

MONTEREY COLLEGE OF LAW

**TORTS**

FINAL EXAMINATION

SPRING 2020

Professor J. Martin

Instructions: There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

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**QUESTION ONE**

Professor PAUL had lunch with Professor DOUG at the crowded law school campus cafe, with the two professors sitting in a booth near the back of the cafe. During their lunch, the two professors discussed their final exams including the topics they planned to utilize, as well as the status of PEDRO, a student known to both of them.

"I definitely will test about an invasion of privacy claim," said Professor PAUL.

"That would be fair," stated Professor DOUG. "But fail student PEDRO whatever you do. I saw in his confidential student file that everyone in his family, including PEDRO, is a revolutionary communist and that type does not belong in the legal profession."

During that exchange, a law student named DICK sneaked into the neighboring booth and listened carefully so he could overhear the discussion. The information heard by DICK was repeated to fellow students prior to their exams in Professor PAUL's class and those exams did contain a question about Invasion of Privacy.

DICK also heard the information about his classmate, PEDRO, and was shocked to hear that PEDRO was a revolutionary communist. Thereafter, DICK informed other law students and PEDRO was excluded from his study group. The information about the political affiliations of PEDRO and his family was partly true, except that PEDRO's mother has always voted for Republicans and PEDRO's father has always voted for Democrats.

1. Professor PAUL vs. DICK. Discuss potential liability and defenses.
2. PEDRO vs. Professor DOUG. Discuss potential liability and defenses.

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## QUESTION TWO

PEGGY is a salesperson and the mother of PAM, a six-year old. PEGGY decides to create healthier meals for herself and her daughter. The next week while PEGGY is shopping at the DULL-MART STORE, she sees a G-100 Food Processor and an accompanying advertisement saying that the G-100 is an easy way to boost meal nutrition. PEGGY buys a new G-100 Food Processor from DULL-MART and takes it home.

The G-100 is accompanied by a 70-page User's Manual that warns, on page 55, that the Food Processor has a small motor and should not be used with certain fibrous foods, such as celery. PEGGY puts the User's Manual in a drawer and does not read it. The G-200 model has a larger motor and can easily handle fibrous foods.

During the first time PEGGY uses the G-100 in her kitchen, she includes celery in the ingredients. The G-100 labors to process the celery and PEGGY notices the machine becomes very hot. Two days later, PEGGY again uses her G-100 and again includes celery as an ingredient. PEGGY's G-100 becomes extraordinarily hot and explodes, sending a piece of metal into the arm of PAM. Despite the danger from the explosion, PEGGY is unhurt.

PAM requires surgery on her arm and stays home from First Grade for a month. During that time, PEGGY does not work as a salesperson in order to remain home with PAM. PEGGY sues DULL-MART STORE in Strict Liability on behalf of herself and PAM.

1. Discuss: PAM vs. DULL-MART, including potential defenses.
2. Discuss: PEGGY vs. DULL-MART

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MONTEREY COLLEGE OF LAW  
TORTS FINAL EXAM  
SPRING, 2020  
PROFESSOR MARTIN

### QUESTION THREE

DAVIS lives in Smallville and he is a seller of heavy construction equipment. He is selling a huge earthmoving machine, the Mongoose-101, for the sum of \$450,000. DAVIS shows the machine to PAUL, who has contracted with the City of Smallville to remove and transport millions of tons of earth during construction of the Smallville Dam.

DAVIS notices that PAUL wears a Woodchuck Lodge ring -- a gold ring worn only by members of that fraternity. DAVIS says, "I see you're also a lodge brother", and DAVIS then gives PAUL a secret handshake used only between Woodchuck Lodge members.

PAUL says he has been negotiating with PETE, another Smallville construction equipment dealer, and that PETE also has a Mongoose-101 for sale. "Don't be a fool and buy junk from PETE," says DAVIS. "He is not a Woodchuck brother and that machine needs a new engine. My Mongoose-101 had a new engine installed just three months ago." PAUL ceases to negotiate with PETE and he purchases DAVIS' Mongoose-101 earthmover.

