

KERN COUNTY COLLEGE OF LAW  
TORTS FINAL EXAMINATION  
SPRING 2022  
PROF. J. VLAHOS

General Instructions:  
Answer Three (3) Essay Questions  
Total Time Allotted: Three (3) Hours

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QUESTION 1

Growing up, Perry was the victim of pervasive child abuse at the hands of his father, a wealthy, nationally-known business man. When Perry was 16, his father was finally brought to justice, and the trial of the abuse allegations was intimately covered by the news media. Perry's father was ultimately found guilty and sentenced to 10 years in prison for the abuse. Twenty years later, Darma, a budding author, wrote a book about, what she called the child-abuse pandemic. The book, entitled "Hear Them Cry" included a separate chapter about Perry's abuse and his father's trial, in which Perry was identified by his full name, the information compiled from publicly available records, as well as interviews Darma had taken of Perry's old and current friends and acquaintances. Additionally, the chapter included details about Perry's current life—his marital status, what he does for a living, and that he has two children. While the chapter generally included information that was correct, it did include a direct quote from Perry's best friend from childhood—Drew—that, because of the abuse he had suffered, "Perry just had a hard time with authority. He was really promiscuous with girls and got himself into a bunch of trouble with the law, even getting arrested twice. It was his way of taking control of his life." In fact, Perry had never had a girlfriend or been with anyone until he met and married his wife, and Perry had never been in trouble with the law. As a result of the publication of the book, Perry has suffered emotional stress and anxiety, but has not otherwise suffered any monetary damages. When Perry's wife tells Perry about the book, he immediately seeks you out—his attorney—to determine what actions he could take against Darma, as well as his old childhood pal Drew.

Discuss the possible actions against Darma and Drew, as well as the likelihood that Perry would succeed against each defendant.

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## QUESTION 2

Due to the latest Covid-19 variant, the world is once again on lock-down, and Jason has decided to engage in new and exciting outdoor activities. He has therefore decided to purchase an off-road ATV—the Hippo—from a local off-road vehicle retailer (Hippos-for-Life), which in turn purchased the vehicle wholesale from the manufacturer (Nile). Nile had advertised the Hippo heavily on TV, its commercials generally showing the vehicle being used in off-road settings such as sand dunes and mountainous areas. The Hippo is designed to seat two individuals and contains seatbelts, but no doors.

Excited to take the Hippo on its maiden ride, Jason and his best friend, Payton, plan a weekend camping trip to the desert. On their first day of the camping trip, Jason and Payton take the Hippo for a spin with Jason driving the vehicle, while Payton is in the passenger seat. Jason takes the Hippo over sand dunes of various sizes, increasing the speed and even getting some air as he maneuvers the dunes. Unfortunately, as Jason drives up one of the dunes, the Hippo tips to its side and rolls over onto its passenger side, crushing Payton's leg, which has slid out of the vehicle during the roll due to the lack of doors. Payton is severely injured, requiring several surgeries to repair his crushed leg.

Payton has come to you to determine whether he has an actionable products liability claim against Nile and Hippos-for-Life. Discuss.

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### QUESTION 3

Delta University is well-known for its track-and-field program, producing some of the finest runners in the university sporting circuit. Delta University students are competitive athletes who are used to being the best.

A couple of weekends ago, Delta hosted the National University Track-and-Field Championships, in which schools from around the country competed. During one of the 100 meter sprinting events, Damien, arguably the top sprinter from Delta University, was threatened to be overtaken by Phil, a student from a different university. To prevent his loss, Damien abruptly swung his arm out and toward Phil, who was hit in the face at full speed, tripped, stumbled, and collapsed to the ground, hitting his head. As a result of the incident, Phil went into cardiac arrest. It is typical for Universities with track-and-field programs to have defibrillators—a device that mechanically shocks the heart in an effort to get it to start beating properly— available for use in an emergency. However, unlike many of the other universities well-known for their track-and-field programs, Delta University did not have a defibrillator in the track arena or anywhere on its campus. Sporting officials began doing manual chest compressions, and were ultimately able to start Phil's heart again. Unfortunately, too much time had passed and the severe lack of oxygen to Phil's brain has resulted in permanent and irreversible brain damage.

What claims, if any, can Phil bring against Delta University and Damien, and what is the likely outcome of each claim? Discuss.

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NO Answer Outline provided by Prof. Vlahos.

85

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**1. Perry v. Darma**

**Invasion of Privacy**

There are four actions for invasion of privacy:

1. Intrusion upon plaintiff's seclusion: the act of prying or intruding into the plaintiff's business that a reasonable person would find highly offensive.

Here, Perry may argue that Darma intruded and pried into Perry's life as a victim of egregious child abuse at the hands of his father. He will argue that Darma had no authority to publish something pertaining to the abuse he suffered and the life he currently lives. Darma will argue that the information was all public record and she therefore wasn't prying or intruding into Perry's life.

It is likely that a court will not find Darma liable for this action, as the information was public record.

