing, Rachelle's ire now rises. Taking a step towards Jerry she shouts: "Listen, you little twerp, if you don't shut up, I'm going to kick the shit out of you!"

In response, Jerry pulls pepper spray out of his pocket and sprays Rachelle directly in the face. Rachelle is temporarily disabled, writhes on the ground in agony, and has to be treated at the local emergency room for minor eye and respiratory injuries.

On what theory or theories might Jerry recover damages from, and what defenses may reasonably be raised, by:

- A. Donnie? Discuss.
- B. Rachelle? Discuss.
- C. Evening Times, Inc.? Discuss.

Question 3

The best present under the Christmas tree last year was the “hoverboard,” a self-balancing, handlebar-free scooter. (Imagine a Segway without the handrail attachment.) Despite the name, the hoverboard does not actually hover. The rider stands on a platform that is about 20 inches long, 15 inches wide, and has wheels on both sides. The rider is propelled forward by the motorized wheels, which are powered by a rechargeable lithium ion battery.

Adam, a college student, was the lucky recipient of a hoverboard. Over the school holiday, he spent hours riding around town on his hoverboard. He was disappointed in its maximum speed of about 10 miles per hour, but took it back to school, planning to use it to get around campus.

When Adam returned to the dorm, he showed his roommate, Brent, the hoverboard. Brent had a brainstorm; he would buy a hoverboard and the two of them would perform during the halftime show at a basketball game. Too impatient to mail order Adam’s model, and too frugal (Adam’s board cost \$30 more) Brent went to the local bicycle shop to buy a hoverboard.

Dale, the manager at the bike shop, had just read in a trade magazine that several hoverboards had caught fire, and certain manufacturers, including HB Co., were considering a voluntary recall. Nonetheless, Dale sold Brent the last hoverboard he had in stock, which indeed had been manufactured by HB Co. Dale did not mention to Brent the fire-related accidents. When Brent asked about possible ways of increasing the speed, Dale said he knew “next to nothing” about hoverboards. However, he did tell Brent to read the warning labels on the box, which stated: “Do not overcharge the board.”

Adam and Brent decided their routine would be more entertaining if the hoverboards could go faster, so they installed more powerful batteries in the boards. When changing the batteries, they noticed that Adam’s hoverboard had a thick metal cover over the battery, while the battery cover on Brent’s hoverboard, bought from Dale’s shop, was plastic and rather flimsy.

The more powerful batteries did improve the speed significantly, but during the halftime show, Brent’s board burst into flames. It appeared that the battery cover had melted, allowing the battery to emit sparks that ignited the board and Brent’s clothing. Brent suffered second-degree burns on his hands, feet, and legs.

Can Brent recover from HB Co. for strict products liability? Discuss.

Can Brent recover from Dale for negligence or misrepresentation? Discuss.

10 Points available for overall content and organization

Candidate "B"s Brother,

Bob v. Candidate "A":

Defamation (*Slander Per Se*) **35 points**

- 1) An unprivileged publication (a "publication" is something *communicated to a third party*)

Single Publication Rule: only one defamation claim if same item is published more than one time.

However, a party can be guilty of "*republishing*" a statement even if they did not write it (Bar owner who failed to wash off woman's # on bathroom wall)

- 2) "Of and concerning" the Plaintiff- *a reasonable person hearing the statement would understand the statement to be about the Plaintiff*

Which Either:

- A) Harms Plaintiff's reputation and/or
- B) Lowers the Plaintiff's esteem in the community and/or
- C) Causes 3rd parties to avoid association with the Plaintiff

*Determine if the Plaintiff is a *Private figure*, *Public Figure* or *Semi-Public Figure*, or if the subject regards a "*Public Concern*":

- If Private figure regarding private concern, P need only show *negligence*
- If Public figure, or semi-public figure, *malice must be shown* (**NY Times v. Sullivan*)
- If publication is about a "public concern" *falsity* and *fault* must be shown-
(the "fault" is *negligence* for a private person, and *malice* if public or semi-public figure)

Malice = knowledge that the statement was false when they said it, or reckless disregard for the statement's truth.

Defamation *PER SE* = on its face the statement is Defamatory

Because the relationship was legal where it occurred- Bob is not guilty of statutory rape- because he was identified as one who had committed a crime he did not commit- he will likely be successful in a slander suit, and will not have to show special damages because the content of the slander contained allegations of criminal conduct.

**The single publication rule* makes it irrelevant that the debate was aired 75 times.

Bob v. Candidate "A"

FALSE LIGHT

(20 Points)

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if :

- a) The false light would be offensive to a reasonable person
- b) Actor had knowledge of or acted in reckless disregard as to the falsity or false light

Candidate "A"s mother Alice v candidate "B"

Public Disclosure of Private Facts

(20 Points)

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- Would be highly offensive to a reasonable person
- Is not of legitimate concern to the public

Would a reasonable person find the disclosure of this information highly offensive? Yes

Is this information of public concern? Shouldn't be ...