DAVIS has never been a member of the Woodchuck. Lodge. Soon after PAUL's purchase of the Mongoose-101 from DAVIS, it has serious engine trouble and, after inspection by a mechanic, PAUL is told that the original engine has never been replaced but has merely been cleaned and tuned up. A new engine for PAUL's newly purchased Mongoose-101 will cost \$90,000.

Advise DAVIS about likely causes of action against him by PAUL and PETE, as well as possible defenses.

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**MONTEREY COLLEGE OF LAW**  
**TORTS FINAL EXAM -- SPRING, 2020 -- PROFESSOR MARTIN**  
**QUESTION ONE -- MODEL ANSWER**

**I. Professor PAUL vs. DICK in Invasion of Privacy**

**Intrusion into Seclusion**

- A. An Act Done With Intent: When DICK "sneaked into" the neighboring booth, he did a volitional, intentional act that would allow him to overhear PAUL.
- B. Intrusion into Seclusion: The eavesdropping of PAUL's conversation represents an entry into an enclave of privacy because the professors likely sought their own cafe booth "near the back of the cafe", probably so they could privately discuss exam topics and students.  
(1) Both topics (exam subjects and the status of a particular student) are confidential topics.
- C. Highly Offensive to a Reasonable Person: Most in the "community" of law school teachers and students would know that the exchanges between PAUL and DOUG were meant to be confidential and that an invasion of that confidential event would be offensive.  
(1) It is also likely that most teachers and students would feel it would be reprehensible to spy and eavesdrop on professors.
- D. Injury to Plaintiffs Peace of Mind: The facts do not reference that PAUL's peace of mind, either privately or professionally, was disrupted. PAUL does not have extreme emotional harm or loss of money, but those are not required.  
(1) It is clear, however, that PAUL's exam secrecy was compromised and it is easily imagined that PAUL would have been distressed about that fact.
- E. Without Consent/Privilege: There are certainly no facts indicating consent. Likewise, no facts indicate a privilege to overhear the private conversation.

**2. PEDRO vs. Professor DOUG**

**Public Disclosure of Embarrassing Private Facts**

- A. An Act: When DOUG spoke and when DICK heard and retold information, acts took place that gave publicity to PEDRO's "confidential student file".
- B. Causing Publicity to Others: Not only did DICK hear the private information about PEDRO, DICK also "informed other law students". Clearly, publicity was given to others about PEDRO's private affairs.
- C. Highly Offensive to Community Notions of Decency: While no facts are given about PEDRO's state of mind, severe emotional distress is not a necessary element. It is sufficient that PEDRO's embarrassing private facts were told.  
(1) Is it highly offensive to be described as coming from a family of "revolutionary communists"? DICK was "shocked" to hear it and, after DICK retold the information, PEDRO's study group "excluded him", which indicates more disapproval.
- D. Without the Privilege of Public Interest/Concern: The comments about PEDRO's family politics may be protected speech because they border on political speech, rather than mere gossip--they discuss the political composition of the

community. Further, a "revolutionary" communist may indicate someone who is violent and that may additionally be a subject of public concern.

- (1) Can the privilege be utilized when it is not entirely true? While a public discussion about a matter of public concern should be protected, some falsity within the discussion may "abuse" the privilege. It is noted that PEDRO's mother and father always vote Republican and Democrat and cannot be called revolutionary communists.
  - (a) The falsity about those important members of PEDRO's family may be enough to not protect DOUG's comment.
- (2) There are no facts that indicate PEDRO gave consent to publicity about his confidential student file.