2. Public disclosure of private or embarrassing facts about the plaintiff: the publication of a fact that is private or embarrassing to the public that a reasonable person would find highly offensive.

Here, Perry will argue that his right to privacy was violated because Darma intruded upon something he holds as private, i.e., being the victim of egregious abuse at the hands of his father. Perry will argue that because he was a minor, and because he was a victim of a violent crime, his name was not published in any news coverage of the trial. He will further argue that because his name was not stated in any news media and he was only identified in court records, his identity as an abuse victim was something that was held private. He will argue that Darma pried or intruded into his personal life, into something he held private, by identifying him as the victim in the chapter about his father. Darma will argue that all of the information was public record and readily available to anyone who attempted to retrieve it, and therefore she should not be liable for an invasion of privacy claim. She will also argue that this was a newsworthy event of public interest.

It is likely Perry would succeed in this action and Darma would be liable.

3. False light: publication of a false statement to the public. <sup>highly offensive</sup> Actual malice is necessary for the publication of a statement of public interest. Actual malice requires knowledge that the information is false or reckless disregard to the truth or falsity of a statement.

Here, Perry will argue that the inclusion of Drew's statement, which was truthful in part and false pertaining to his arrest record and sexual promiscuity, was an invasion of privacy and was included with actual malice. He will argue that Darma did not do her due diligence in fact-checking the accuracy of the arrest record. This could have been easily corrected had she checked Perry's arrest record.

It is likely that Darma will be liable for false light.

4. Appropriation of likeness or name for commercial benefit involves the misappropriation of one's name or likeness for financial benefit.

This is not a relevant cause of action.

### Defamation

/ Defamation occurs when a defendant publishes information that injures the plaintiff's reputation. The elements for common law defamation, a strict liability tort, are: (1) defamatory language (2) of or concerning the plaintiff, (3) publication to a third party who understands the information, and (4) damage to reputation. The constitutional analysis of defamation relates to public figures, and adds to elements to the defamation analysis: falsity and fault (actual malice).

Here, it can be argued that Perry was a public figure because he was the subject of a public child abuse trial, wherein he was the victim. The trial was intimately covered by the news. Perry may be considered a public figure because the trial was a newsworthy event of public interest. Perry will argue that he was not a public figure, as he was the victim of a crime and was a minor, which would exclude his name from being mentioned in the press at the time of the trial. However, because Darma included Perry's full name and information compiled from public records, it is likely that Perry would be considered a public figure. This was a trial and now a book that has garnered public interest and is newsworthy. Therefore, Perry

would have to prove that he was defamed as a public figure, which adds the elements of falsity and fault to the case. This also includes actual malice.

### 1. defamatory language

A defamatory statement is one that is injurious to the plaintiff's reputation. A defamatory statement can either be stated libelously or slanderously.

### Libel v. slander

Libel is the written or permanent communication of a defamatory statement. Slander is an orally uttered or spoken defamatory statement. Libelous defamation assumes that special damages are proven, i.e., hard costs incurred as a result of the libel. For allegations of slander, special damages have to be proven unless the statements are related to a crime, loathsome disease, unchastity, or dishonesty in business.

Here, because the information was published in a book, the defamation claim will be analyzed under libel.

### Libel per se v. libel per quod

Libel per se is libel that is so injurious on its face that special damages are presumed. Libel per quod is libel whereby the plaintiff must prove the statement through extrinsic facts introduced by inducement and proven by innuendo. This is typically a colloquium, whereby a statement is made that does not directly name the plaintiff, and the plaintiff must prove through extrinsic facts that the statement was about him. A reasonable person must understand that the statement is about the plaintiff.

Here, the plaintiff will argue this was libel per se, as he was directly named in the book. His name, information from the trial, and detail about his current life were included in the book. It is obvious that a person would be able to identify that Perry is the subject of the book, as it names him directly and uses facts from the trial and from his current life to identify him. However, the facts stipulate that Perry did not suffer any monetary damages as a result of the book's publication.

While this would be considered a libel per se case, because special damages would ordinarily be presumed, this element fails, because Perry did not suffer any special damages as a result of the defamatory statement. 7

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2. Of or concerning the plaintiff

A reasonable person must understand that the statement is about the plaintiff.

Here, the plaintiff will argue this he was directly named in the book. His name, information from the trial, and detail about his current life were included in the book. It is obvious that a person would be able to identify that Perry is the subject of the book, as it names him directly and uses facts from the trial and from his current life to identify him.

A reasonable person would be able to identify that the chapter about Perry's abuse was in fact about Perry.

3. Publication

Defamation requires publication to a third party who would reasonably know it was about the plaintiff.

Here, Darma published a book in which an entire chapter was dedicated to the trial of Perry's father. A reader, a third party, who knew about Perry's father's trial, knew Perry, or even knew Perry's family would be able to understand that the chapter was about Perry.

The publication of the book constituted a publication to a third party.