Are all family members of political candidates considered public figures?

Candidate "B" v Candidate "C" defamation/slander- regarding infidelity. Candidate B is a public figure so malice must be shown. Was it malicious for candidate "C" not to check this fact before revealing it? Yes. Because the issue involved adultery, candidate B need not show special damages.

Candidate "A"s mother Alice v candidate "B"

Intrusion Upon Seclusion

(15 Points)

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion or another, or his private affairs, or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

**DEFAMATION FINAL EXAM 2016 POINT
ASSIGNMENT:**

Overall Content / Organization:	10	_____
Defamation (Bob v. A)	35	_____
False Light (Bob v. A)	20	_____
Public Disclosure of Private Facts	20	_____
<i>(Alice v. Candidate B)</i>		
Intrusion Upon Seclusion	15	_____
<i>(Alice v. Candidate B)</i>		

Answer Outline: Question 2

Judge C. Crandall

San Luis Obispo College of Law

Draft Answer Key

I. Jerry v. Donnie

- a. negligence per se, identification of elements **-2 points**
 - i. call of the question is to recognize that Jerry is within the class of the people to be protected by the public safety ordinance, thereby creating a rebuttable presumption of negligence—**12 points**
- b. ordinary negligence, identification of elements--**2 points**
 - i. even without rebuttable presumption, Donnie's behavior appears to be below standard of care, **2 points** ...
 - 1. call of question is whether Donnie should be held to standard of the reasonably prudent 15-year-old or instead to a reasonable adult standard since driving an electric golf cart is an adult activity -- **12 points**

II. Jerry v. Rachelle

- a. Negligence per se and negligence of Donnie must be proved (as above) – **2 points**
- b. Vicarious liability: if negligence is proved as to Donnie, important to discuss whether Rachelle, as a parent, has breached her duty to exercise reasonable care to control over Donnie given that she has: 1) ability to do so; and, 2) knows of Donnie's reckless tendencies -- **12 points**
- c. Punitive damages: poor parental supervision could be construed as *reckless* but is this enough to warrant punitive damages? **2 points**
- d. assault, identification of elements -- **2 points**
 - i. call of the question is to discuss whether factual circumstances and conditional nature of Rochelle's threat ("if you don't shut up") defeats this intentional tort or, instead, whether Rochelle's taking a step toward Jerry put him in reasonable and imminent apprehension of a battery--**12 points**

III. Jerry v. Evening Times Newspapers, Inc.

- a. Respondeat superior, a sub-specie of vicarious liability
 - i. Rule-Evening Times is responsible for the tort of its employee, Donnie, acting within the course and scope of his employment. --6 points
 - ii. call of question is to discuss in some detail the frolic and detour rule, i.e., whether Donnie's "thrill ride" is a small or major deviation from the driving route set by Evening Times for Donnie to deliver the newspapers-- 18 points
 - iii. Is Evening Times aware that Donnie is delivering newspapers with a golf cart? Does this matter? --6 points

IV. Overall form and content -- 10 points

ANSWER OUTLINE: Question 3

Monterey College of Law (Seaside Campus)
Products Liability and Misrepresentation
Spring 2016
Jeanine Strong

Brent v. HB Co.

Strict products liability. Design, warning. Total points possible: about 50.

I. Strict products liability.

1. HB Co. is the manufacturer and in the chain of distribution so a proper defendant.

2 points

2. Warning defect/failure to warn.

Adequate warning? "Do not overcharge the board."

Ambiguous, doesn't explain how overcharging can occur, doesn't state that a more powerful battery should not be used, doesn't identify risk of overheating if the board is "overcharged."

10 points

3. Design defect.

Facts suggest that HB's battery cover was defective. A and B both installed more powerful batteries in their boards, but A's battery cover did not melt. Suggests superior design (more durable materials used to make cover).

- a. Consumer expectation test

A "Consumer expectation test" permits a plaintiff to prove design defect by demonstrating that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. (Disfavored.) Is the product one that ordinary consumers can form minimum safety expectations regarding?

- b. Risk/benefit test.

"A product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors . . . that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. "In evaluating the adequacy of a product's design pursuant to this latter standard, a jury may consider, among

other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.” (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431, 435.)

- c. Alternative feasible design. (overlaps with risk/benefit; need not discuss separately to earn full points)

“A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.” (Restatement (Third) of Torts: Products Liability § 2(b). 20 points

4. No mfg. defect. A manufacturing defect exists when an item is produced (comes off assembly line) in a substandard condition. The facts here do not suggest a manufacturing defect.
5. Causation: Would the plastic cover have melted even if Brent had not replaced the battery? 5-10 points
6. Damages – physical injuries.
7. Defenses: Misuse (which can be discussed as HB’s defense or as an element of the tort). Assumption of the risk. Contributory negligence is not a defense to SPL. 5-10 points

Brent v. Dale

Brent can sue Dale for negligence and misrepresentation.