### **Defamation**

- A. Publication: When DOUG spoke to PAUL about PEDRO, he published information to a third party. When DICK republished that information to "fellow students", it is certain that others were the targets of publication.
  - (1) DOUG's publication to PAUL might be privileged because they are in the same organization and seemed to be discussing matters that pertain to that organization, namely, exam and student issues.
    - (a) DICK's republication would not be privileged but should DOUG be responsible for a conversation that was intended to be private but was eavesdropped upon? Because DICK's acquisition of the information was similar to a theft, it is possible that DOUG did publish with privilege.
- B. Of Defamatory Material to 3<sup>rd</sup> Parties who Perceive it as Defamatory: The effect on others was to "shock" DICK and to influence "fellow students" to "exclude" PEDRO from his study group.
  - (1) Because PEDRO was shunned and avoided, and possibly held in contempt, he likely was described in defamatory terms.
- C. And Understand that it Pertains to Plaintiff/Pedro: PEDRO's name was used and the law school community is a small population, so it is certain that DICK and the "fellow students" knew who the information described.
- D. Causing Damages: The conversations were spoken, transitory expressions and therefore they would fall into the category of Slander. Slander requires special damages unless it is a *Slander Per Se* category and calling someone a communist, even a "revolutionary communist" does not seem to apply.
  - (1) Therefore, without special/monetary damages, PEDRO may lack an element.
- E. Common Law Defense of Conditional Privilege: DOUG may succeed in defending his speech because he had a "duty" to inform PAUL and, because they were both teachers in the same organization, PAUL possessed a reciprocal interest.
- F. Constitutional Privilege of Free Speech: Because PEDRO is a Private Citizen and the expression was likely about a matter of Public Concern, he can succeed against DOUG's speech by merely showing Fault and Falsity within the speech.
  - (1) The falsity is discussed above. The fault may not exist because it came from a reputable source -- PEDRO's confidential student file.

**MONTEREY COLLEGE OF LAW**  
**TORTS FINAL EXAM -- SPRING, 2020 --PROFESSOR MARTIN**  
**QUESTION TWO-- MODEL ANSWER**

1. PAM vs. DULL MART, in Strict Products Liability due to Personal Injury caused by a purchased Defective Product.
  - A. Sale of a Product: The facts are clear that PEGGY "buys" a "new" G-100 Food Processor from DULL MART. The G-100 is clearly a tangible product.
    - (1) DULL MART is indicated to be a Seller, in the business of selling that product, and is liable to the same extent as the manufacturer.
  - B. Containing a Defect: There is no mention of a Manufacturing Defect in PEGGY's G-100. And while it may be argued that the G-100 has a Design Defect due to its "small motor", the primary defect appears to be an Informational Defect, namely, that PEGGY was not sufficiently appraised about requirements or limits associated with the product. That is, the product failed to adequately warn of dangers associated with the use of the product.
    - (1) Specifically, the G-100 was not to be used to process "fibrous foods, such as celery", but that information only appears to be given to purchasers/consumers on page 55 of the 70-page User's Manual.
      - (a) It is entirely understandable and foreseeable that purchasers would not study a lengthy, 70-page manual and, like PEGGY, most buyers would just set the manual aside and remain inadequately informed.
      - (b) The warning(s) should have been made part of the product and indelible.
  - C. Causing Physical Harm: The facts are also clear that the G-100 becomes "extraordinarily hot", explodes, and sends a piece of metal into PAM's arm, causing a physical injury that requires surgery and one month of healing.
    - (1) The injury to PAM was actually and proximately caused by the G-100 as the injury is both direct and immediate, with no intervening causes.
  - D. To a User or Bystander: The facts state that PEGGY bought the product and that PAM is her six-year old daughter who appears to have been in the kitchen with PEGGY at the time of the explosion. PAM was therefore a bystander, rather than a user.
    - (1) Liability therefore extends to PAM despite PAM not being a purchaser.
  - E. Defenses to Liability:
    - (1) Comparative Negligence can be a defense to Strict Products Liability and is often found because of misuse of a product. Was including celery as an ingredient a form of misuse?
      - (a) It is submitted that celery is a common food and its use is entirely foreseeable and understandable. Without adequate warning, PEGGY's choice of celery does not seem to be "misuse".
    - (2) Because the G-100 became "very hot" during the first time PEGGY used it, was its second use by PEGGY a form of misuse?
      - (a) Again, PEGGY likely did not fully understand the danger, nor did she understand how the small motor was "laboring" by trying to process celery. Therefore, PEGGY's use of celery -- even the second time-- was

ordinary carelessness, not recklessness or misuse.