4. Damage to reputation

In order to establish a prima facie case for publication, a plaintiff must establish that there was damage to his or her reputation through special damages. Special damages are hard costs incurred as a result of the defamatory statement. Hard costs can include loss of business or any economic loss that resulted from the defamation. If special damages are proven, then a plaintiff can argue for and recover general damages. General damages are emotional distress damages.

Here, as argued under the defamatory statement element, Perry did not suffer special damages as a result of the publication. In order to recover for general damages, the plaintiff must prove special damages. Perry was unable to prove that he suffered any monetary damages as a result of the publication. Perry did suffer emotional stress and anxiety as a

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libel per se → presumed damages

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result of the publication. Had Perry proven that he suffered economic loss (special damages) as a result of the publication, he could have recovered for his emotional distress claim.

This element fails, as Perry cannot recover special damages. Had he proven he suffered special damages, it is likely Perry could recover for general (emotional distress) damages.

### ***Additional elements for constitutional analysis of public figures***

#### 5. Falsity + fault (actual malice)

In order for a public figure to recover for defamation, the plaintiff must prove that the defendant acted with actual malice. Actual malice occurs when the defendant knowingly publishes false information or recklessly disregards the truth or falsity of a statement made.

Here, Perry may argue that the inclusion of Drew's statement regarding Perry's sexual promiscuity and his arrest record were false and published in the book with actual malice. Arrest records are public record and can easily be proven true or false. Darma will argue that there was no actual malice as she was simply publishing the statement of an old friend of Perry, adding context and additional information about the effects of the abuse. Darma will argue that she had no knowledge that the information was false.

It is likely a court would side with the defense and would not find Darma acted with actual malice.

Ultimately, Perry's argument that Darma's book defamed him would fail. He would not be able to prove that the information presented in the book caused special damages. He also will not be able to prove Darma acted with actual malice. While the information was obviously about Perry, it was not injurious to his reputation in a way that caused him economic harm, and he would not be able to recover for any claims of emotional distress.

#### Defenses to defamation

truth is the ultimate defense to defamation. Consent is also a defense. Absolute privilege involves legislative or judicial proceedings. Qualified privilege involves the reporting of a judicial event or public event that is of interest to the public. Darma will argue that all information came from a judicial proceeding and therefore has qualified privilege. Truth is a defense here, and also would defend Darma in a defamation claim.

## 2. Perry v. Drew

### Defamation

Defamation occurs when a defendant publishes information that injures the plaintiff's reputation. The elements for common law defamation, a strict liability tort, are: (1) defamatory language (2) of or concerning the plaintiff, (3) publication to a third party who understands the information, and (4) damage to reputation. The constitutional analysis of defamation relates to public figures, and adds to elements to the defamation analysis: falsity and fault (actual malice).

Here, it can be argued that Perry was a public figure because he was the subject of a public child abuse trial, wherein he was the victim. The trial was intimately covered by the news. Perry may be considered a public figure because the trial was a newsworthy event of public interest. Perry will argue that he was not a public figure, as he was the victim of a crime and was a minor, which would exclude his name from being mentioned in the press at the time of the trial. However, because Darma included Perry's full name and information compiled from public records, it is likely that Perry would be considered a public figure. This was a trial and now a book that has garnered public interest and is newsworthy. Therefore, Perry would have to prove that he was defamed as a public figure, which adds the elements of falsity and fault to the case. This also includes actual malice.

### 1. defamatory language

A defamatory statement is one that is injurious to the plaintiff's reputation. A defamatory statement can either be stated libelously or slanderously.

### **Libel v. slander**

Libel is the written or permanent communication of a defamatory statement. Slander is an orally uttered or spoken defamatory statement. Libelous defamation assumes that special damages are proven, i.e., hard costs incurred as a result of the libel. For allegations of slander, special damages have to be proven unless the statements are related to a crime, loathsome disease, unchastity, or dishonesty in business.

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Here, because the statement made by Drew was published in a book, the defamation claim will be analyzed under libel.

### **Libel per se v. libel per quod**

Libel per se is libel that is so injurious on its face that special damages are presumed. Libel per quod is libel whereby the plaintiff must prove the statement through extrinsic facts introduced by inducement and proven by innuendo. This is typically a colloquium, whereby a statement is made that does not directly name the plaintiff, and the plaintiff must prove through extrinsic facts that the statement was about him. A reasonable person must understand that the statement is about the plaintiff.

Here, the plaintiff will argue this was libel per se, as he was directly named in the statement Drew made pertaining to his sexual promiscuity and arrest record. It is obvious that a person would be able to identify that Perry is the subject of the statement, as it names him directly. However, the facts stipulate that Perry did not suffer any monetary damages as a result of the book's publication.

While this would be considered a libel per se case, because special damages would ordinarily be presumed, this element fails, because Perry did not suffer any special damages as a result of the defamatory statement.

### 2. Of or concerning the plaintiff

A reasonable person must understand that the statement is about the plaintiff.