1. Negligence: (30 points)

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

The standard duty of care is that of a reasonably prudent person in similar circumstances. Under the majority view, a person or entity owes a duty of care to those foreseeably harmed by their actions.

Retailer is a proper plaintiff for a SPL action – in the chain of distribution.

Several possible breaches by Dale: not investigating the recall information, not inspecting the item and discovering its defect, not supplementing or explaining

warnings that were inadequate, giving his own inadequate warning (I know next to nothing which overlaps with misrepresentation)

Causation: Is misuse foreseeable? More powerful battery a superseding cause? But for-proximate –substantial factor.

Damages – physical injuries. Possibly bonus points for discussing the damage to the hoverboard itself. Economic loss rule and property damage recoverable.

Defenses (5-10 points of 30)

- a. Assumption of risk
- b. Contributory/comparative negligence
- c. Misuse.

2. Misrepresentation (20 points, possibly more).

Plaintiff must prove: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. (CACI No. 1900.)

Dale's duty to disclose? Partial disclosure?

Brent's reliance, justified? Causation? But for, substantial factor, proximate cause.

Grading guidelines:

Did the person recognize the critical, determine facts: warning, plastic cover, misuse, failure to disclose, partial answer

Bare points for recognizing issues. Award points in higher range for more thoughtful, detailed and complete analysis. Did the person explain why he or she reached a certain result? Give reasons for the conclusion? Or was the person conclusory? Make counter-arguments where called for?

Factors to consider: organization and following the call of the question, answering the question asked and not including irrelevant information (e.g., need not discuss warranty, because not asked), use of headings, getting to the point quickly, repeating or restating facts rather than using facts to make argument.

1)

===== Start of Answer #1 (1211 words) =====

Bob

Defamation ✓

Defamation is an unprivileged publication (communicated to a 3rd party) of and concerning the plaintiff that either 1) harms plaintiff's reputation, 2) lower's their esteem in the community, or 3) cause's 3rd parties to avoid them. Defamation can be slander or libel. Slander is a non-permanent oral communication to a 3rd party and damages are special and must be proved. Libel is a written or broadcasted more permanent form of communication and damages are presumed. Defamation can be per se (it is clear who the defamatory statement is about) or it can be per quod (less clear who defamatory statement is about and plaintiff must prove it is about them). For a private figure, the plaintiff need only prove defendant was negligent in making the statement, for a public or semi-public figure or official, the plaintiff must prove that the statement was made with malice, that is, knowing that it was false or with reckless disregard for the truth.

In this case, Candidate A (A) claimed in front of a crowd at a debate that Bob (B), Candidate B's brother, had been convicted of statutory rape when in fact he had merely married his girlfriend when he was 18 and she was 17 with full support of the family. Being known as a statutory rapist would harm B's reputation as well as lower his esteem in the community because instead of being known as a long-time married husband, B will have the reputation of a statutory rapist which consequently would lower his esteem in the community. This statement would also cause 3rd parties to avoid B because young women under 18 would likely avoid contact with him for their own reasons or even because their parents wouldn't want them near a statutory rapist.

Slander: This is slander because it is spoken to Candidate B and a crowd that is presumably at the debate

Libel: This is also libel because it is aired 75 times to the public.

Single Publication Rule: Although the statement is aired 75 times, B can only bring one case of defamation against A for the original airing.

Per Se: This will be considered per se libel and slander because A mentions B by name so it is clear who the statement is about.

Private Figure: B is the brother of a presidential candidate so it likely that he should expect to be put in the public light at certain times because of the high degree of publicity of the President and the President's family. It is therefore not likely that he will be considered a private figure, however B will argue that he is because then he will only need to prove that A was negligent in making the statement. B will not likely be considered a private figure.

Public/Semi Public Figure: A court will likely find that B is a semi-public figure (see supra) and therefore must prove that A made the statement with malice. Malice is making the statement knowing that it was false or making the statement with reckless disregard for the truth. A knew the truth of B's "statutory rape", he knew that B had only married his wife when he was 18 and she was 17 and that it was not statutory rape. All A wanted to do was tarnish the family name so he intentionally embellished. A therefore made the statement knowing it was false so the malice requirement is fulfilled.

Conclusion: A court will likely find A liable for defamation. Damages will be presumed because it is slander/libel per se and because A made a false statement about B being a criminal. When someone makes a statement saying that a person is a criminal, has an STD, is adulterous, etc. then damages are presumed.