- (3) PEGGY's use of celery is contrary to the manufacturer's instructions but those instructions were not readily apparent. That lack of clear warning is the fault of the manufacturer, not PEGGY.
- (4) Could PEGGY's misuse (if any) be attributed to PAM?
  - (1) Even if PEGGY is seen to have misused the G-100, there would be no vicarious misuse for bystanders, especially a six-year old.

2. PEGGY vs. DULL MART, in Strict Products Liability

A. While most of the elements of SPL are present, recovery is only allowed for a physical injury and accompanying property loss. SPL is not available for pure economic loss.

- (1) The facts indicate that despite the danger, PEGGY is "unhurt" and therefore ineligible for recovery of her one-month loss of wages, at least through SPL.

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**MONTEREY COLLEGE OF LAW**  
**TORTS FINAL EXAM -- SPRING, 2020 -- PROFESSOR MARTIN**  
**QUESTION THREE-- MODEL ANSWER**

**PAUL vs. DAVIS in Fraud**

Because DAVIS made false representations to PAUL and PAUL thereafter relied on those representations to his detriment, DAVIS may have committed the tort of Fraud.

- A. Acts that were False representations of Fact.
1. Woodchuck fraternity: DAVIS comments on PAUL's fraternity ring and clearly identifies himself as also a member. The facts state that DAVIS has "never been" a member of that group and the statement is therefore false.
  2. Mongoose-101 New Engine: After disparaging another machine, DAVIS clearly claims that the machine he is selling "had a new engine (recently) installed". The facts state that the engine had never been replaced, amounting to another falsity.
- B. Material Facts (Are the facts a basis for a decision that was made by Plaintiff?)
1. The importance of both men being in the same lodge/fraternity depends on the individuals but can be very important as members of various groups tend to stick together and do business with each other. Therefore, it is somewhat likely that DAVIS' identification as a Woodchuck Lodge member is material to PAUL.
  2. The importance of DAVIS' Mongoose-101 having a "new" engine is certainly material to PAUL. A new engine is always more desirable than a reconditioned engine. A new engine in the Mongoose-101 is also very expensive, per the facts. Therefore, the representation of a new engine is clearly material to PAUL.
- C. Made with Scienter (A lie or reckless disregard for the truth)
1. Both false representations were likely motivated by a desire to sell the expensive piece of heavy construction equipment.
    - (a) DAVIS obviously knew that he was never a member of the Woodchuck Lodge and that representation was clearly a lie to sell the machine.
    - (b) DAVIS was the person most likely to know the specifics of the Mongoose-101 and that representation was clearly made, at least in conscious ignorance and more likely with knowingly falsity, in order to sell the machine.
- D. That is Justifiably Relied on
1. DAVIS is not a detached stranger to the sales conversation. Rather, he holds himself out to be a knowledgeable vendor of heavy construction equipment, with worthy opinions about similar machines. DAVIS therefore poses as an authority, worthy of being relied on.
  2. PAUL, however, is also capable of knowledge about heavy construction equipment as he appears to be an earthmoving contractor with a large contract that pertains to a dam project.
    - (a) Therefore, PAUL is capable of personal examination, as well as hiring an expert to examine the machine and report to him.
    - (b) The expensive investment (\$450,000.) would require PAUL to be an informed buyer, beyond just taking DAVIS' opinions about the sale. Therefore, PAUL may have unjustifiably relied on DAVIS' representations.



E. Causing Damages

1. Because the Mongoose-I 01 that PAUL purchased soon had "serious engine trouble", and because a new engine has a cost of \$90,000., damages are evident from the facts.

F. Conclusion

1. The elements of the tort of Fraud appear to be clearly present, with the exception of justifiable reliance.
  - (a) If PAUL is seen to be careless regarding his own responsibilities, and if his reliance is therefore unjustifiable, a cause of action based on fraud may fail.