Here, the plaintiff will argue he was directly named in the statement which was published in the book. It is obvious that a person would be able to identify that Perry is the subject of the book, using the information in the book and the statement itself.

A reasonable person would be able to identify that the statement about Perry's sexual promiscuity and arrest record was in fact about Perry.

### 3. Publication

Defamation requires publication to a third party who would reasonably know it was about the plaintiff.

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Here, Perry published the information to Darma, a third party. The publication of the statement to Darma constituted a publication to a third party.

4. Damage to reputation ✓

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In order to establish a prima facie case for publication, a plaintiff must establish that there was damage to his or her reputation through special damages. Special damages are hard costs incurred as a result of the defamatory statement. Hard costs can include loss of business or any economic loss that resulted from the defamation. If special damages are proven, then a plaintiff can argue for and recover general damages. General damages are emotional distress damages.

Here, as argued under the defamatory statement element, Perry did not suffer special damages as a result of the publication. In order to recover for general damages, the plaintiff must prove special damages. Perry was unable to prove that he suffered any monetary damages as a result of the publication. Perry did suffer emotional stress and anxiety as a result of the publication. Had Perry proven that he suffered economic loss (special damages) as a result of the publication, he could have recovered for his emotional distress claim.

This element fails, as Perry cannot recover special damages. Had he proven he suffered special damages, it is likely Perry could recover for general (emotional distress) damages.

***Additional elements for constitutional analysis of public figures***

5. Falsity + fault (actual malice) ✓

In order for a public figure to recover for defamation, the plaintiff must prove that the defendant acted with actual malice. Actual malice occurs when the defendant knowingly publishes false information or recklessly disregards the truth or falsity of a statement made.

Here, Perry may argue that Drew's statement regarding Perry's sexual promiscuity and his arrest record were false and were told to Darma with actual malice, as Drew acted knowingly knew this was false information. Arrest records are public record and can easily be proven true or false. Drew will argue that there was no actual malice as he was stating information as he remembered it at the time. It is likely a court would side with the defense and would not find Drew acted with actual malice.

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Ultimately, Perry's argument that Drew's statement included in the book defamed him would fail.

### **Intentional Misrepresentation**

Misrepresentation occurs when there is an assertion of a false statement made about the plaintiff. The elements of intentional misrepresentation are:

1. false assertion of a fact
2. that induces one to rely on it
3. there is justifiable reliance as a result of the false statement
4. and there is some type of damage

Here, Perry will argue that Drew intentionally misrepresented facts to Darma about his sexual promiscuity as a result of the abuse and his arrest record. He will argue that he made these statements to Darma so that she would rely on them, and she justifiably relied on the statements, since she published them in her book. Perry will argue that there was emotional distress and anxiety caused as a result and that he should be able to recover general damages as a result of the misrepresentation. Drew will likely argue that the statements he made to Darma were in fact true and he Perry perhaps remembered the details of his life after the abuse wrong because of the trauma of the trial and the abuse.

It is likely that a court would find that Drew intentionally misrepresented to Darma that Perry was sexually promiscuous and was arrested twice.

### **Invasion of Privacy**

There are four actions for invasion of privacy:

1. Intrusion upon plaintiff's seclusion: the act of prying or intruding into the plaintiff's business that a reasonable person would find highly offensive.
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Here, Perry may argue that Drew intruded and pried into Perry's life as a victim of egregious child abuse who was healing from the trauma of a public trial. He will argue that Drew had no authority to speculate as to Perry's "hard time" with authority and his sexual promiscuity with girls.

It is likely that a court will find Drew liable for this action.

3. False light: publication of a false statement to the public. Actual malice is necessary for the publication of a statement of public interest. Actual malice requires knowledge that the information is false or reckless disregard to the truth or falsity of a statement.

Here, Perry will argue that Drew's statement, which was truthful in part and false pertaining to his arrest record and sexual promiscuity, was an invasion of privacy and was stated to Darma with actual malice, as there was a reckless disregard for the truth of the statement.

It is likely that Drew will be liable for false light.

4. Appropriation of likeness or name for commercial benefit involves the misappropriation of one's name or likeness for financial benefit.

This is not a relevant cause of action.

Ultimately, Drew will likely be liable for intentional misrepresentation and invasion of privacy. He will not be liable for defamation.

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80

1. Payton v. Nile

Products liability

Products liability is not a tort but an umbrella term for recovery for products that are defective and/or cause injury to an individual. Warranties (contract considerations) occur when there is damage to the product itself as a result of the defect. One can sue for warranty only in the event that there is no physical injury or property damage as a result of the defect. Here, Payton can not sue for the warranty of the product because the vehicle was not harmed as a result of the defect — only Payton was injured.

There are three types of products liability claims:

1. intentional products liability: this is a very uncommon form of products liability, but when it occurs, it is usually with battery. For intentional products liability, privity is not required; damages are compensatory and punitive, and typical defenses to intentional torts apply.

Intentional products liability is not relevant here because there was no intentional tort involved.