False Light ✓

False Light is placing a person in the public view under a false light with malice and it would be highly offensive to the reasonable person. The plaintiff must prove falsity or

fault. Here, A places B in front of the public as a statutory rapist when he is in fact not a statutory rapist. This is done with malice, falsity and fault because it wasn't true and the only reason A did it was to tarnish the family reputation. Being called a statutory rapist in front of a crowd and then having it aired would be highly offensive to a reasonable person, especially since it wasn't true.

A court will likely find A liable for false light.

IIED

IIED is an intentional extreme and outrageous act by the defendant that causes the plaintiff to experience an outward manifestation of severe emotional distress. Here, A commits an extreme and outrageous act however there is no outward manifestation of severe emotional distress on B's part so it is unlikely that this A will be liable.

Alice

Intrusion Upon Seclusion ✓

Intrusion upon seclusion happens when a defendant intrudes upon the private concerns or affairs of the plaintiff and the intrusion would be highly offensive to a reasonable person. Here, Candidate B (B) intrudes by finding information that Alice (A) had only told to her health care providers and the facts state that he wrongfully does this. This would be highly offensive to a reasonable person because clearly only A and her healthcare providers were supposed to know so this is very private information. B will likely be liable here.

Public Disclosure of Private Facts ✓

This happens when a defendant widely publicizes private concerns or affairs of the plaintiff and it would be highly offensive to a reasonable person and it is not a legitimate concern of the public. Here, A tells an entire crowd at a debate that Alice has had 2 abortions when her son, Candidate A is strongly opposed to abortion. This is a very private concern and would be highly offensive to a reasonable person(see supra). The

fact that it is aired 75 times to the public is widespread publication. This information, however, may be a legitimate concern of the public because A is against abortion and the public would probably want to know if his mother had an abortoin because that could show weakness in A's stance against abortion. The public likely has a strong interest in knowing this information, however private it is, so a court may find that it was a legitimate concern of the public and B may escape liability.

Defamation

(See Supra)

Private/Public/Semi Public Figure: The facts state that Alice was a very private person. However since her son is a Presidential candidate and such candidate's family's are usually part of the limelight, Alice will be considered a semi-public figure whether she likes it or not. Therefore, malice must be proven in the statement. There is no malice in this statement because it was true, therefore Alice's defamation claim fails.

IIED

(See Supra) Here, stating in front of a crowd and then having it aired that A has had 2 abortions is an extreme and outrageous act. A was horrified when she learned of this, which is not an outward manifestation of severe emotional distress but is still a strong emotional reaction. A will argue that she was severely emotional distressed but since there is no outward showing, she will unlikely prevail in that claim.

==== End of Answer #1 =====

Question #1

93

Overall Presentation 10

10

Defamation

35

35

False Light

20

17

Public Disclosure
of Private Facts

20

17

Intrusion Upon
Seclusion

15

13

2)

===== Start of Answer #2 (1406 words) =====

Question Two

Jerry v. Donnie

Negligence

Here Jerry could sue Donnie for negligence. Negligence is present when the defendant has a duty, breaches the duty, and the breach is the cause of the plaintiff's damages.

Duty

A duty is a standard of care that is owed to a foreseeable plaintiff. The standard of care is that of a reasonably prudent person. In the case of a child, the standard is that of a reasonably prudent child of the age and education of the defendant. However there is an exception when (as is the case here) the child is involved in adult activities.

Here, Jerry was a foreseeable plaintiff since he was the father of Sam, the friend of Donnie. The standard of care owed by Donnie was that of a reasonably prudent adult driving a golf cart on the street. This would include a duty to drive responsibly and safely. It would also include a duty not to endanger a passenger (Sam.)

Breach

A breach occurs when the defendant's behaviour falls below the standard of care that he owes to another. Here, Donnie breached his duty because he did not drive like a reasonably prudent adult in his situation. He was reckless and unsafe. A reasonably prudent adult would know that you need to look for oncoming traffic before you launch into the street. Therefore, Donnie breached his duty to Sam and Jerry.

Causation

For there to be negligence the harm must be caused by the breach. There are two types of causation: actual and proximate.

Actual: this is a but for test. Here, but for Donnie's breach, there would not have been a crash. Therefore there is actual causation.

Proximate: this is a test of foreseeability. Here, Jerry could argue that it was foreseeable that a 15 year old driving like an idiot would result in running into something. In response, Donnie could argue that Jerry driving down the street was an intervening cause that broke the causal chain- that he only hit the tree because of Jerry's presence. This would not succeed however, since it is reasonably foreseeable that there would be traffic on the street during the day.

Therefore Donnie's breach was the cause of the damages.

Damages

In this case Sam suffered physical injury. The cost of the medical expenses would be available to Jerry.

Defenses

Assumption of the Risk: Donnie could argue that Sam and Jerry assumed the risk. This is present when a defendant knows the dangers that are inherent and voluntarily assumes them. Here, Jerry knew that Donnie drove like an idiot in his cart from previous encounters. He still dropped Sam off with Donnie and left them unsupervised. In response Jerry could argue that he knew of the risk, but did not assume it because he explicitly warned them all not to drive in the cart (including Donnie's mom). Therefore

this defense would not work and Jerry would succeed in his suit.

Per Se

Negligence Per Se is present when there is a statute; a violation of the statute; there is the type of harm that the statute meant to prevent; and the plaintiff is the type of plaintiff that the statute meant to protect.

Statute and violation: Here, there is a statute making it illegal for a person under 16 to drive a golf cart on a street. Donnie would argue that he did not actually make it into the street since he hit the tree straight out of his driveway. Jerry would argue that he would have gone into the street had he not swerved to hit him. Therefore the statute was probably violated.

The harm the statute meant to protect against: It seems that the statute was meant to protect people on the road from minors who do not have their drivers licenses yet. Here, Donnie would argue that hitting a tree is not the type of harm that the statute sought to address- rather that it was to keep kids without licenses out of traffic. Jerry could argue that Donnie was headed into the street when the incident occurred. Therefore the statute probably meant to protect from this type of harm.

Person the statute meant to protect: Here, Donnie could argue that the statute meant to protect other drivers since it specifically applied to the streets and said nothing about the sidewalk. He could argue that the type of injury that happened to Sam could have happened on the sidewalk too, and that because of this, riding persons were not the protected group. Jerry could argue that the statute meant to protect anyone from the risk of poor driving, and that driving on the sidewalk was already illegal anyway. Therefore Sam was probably a proper plaintiff under the statute.

Therefore Donnie would be liable for negligence per se.

Jerry v. Rachelle

Negligence on Vicarious Liability Theory

In certain cases a parent can be liable for the actions of their minor children. This is the case when there is over 25k in damages; the parent directs the child to commit the behaviour; or the parent knows about the behaviour and does nothing to stop it.

(All rule statements are referenced above)

Duty

Here Rachelle had a duty to act as a reasonably prudent parent who knew of her child's dangerous behaviour. Sam was a foreseeable plaintiff since he rode with Donnie, and Jerry was since he was Sam's dad.

Breach

Jerry would argue that Rachelle breached her duty as a reasonably prudent parent by allowing them to take rides in the cart after he warned her about what they were doing. He could also argue that she was watching it happen which showed she was ratifying the behaviour, if not encouraging it. Rachelle could argue that she did not stop them from going because it was time for Donnie to do his paper route, and that to stop him would interfere with his work. She could also argue that he did not know what Donnie would do- that she was standing on the porch to watch them leave.

Therefore there was probably not a breach so she would not be liable for negligence on a vicarious liability theory.

Assault

Assault is an act that puts the plaintiff in fear of an immediate harmful or offensive contact. Here, Rachelle stated that she would kick Jerry's ass if he did not stop yelling at her. Jerry could argue that it was reasonable for him to believe that Rachelle was going to hurt him since she was a strongly built black belt. He could argue that it was immediate because she said that she would do it right then and there. He would argue that getting your ass kicked is offensive to most people, and harmful to all of them. Rachelle could argue that the threat was not immediate because it was qualified- she would if and only if he would not stop yelling at her. She could also argue she acted in self defense since Jerry was close to her and getting himself more and more worked up. Jerry could say that she threatened to use more force than was justified, so self defense would not apply.

Therefore Rachelle would probably not be liable for assault.

Jerry v. Evening Times

Negligence on Vicarious Liability Theory

In certain cases an employer can be liable for the acts of his or her employee. This is the case when the act occurs during the scope of the employee's duties. Here, Jerry would argue that the ET should be liable for Donnie's acts since he was on his way to deliver the papers on his morning route. He could argue that driving the cart was within the scope of the duties. In response to this the ET could argue that it was a frolic and detour.

A frolic and detour is present when an employee's actions are outside of the scope of what they are employed to do. ET could say that, since he was not even of his own property, Donnie was not yet actually on the clock for ET. They could also argue that they were not the ones who provided the cart to Donnie,- that his mother did that on her own. They could argue that all the other kids use bikes, and they did not have any input or knowledge of what Donnie was doing.