2. Strict products liability: in order to establish strict products liability, one must analyze the following elements:

**1. The defect was the actual and proximate cause of the injury.**

The defect must be the actual (but-for) cause of the injury, which establishes the connection between the injury and the defect. The defect must also be the proximate cause of the injury, which means that the injury was foreseeable as a result of the defect.

Here, Payton will argue that the lack of doors was the actual cause of the injury he suffered. Payton will argue that but for the lack of doors installed on the Hippo, he would not have been seriously injured when the ATV tipped. He will also argue that the injury he suffered was foreseeable because the vehicle lacked doors. He will again argue that it was foreseeable that a serious injury would occur in the event of the vehicle tipping due to the lack of doors installed on the ATV. Nile will argue that it is possible that Payton was not wearing his seatbelt and that was the actual cause of his injury. They will also argue that negligent driving of the vehicle was the actual cause of the injury, and the liability should be on Jason, not on Nile.

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It is likely a court would find the lack of doors (the defect) to be the actual and proximate cause of Payton's injury.

## 2. define the defect

a. design defect: occurs when every product on the belt is defective. Under design defect, one must use the risk analysis test, which weighs the benefits of the product against the dangers associated with the use of the product.

b. manufacturing defect: occurs when one product on the belt is defective. Under manufacturing defect, one must use the OCET (consumer expectation test) to determine whether the consumer would anticipate the kind of defect would occur.

c. warning defect/informational defect: not relevant, but occurs when there is a lack of warning of a product or too much warning included that it is not effective.

Here, it can be argued by Payton that there was a design defect of the Hippo, as it was not designed with doors. Payton will argue that the risk of not having doors installed on the ATV was higher than the benefits of not including them. He will argue that it would have been safer to include doors as it would serve as a buffer between safety and extreme harm. Nile will argue that the doors were not required because they included seat belts, which would keep passengers inside the ATV if they utilized them. Because the facts do not indicate whether Payton was wearing a seatbelt, Nile may argue that it was unlikely that Payton was wearing a seatbelt, and doing so would have caused him to avoid the risk of serious injury.

It is likely that a court would find that there was a design defect in designing the Hippo.

## 3. Proper plaintiff

A proper plaintiff is a user or consumer of a product. If not a user or consumer of a product, i.e., a third party, the third party must be a foreseeable plaintiff within the zone of danger.

Here, Payton was a consumer of the product. He was a passenger inside the ATV when it tipped, causing his injury.

## 4. proper defendant

A proper defendant is anyone within the chain of distribution of the production. This can be a manufacturer or a seller.

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Here, Nile is the manufacturer of the product and is therefore a proper defendant.

**5. the product was used in a reasonably foreseeable manner**

The plaintiff must prove that the product was used in a reasonably foreseeable manner.

Here, Payton and Jason used the Hippo in the way that it was portrayed in advertisements. In commercials, the vehicle was shown being used in off-road settings like sand dunes and mountainous areas. Payton will argue that the product was used in a reasonably foreseeable manner and Nile should have expected that users would use the Hippo off road. Nile will argue that Payton and Jason did not use the Hippo in a reasonably foreseeable manner as they drove dangerously and quickly, even getting air at some points.

It is likely the court will find that the vehicle was used in a reasonably foreseeable manner.

**6. damages**

Payton must prove he suffered more than economic loss as a result of the defect.

Here, Payton was severely injured as a result of the defect. As Jason drove up one of the dunes, the Hippo tipped over to its side and rolled over onto its passenger side, crushing Payton's leg. His leg slid out of the vehicle during the roll due to the lack of doors. Payton was severely injured and required several surgeries to repair his crushed leg as a result of the defect.

Payton will likely recover damages as a result of the lack of doors installed on the Hippo.

*Therefore, Payton will likely have a strict products liability claim against Nile and will likely recover as a result. Nile will likely be held liable for strict products liability.*

**3. Negligent product liability:** negligent products liability occurs when the manufacturer owed a duty to the plaintiff, and the manufacturer fell below the standard of care required for that duty. The elements required for a negligence analysis are:

**a. duty**

A defendant owes a duty of care to any foreseeable plaintiff. A defendant owes a standard of care that a reasonably prudent person in same or similar circumstances would owe. A manufacturer owes a duty of care to a consumer or user that the product will be safe.

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Here, Nile owed a duty to Payton, a consumer, that the product would be safe and would not cause injury if used properly. Payton will argue the two used the product the way it was intended and advertised. Nile will argue that they performed their duty to the adequate standard of care, one which a reasonably prudent manufacturer who developed ATVs would have used. They will argue that they provided seatbelts and, if the custom of the industry was to not include doors on ATVs, then they followed the custom of the industry.

It is likely a court will find Nile owed a duty to Payton.