100

190172

Draft Answer Key

I. Jerry v. Donnie

- a. negligence per se, identification of elements -2 points (2)
- Excell! i. call of the question is to recognize that Jerry is within the class of the people to be protected by the public safety ordinance, thereby creating a rebuttable presumption of negligence—12 points (12)
- b. ordinary negligence, identification of elements--2 points (2)
 - i. even without rebuttable presumption, Donnie's behavior appears to be below standard of care, 2 points ... (2)
 - nice! 1. call of question is whether Donnie should be held to standard of the reasonably prudent 15-year-old or instead to a reasonable adult standard since driving an electric golf cart is an adult activity -- 12 points (12)

II. Jerry v. Rachelle

- a. Negligence per se and negligence of Donnie must be proved (as above) - 2 points (2)
- Scrap! b. Vicarious liability: if negligence is proved as to Donnie, important to discuss whether Rachelle, as a parent, has breached her duty to exercise reasonable care to control over Donnie given that she has: 1) ability to do so; and, 2) knows of Donnie's reckless tendencies -- 12 points (12)
- c. Punitive damages: poor parental supervision could be construed as *reckless* but is this enough to warrant punitive damages? 2 points
- d. assault, identification of elements -- 2 points (2)
 - Excell! i. call of the question is to discuss whether factual circumstances and conditional nature of Rochelle's threat ("if you don't shut up") defeats this intentional tort or, instead, whether Rochelle's taking a step toward Jerry put him in reasonable and imminent apprehension of a battery-- 12 points (12)

III. Jerry v. Evening Times Newspapers, Inc.

a. Respondeat superior, a sub-specie of vicarious liability

- i. Rule-Evening Times is responsible for the tort of its employee, Donnie, acting within the course and scope of his employment. --6 points (6)
- ii. call of question is to discuss in some detail the frolic and detour rule, i.e., whether Donnie's "thrill ride" is a small or major deviation from the driving route set by Evening Times for Donnie to deliver the newspapers-- 18 points (18)
- iii. Is Evening Times aware that Donnie is delivering newspapers with a golf cart? Does this matter? --6 points (6)

IV. Overall form and content -- 10 points (10)

*This is a model answer.
Concise, well argued with
no fluff.*

3)

===== Start of Answer #3 (1342 words) =====

Question Three**Brent v. HB****Strict Product Liability**The Defendant

Strict Product Liability is present when the defendant puts a defective product into the stream of commerce that causes damages. SPL is limited to defendants who are manufacturers, distributors, retailers, home sellers, and lessors. Here HB was a manufacturer. Therefore he was a proper defendant for SPL. ✓

The Plaintiff

To have standing to sue for SPL the plaintiff must have been a reasonably foreseeable user of the product. In this case Brent was the one who purchased the board. Therefore ✓ he was a proper plaintiff for SPL.

Types of Defects

For SPD there are three types of defects: manufacturing defects, design defects, and ✓ warning defects.

Manufacturing defect- This is when the product was not manufactured according to design. Here, Brent would probably not argue that the board suffered a design defect, ✓ since this is usually a one in a million occurrence. Here there is evidence that the boards were catching on fire so often that HB was considering a recall. This is more

suggestive of a design defect.

Design defect- This is when the design itself is defective, which is determined by one of two tests: the consumer expectation test (the product was more dangerous than a reasonable consumer would expect) and the danger utility test (the defect in the design could have been made safer at a similar cost.) Brent would argue that a reasonable consumer would not expect for their board to catch on fire while they were riding it (or at all), and that this would be seen as too dangerous by most people. He would also argue that, if the batteries were the problem, that a different design in the battery cover would have been safer and not much more expensive. (He could point out how Adam's seemed to be spark and fireproof while his was not.)

Warning defect- This is when there was an inadequate warning. This is hard to prove since it must be shown that the harm would not have occurred but for the warning defect. Here Brent could argue that the warning was inadequate since it did not state what would happen if a person did overcharge the hoverboard. He could argue that, had they said what would have happened, he would never have overcharged the board.

Causation

Actual- To be the actual cause of the harm, the defect must have been present when it left the care of the defendant, and the defect must have actually been the cause of the harm.

In this case Brent could argue that the design defect was the actual cause since, but for HB's design, he would not have suffered burns on his hands and feet.

Brent could also argue that the warning label was the actual cause since, but for the warning label, he would not have been burned. This would be harder to prove however, as HB would argue that it was Brent's use of a different battery that caused the harm- something that was not on the label. Brent could then argue that it should have been on the label since it was reasonably foreseeable that people would want to make them

go faster.

Proximate- To be the proximate cause, the harm caused by the defect must have been foreseeable. In this case Brent could argue that the fact that he would get burned was reasonably foreseeable since it is something made for a person to ride on. HB could argue that his use of a different battery was a superseding intervening cause breaking the causal chain for both the design defect and the warning defect.

Defenses

The defendant in a suit for SPL can claim the following defenses: the plaintiff misused the product in a way that was unforeseeable and unintended; the plaintiff knew that the product was defective but used it anyway, even when there was an available alternative; the plaintiff modified the product in a way that was unforeseeable.

Misuse and Modification- Here HB could argue that Brent made a modification that was unintended and unforeseeable. They could say that if they intended the boards to use different batteries that they would have manufactured them for sale on their own. They could also say it was not foreseeable since most people aren't able to come up with their own batteries designs. Brent could argue that if it wasn't intended that they should have warned about it. He would also argue that it is foreseeable that anytime you sell a product marketed towards teenage boys it can be expected that they will try to make it go faster.

Damages

A plaintiff can collect compensatory damages for property loss or personal injury. They can collect punitive damages with a showing of malice. In this case Brent could recover for his medical injuries and the price of the board. However, since HB had put out a bulletin warning about the dangers, Brent would not have a good claim that they acted with malice. This would limit his damages to compensatory ones.

Conclusion

Therefore Brent would succeed in his suit for SPL and would collect compensatory damages for property loss and personal injury.

Brent v. Dale

Intentional Misrepresentation

Intentional misrepresentation is present when the defendant makes a misrepresentation to deceive about a material fact; the misrepresentation is reasonably relied on; and the reliance leads to damages. ✓

Misrepresentation

A misrepresentation can be an affirmative statement or an omission. Here Brent could argue that Dale did not tell him about the boards catching fire because he wanted to make a sale before they got recalled. He could argue that Dale made an omission. ✓
Therefore there was a misrepresentation.

use specific facts to make points

Deceit

Deceit is present when the defendant attempts to induce reliance based on something that is not accurate. Here Brent could argue that the omission was meant to induce Brent to purchase the board. Therefore there was an intent to deceive.

Material Fact

A fact is material if a reasonable person would find it to be so, or if the defendant knows that the fact is material to the plaintiff making the purchase. Here Brent could argue that

an issue with something catching on fire would be something that any reasonable person would find material. In addition to this it seemed that the fact would be material to Brent as an individual since he was inquiring about making it go faster. Therefore the fact was material. ✓

Reasonable Reliance

A statement is reasonably relied on if it is one that would move a reasonable person to action. Brent would argue that information coming from a manager would be reliable to a reasonable person, and that it would move them to rely. Therefore there was reasonable reliance.

what info? what omitted?

Damages

Damages for misrepresentation are compensatory and punitive. In this case Brent could recover for the price of the hoverboard, and the costs of his medical expenses, from Dale. He could make a good argument that Dale was reckless, and that he should get punitive damages as well.

Negligent Product Liability (?? the exam just says "negligence" but I am assuming based on the context it is referring to Product Liability Neg., not neg. misrep. or regular neg.)

Duty

Here Dale had a duty to act as a reasonably prudent store manager. He had a duty to inspect, discover, and fix any issues with the products he sold.

Breach

Here Dale breached this duty when he failed to tell Brent about the discovery regarding

the hoverboards, and failed to tell them that they could be recalled. This was a failure of his duty to remedy the problem he knew about- something that a reasonably prudent manager would do.

Causation

But for Dale's breach there would have been no damages to Brent. It was also foreseeable that Brent would be injured by a board that Dale knew could catch fire.

Damages

Damages for negligence PL are compensatory. In this case Brent could recover for the price of the hoverboard from Dale, and the costs for his injuries.

Out of time but I like Torts!

BYE :-)

=====
===== End of Answer #3 =====

END OF EXAM

The best present under the Christmas tree last year was the “hoverboard,” a self-balancing, handlebar-free scooter. (Imagine a Segway without the handrail attachment.) Despite the name, the hoverboard does not actually hover. The rider stands on a platform that is about 20 inches long, 15 inches wide, and has wheels on both sides. The rider is propelled forward by the motorized wheels, which are powered by a rechargeable lithium ion battery.

Adam, a college student, was the lucky recipient of a hoverboard. Over the school holiday, he spent hours riding around town on his hoverboard. He was disappointed in its maximum speed of about 10 miles per hour, but took it back to school, planning to use it to get around campus.

When Adam returned to the dorm, he showed his roommate, Brent, the hoverboard. Brent had a brainstorm; he would buy a hoverboard and the two of them would perform during the halftime show at a basketball game. Too impatient to mail order Adam’s model, and too frugal (Adam’s board cost \$30 more) Brent went to the local bicycle shop to buy a hoverboard.

Dale, the manager at the bike shop, had just read in a trade magazine that several hoverboards had caught fire, and certain manufacturers, including HB Co., were considering a voluntary recall. Nonetheless, Dale sold Brent the last hoverboard he had in stock, which indeed had been manufactured by HB Co. Dale did not mention to Brent the fire-related accidents. When Brent asked about possible ways of increasing the speed, Dale said he knew “next to nothing” about hoverboards. However, he did tell Brent to read the warning labels on the box, which stated: “Do not overcharge the board.”