**b. breach**

A breach occurs when a defendant does not meet the threshold for the requisite standard of care. Breach can be proven through the following ways:

1. Res ipsa loquitur: the thing speaks for itself. The injury would not have occurred but for the defendant's negligent act.
2. Negligence per se: a statutory violation whereby the statute protects a certain class of people and against a certain act.
3. Hand formula: this is not typically applied by the courts anymore. If the burden of attempting to prevent the injury is greater than the gravity of the injury times the probability of the injury, then there is no liability. If the burden is less than the gravity times the probability of injury, then there is a breach.

Here, Nile did not provide doors on the Hippo. Payton will argue that there was a breach of duty because Nile did not act in the way a reasonably prudent manufacturer of a potentially dangerous vehicle would have acted in the same or similar circumstances — he will argue that including doors on an ATV would indicate that a manufacturer met the requisite standard of care. Nile will argue that there was no breach because although they did not have doors on the ATV, they included seatbelts, which met the requisite standard of care for manufacturers to keep users safe.

It is likely a court will find a breach of duty occurred.

**c. causation**

Causation is analyzed under the actual cause and the proximate (legal) cause.

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The defect must be the actual (but-for) cause of the injury, which establishes the connection between the injury and the defect. The defect must also be the proximate cause of the injury, which means that the injury was foreseeable as a result of the defect.

Here, Payton will argue that the actual cause was the lack of doors installed on the ATV. He will argue that but for the ATV having doors, his severe injury would not have occurred. Nile will argue that the actual cause was the reckless driving conducted by Jason, which included speeding and getting air over sand dunes of varying sizes. In response, Payton will argue that regardless of the speed at which they were driving the ATV, if doors would have been installed, his leg would not have fallen out of the vehicle and been crushed.

The court will likely find that the actual cause of the injury was the lack of doors installed on the ATV.

Further, Payton will argue that the proximate cause of the injury was the lack of doors installed on the ATV. The legal cause is about foreseeability — it is reasonably foreseeable that the lack of doors would cause the severe injury Payton sustained. Nile will argue that the legal cause to Payton's injury was actually Jason's negligent driving.

It is likely the court will find the lack of doors the actual and proximate cause of Payton's injury.

#### **d. damages**

Here, Payton will argue that he suffered special damages as a result of his severely injured leg. He required several surgeries to repair his leg.

Ultimately, it is likely the court would find Nile was liable for negligent products liability.

#### Defenses to negligence

1. contributory negligence is abolished in the vast majority of states. It states that if the plaintiff is even one percent liable they are unable to recover for negligence. The last chance doctrine applies under contributory negligence, which states that if the defendant has the last clear chance to avoid causing harm to the defendant, they must do so.

Here, Nile will argue that Payton contributed to his injury and should not be liable. Payton will argue that he was not negligent as he wore his seatbelt and there were no warnings to indicate that his leg could be crushed. Contingent on the jurisdiction, this could completely bar Payton from recovery.

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2. Comparative fault refers to whether the plaintiff had a part in the injury sustained. *Impure comparative fault* jurisdictions recognize that if the plaintiff is more than 50 percent liable, then they cannot recover at all. If the jurisdiction is a *pure comparative fault* jurisdiction, the plaintiff can recover regardless of their fault in the injury.

Here, Nile will argue that Payton played a role in his injury by engaging in the activity of riding on an ATV. Payton will argue that even if he were liable for engaging in the activity, he should still recover as the inherent dangers of manufacturing an ATV without doors is higher than the dangers of simply riding in an ATV.

It is unlikely this defense would be applicable, as Payton was not the one driving the ATV — had he been driving, it is possible he could have some comparative fault in the injury he suffered.

3. Assumption of the risk: This is a defense to negligence whereby the plaintiff assumes the risk in inherently risky or dangerous activities.

Here, it can be argued by Nile that Payton assumed the risk of injury when he got into the ATV. Payton will argue that there was no assumption of risk that his leg would get crushed as a result of the ATV not having doors.

It is likely this could be seen as a valid defense to Nile's negligence.

#### Negligent infliction of emotional distress

NIED occurs when the defendant's negligent act causes the plaintiff to suffer emotional distress.

Here, Payton will argue that multiple surgeries and the crushing of his leg caused him severe emotional distress. He will argue that because of the lack of doors, he suffered the injury to his leg, and if doors were installed on the ATV, he would not have been injured.

It is likely that Payton will recover for NIED against Nile.

#### 2. Payton v. Hippos-for-life

##### Products liability

Products liability is not a tort but an umbrella term for recovery for products that are defective and/or cause injury to an individual. Warranties (contract considerations) occur when there is damage to the product itself as a result of the defect. One can sue for warranty only in the event that there is no

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physical injury or property damage as a result of the defect. Here, Payton can not sue for the warranty of the product because the vehicle was not harmed as a result of the defect — only Payton was injured.

There are three types of products liability claims:

1. intentional products liability: this is a very uncommon form of products liability, but when it occurs, it is usually with battery. For intentional products liability, privity is not required; damages are compensatory and punitive, and typical defenses to intentional torts apply.

Intentional products liability is not relevant here because there was no intentional tort involved.