Adam and Brent decided their routine would be more entertaining if the hoverboards could go faster, so they installed more powerful batteries in the boards. When changing the batteries, they noticed that Adam’s hoverboard had a thick metal cover over the battery, while the battery cover on Brent’s hoverboard, bought from Dale’s shop, was plastic and rather flimsy.

The more powerful batteries did improve the speed significantly, but during the halftime show, Brent’s board burst into flames. It appeared that the battery cover had melted, allowing the battery to emit sparks that ignited the board and Brent’s clothing. Brent suffered second-degree burns on his hands, feet, and legs.

Can Brent recover from HB Co. for strict products liability? Discuss.

Can Brent recover from Dale for negligence or misrepresentation? Discuss.

ANSWER OUTLINE:

Brent v. HB Co.

Strict products liability (50 points)

1. HB Co. is the manufacturer and in the chain of distribution so a proper defendant. 2 points

2. Warning defect/failure to warn.

Adequate warning? "Do not overcharge the board."

Ambiguous, doesn't explain how overcharging can occur, doesn't state that a more powerful battery should not be used, doesn't identify risk of overheating (fire) if the board is "overcharged." 10 points

3. Design defect.

- a. Consumer expectation test

Did product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner? (Disfavored.) Is the product one that ordinary consumers can form minimum safety expectations regarding? 5 points

- b. Risk/benefit test.

Did the benefits of the challenged design outweigh the risk of danger inherent in such design. Relevant factors include the gravity of the danger, the likelihood of danger, the mechanical feasibility and costs of a safer alternative design, the financial cost of an improved design. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431, 435.)

- c. Alternative feasible design. (overlaps with risk/benefit; need not discuss separately to earn full points)

Key facts: metal cover over the battery costs \$30 more, is feasible, and catching fire is a potentially very dangerous. Risk of plastic cover (fire) outweighs benefit (lower cost). 15 points

4. No mfg. defect. A manufacturing defect exists when an item is produced (comes off assembly line) in a substandard condition. The facts here do not suggest a manufacturing defect. 2 points

5. Causation: Would the plastic cover have melted even if Brent had not replaced the battery? Unknown, but significant that Adam's hoverboard (with a metal battery cover) did not catch fire. 5-10 points

6. Damages – physical injuries. 2 points
7. Defenses: Misuse (which can be discussed as HB’s defense or as an element of the tort).
Assumption of the risk. Contributory negligence is not a defense to SPL.

10 points

Brent v. Dale

Brent can sue Dale for (1) negligence and (2) misrepresentation. (No points for spotting issues since they are given.)

1. Negligence: (30 points)

Under a negligence action based on products liability, a plaintiff must allege that there was a (1) duty of care, (2) that was breached, (3) the breach was the actual and proximate cause, of (4) harm suffered. 5 points

The standard duty of care is that of a reasonably prudent person in similar circumstances. Under the majority view, a person or entity owes a duty of care to those foreseeably harmed by their actions. Retailer is a proper plaintiff for a SPL action – in the chain of distribution.

Several possible breaches by Dale: not investigating the recall information, not inspecting the item and discovering its defect, not supplementing or explaining warnings that were inadequate, giving his own inadequate (and misleading) warning 10 points

Causation: Is misuse foreseeable? Installing more powerful battery a superseding cause? But for/proximate/substantial factor. 5-10 points

Damages – physical injuries. Possibly bonus points for discussing the damage to the hoverboard itself. Economic loss rule and property damage recoverable. 2-5 points

Defenses 5-10 points

- a. Assumption of risk
- b. Contributory/comparative negligence
- c. Misuse.

2. Misrepresentation (20-30 points)

Intentional misrepresentation. Plaintiff must prove: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. (CACI No. 1900.)

Negligent misrepresentation. (1) a duty to give correct information; (2) knowledge on the part of the defendant that the information concerns a serious matter; (3) knowledge on the part of the defendant that the other person will rely and act on that information; (4) an awareness by the defendant that false or erroneous information will cause injury to the other person; and, (5) a relationship between the parties which rises to a level that the party to whom the information is given has the right to rely on the correctness of that information.

Dale's duty to disclose? Partial disclosure? A half-truth, or a statement that is misleading because it is incomplete or because it implies facts, may be as misleading as a statement that is wholly false.

Key facts: Brent told Dale he wanted to make the board go faster; Dale had read about dangers; knew HB was considering recall; failed to warn or inform; may have known warning on box was inadequate, may have known that "overcharge" could include installing more powerful batteries, saying he knew "next to nothing" may have been a partial truth that was misleading.

Brent's reliance justified? Possibly yes, because (1) he told Dale he wanted to make it go faster and (2) "do not overcharge" may ambiguous and in any event doesn't state risk (fire).

Causation? But for, substantial factor, proximate cause.

Defenses: Assumption of risk/contrib/cmpar/misuse.

Up to 10 points for organization. Bare points for answers that do not discuss key facts.