2. Strict products liability: in order to establish strict products liability, one must analyze the following elements:

**1. The defect was the actual and proximate cause of the injury.**

**2. define the defect**

**3. Proper plaintiff**

A proper plaintiff is a user or consumer of a product. If not a user or consumer of a product, i.e., a third party, the third party must be a foreseeable plaintiff within the zone of danger.

Here, Payton was a consumer of the product. He was a passenger inside the ATV when it tipped, causing his injury.

**4. proper defendant**

A proper defendant is anyone within the chain of distribution of the production. This can be a manufacturer or a seller.

Here, HFL was a seller of the product. HFL is the intermediary between Nile and Payton. HFL will argue that as the intermediary, they were not responsible for checking for the safety of the product based on the lack of doors. They will argue that because the product had seatbelts, they believed it was safe for the consumer. Payton will argue that the HFL had a duty to inspect the product for safety issues before selling it to the consumer.

It is unlikely the court will find HFL to be a proper defendant.

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**5. the product was used in a reasonably foreseeable manner**

**6. damages**

*Payton will NOT likely have a strict products liability claim against HFL and will NOT recover as a result. HFL was not a proper defendant in this case.*

**3. Negligent product liability:** negligent products liability occurs when the manufacturer owed a duty to the plaintiff, and the manufacturer fell below the standard of care required for that duty. The elements required for a negligence analysis are:

**a. duty**

A defendant owes a duty of care to any foreseeable plaintiff. A defendant owes a standard of care that a reasonably prudent person in same or similar circumstances would owe. A manufacturer owes a duty of care to a consumer or user that the product will be safe.

Here, HFL owed a duty to Payton, a consumer, that the product would be safe and would not cause injury if used properly. HFL had a duty to inspect the product to ensure that it was safe for the consumer. Payton will argue the two used the product the way it was intended and advertised. HFL will argue that they did not have a duty to inspect the product before it was sold to consumers, as they would assume the manufacturer created the product in a way that was safe.

It is likely a court will find HFL did not owe a duty to Payton.

**b. breach**

A breach occurs when a defendant does not meet the threshold for the requisite standard of care. Breach can be proven through the following ways:

1. Res ipsa loquitur: the thing speaks for itself. The injury would not have occurred but for the defendant's negligent act.
  2. Negligence per se: a statutory violation whereby the statute protects a certain class of people and against a certain act.
  3. Hand formula: this is not typically applied by the courts anymore. If the burden of attempting to prevent the injury is greater than the gravity of the injury times the probability of the injury, then there
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is no liability. If the burden is less than the gravity times the probability of injury, then there is a breach.

Here, it is unlikely a breach occurred, because there was no duty owed.

**c. causation**

Causation is analyzed under the actual cause and the proximate (legal) cause.

The defect must be the actual (but-for) cause of the injury, which establishes the connection between the injury and the defect. The defect must also be the proximate cause of the injury, which means that the injury was foreseeable as a result of the defect.

This is irrelevant, as the court will not find HFL liable.

**d. damages**

Ultimately, because Payton did not suffer as a result of HFL, and because the court will likely find that HFL was not negligent, there is no cause of action and no damages relevant to discuss.

It is unlikely Payton will have a COA against HFL.

Defenses to negligence

1. contributory negligence is abolished in the vast majority of states. It states that if the plaintiff is even one percent liable they are unable to recover for negligence. The last chance doctrine applies under contributory negligence, which states that if the defendant has the last clear chance to avoid causing harm to the defendant, they must do so.

Here, because HFL would likely not be liable for negligence, this does not apply.

2. Comparative fault refers to whether the plaintiff had a part in the injury sustained. *Impure comparative fault* jurisdictions recognize that if the plaintiff is more than 50 percent liable, then they cannot recover at all. If the jurisdiction is a *pure comparative fault* jurisdiction, the plaintiff can recover regardless of their fault in the injury.

Here, because HFL would likely not be liable for negligence, this does not apply.

3. Assumption of the risk: This is a defense to negligence whereby the plaintiff assumes the risk in inherently risky or dangerous activities.

Here, because HFL would likely not be liable for negligence, this does not apply.

Negligent infliction of emotional distress

NIED occurs when the defendant's negligent act causes the plaintiff to suffer emotional distress.

Payton will not recover for NIED against HFL because there was is likely no negligence liability.



85

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**Phil v. Delta University:**

*Negligence:*

*Duty - a D has a duty to act as a reasonably prudent person. D had a duty to mitigate harm to foreseeable plaintiffs. If plaintiffs are in the zone of danger (Palsgraph) they are foreseeable. Children under 5 owe no duty. 6+ owe a duty based on circumstances and behavior of person (subjective). If acting like an adult will be treated as an adult and owe a duty.*

*Breach - P must prove the D did not live up to their standard of care (SOC). SOC is a D's duty to act as a reasonably prudent person in the same/similar circumstances as other reasonable people in their position. If D set himself/herself out to be important (lawyer/doctor) they have a higher SOC to act as a reasonably prudent person in same/similar circumstances as a reasonable professional in their position (ex: NY doctor acts as another esteemed NY doctor in the same/field or practice).*

*Causation- P links D to damages. Cause in fact occurs when But, For the defendants actions, P would not have been injured. Proximate cause occurs when P connects that D's actions/consequence of damage was foreseeable.*

*Damages- P states damages suffered.*

*Custom.*

*Vicarious liability: A defendant that is liable for someone they share a special relationship with. Typically employer is liable for employee. Exceptions - no liability when P is acting in a manner that is in the furtherance of their job duties.*

*As a university Delta owed a duty to all of their students and guest in attendance of the track meet they decided to host and invite schools to compete at. Delta university have social guest and invitees present at the school which require the most duty to ensure they are not harmed. Delta university failed in acting as a reasonably prudent university by failing to mitigate all possible harm to the people in attendance, especially the athletes that are participating. Tracks meets are unpredictable and depending on the weather it would not be foreign for someone to have an issue with passing out wither by natural causes or unnatural negligent causes. Delta university should have all first aid and medical necessities present to ensure they can assist fast in serious situations. Defibrillators are very common now and are almost always seen where there is a first aid kit, Phil has a strong case that Delta university did not meet their standard of care for the people in attendance at the track meet. The facts states that other university's have the necessary first aid tools such as defibrillators*

on their campus and most likely accessible nearby, Delta did not act in the same or similar circumstances as other university's do. Phil can prove that but for Delta's negligence in not having a defibrillator he would not have suffered without oxygen as long as he did and would not have suffered permanent and irreversible brain damage. Phil suffered from permanent and irreversible brain damage due to being without oxygen for so long.

Phil will prevail in a negligence suit against Delta University.

Due to a special relationship existing between Delta University and their track star Damien they will be held vicariously liable for his action. Today athletes can be seen as employees and their colleges as employers because they perform for them or may even be getting paid by them due to scholarship offers, financial aid, or other endorsement opportunities college students are now allowed to receive. Damien committed his assault and battery which resulted in permanent irreversible brain damage to Phil while on school grounds, running in a track meet Delta university hosted. Delta university would be responsible for Damien's actions as he is their student/employee and is on school grounds committing torts. Damien may declare he has no liability here due to his torts being in the furtherance of his track career for Delta University. This claim will fail because it is illegal and against public policy to cheat or act in such an extreme manner to win a sport to continue the presence/appearance of being the best track star or making Delta University look good.

Phil will most likely prevail in a vicarious liability case against Delta University if they live in a jurisdiction that would agree with Damien being an employee of Delta University and having an existing relationships to have Delta University be liable for Damien's actions.

**Phil v. Damien:**

*intentional + willful.*

*Assault: D places P in reasonable apprehension of harm or offensive contact.*

*Battery: D willfully and intentionally commits a harmful or offensive contact with P.*

*Intentional Infliction of Emotional Distress: D acts in an extreme or outrageous manner that causes P's extreme emotional distress (more than ordinary emotional pain).*

*willful + intentional.*

Here, Damien committed an ~~assault~~ against Phil because while running it is reasonable to believe Phil saw Damien's hand which would cause any reasonable person ~~apprehension~~ of harm and offensive contact. When there is a ~~battery~~ there is an ~~assault~~ and Damien committed an assault when his hand make physical contact with Phil's face. Damien hitting Phil so fast and so hard would leave a reasonable person scared and confused of what is to come, especially considering the circumstances

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of running the fastest they have probably ran and with Phil not even thinking that Damien's hand would be coming towards his face is scary and dangerous. Damien's hand caused Phil to trip, stumble, collapse on the ground and hit his head. Going through that alone would be traumatic for the average person which meets the elements of intentional infliction of emotional distress due to Damien acting in an outrageous and extreme manner (not typical behavior in a track meet/extremely dangerous) that caused Phil severe emotional distress. Phil ended up going into cardiac arrest and due to lack of a defibrillator sporting officials had to do manual chest compression which left Phil without oxygen for too long and he suffered brain damage. The elements of intentional infliction of emotional distress are met because Damien intentionally caused Phil the harm. Phil's family can also have a claim for intentional infliction of emotional distress if they were in the zone of danger (Palsgraph). That would require his parents or someone with a special relationship to be in close proximity to the scene of the accident, due to the horrific situation it may be sufficient timing if the family ran to Phil after his fall and was present when he was experiencing cardiac arrest. The court may also allow a claim if the family heard what happened, if people screamed or if Phil screamed while going down to the ground or the sound of him collapsing could be heard by family. The family would have to have suffered emotional distress which isn't unreasonable considering the circumstances of having your son or family member running in the race, almost winning then all of a sudden being hit in the face, falling, going into cardiac arrest, then suffering brain damage. Phil's whole life is bound to be affected from his schooling, inability to participate in track and field, he may now require special care from his parents.

Damien has no defense to his actions.

Phil will succeed in his suit for assault, battery, and intentional infliction of emotional distress.

**END OF EXAM**