**PETE vs. DAVIS in Interference with a Prospective Advantage**

DAVIS disparaging PETE's Mongoose-I 01 machine, as well as identifying PETE as not being a Woodchuck Lodge member, may amount to a tort of Interference with a Prospective Advantage.

A. The existence of an Economic Relationship

1. The facts relate that PAUL and PETE had been "negotiating" regarding another Mongoose-I 01 machine. Nowhere do the facts state that a contract had been signed, nor that a deposit had been made. Instead, PAUL had been looking at heavy construction machinery because he had contracted with the City of Smallville to remove and transport earth. He had only discussed buying an expensive piece of equipment with PETE.
  - (a) In a capitalistic society, shopping and negotiating is a common practice and it is expected for an expensive transaction. Negotiating does not necessarily indicate an "economic relationship". Further, nowhere in the facts does it say that PETE and PAUL had a history of transactions, or that PETE had relied on PAUL's negotiations in any way.

B. Knowledge of the Relationship

1. If an economic relationship is seen to exist, it is clear from the facts that DAVIS understood that PETE had met with PAUL and had been "negotiating" about a sale. PAUL informed DAVIS of that fact and DAVIS clearly had knowledge.

C. Intent to Interfere with an Act that furthers the intent

1. DAVIS clearly had an intent to interfere with the negotiations between PETE and PAUL. DAVIS acted by commenting on PETE not being a Woodchuck member and said that PETE's machine was "junk". DAVIS obviously wanted to sell his product and disparage PETE's product.

D. Causing Disruption to the Relationship

1. The disruption is clearly related by the facts that state PAUL "ceases to negotiate" with PETE and purchases DAVIS' Mongoose-I01.

E. Resulting in Damages is obvious as PETE lost the proposed sale.

F. Without Consent or Privilege

1. The privilege of competition is powerful in a capitalistic society and seems to be persuasive here. That is, both sellers are free to make offers and attempt to persuade, within the limits of the Common Law. That privilege protects DAVIS.

1)

Paul v. Dick - Invasion of Privacy

Paul may have an action against Dick for the tort, intrusion into seclusion. Intrusion into seclusion occurs when the defendant interferes, physically or otherwise, with the plaintiff's solitude or private affairs. For the plaintiff to establish the prima facie case, he must have a reasonable expectation of privacy (REP) at the time of the offense, and the interference must be considered "highly objectionable" to a reasonable person.

Did Paul have REP in the cafe?

The facts indicate that the cafe was open to the public and "crowded" during the lunchtime meeting. However, the professors met in a "booth near the back of the cafe." Although they may have a subjective expectation of privacy, the standard for intrusion into seclusion requires an objective REP. Paul may argue that despite the cafe being crowded, the booth at the back of the cafe, as opposed to a table in the middle of the room, is sufficiently removed from the public, and is a place where a reasonable person would discuss private matters with REP. Dick would strongly assert that the cafe was a public space, and that he could hear the conversation with the naked ear without trespass. If the court finds that Paul has no REP in the cafe, eavesdropping in this case will not be an actionable offense, regardless of the fact that Dick "sneaked" into the nearby booth.

Is the eavesdropping "highly objectionable?"

In the event that the court finds Paul has a REP in the cafe, he must show that Dick's interference was highly objectionable to a reasonable person. The facts state that Dick intentionally sought to eavesdrop on the conversation and knew or should have known

that Paul's intent was to speak only with Doug. A reasonable person would consider intentional eavesdropping into a private conversation to be highly objectionable.

Additionally, after the interference he later disseminated the information to the other students. The subject of the conversation was about the upcoming exam. Assuming that this information was not already publicly announced to the class, a reasonable student would understand this to be a private conversation. Evidence that Dick's behavior amounts to more than just negligence will also make it highly objectionable.

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Pedro v. Doug - Defamation:

*OK* Defamation is when (1) a defamatory message (2) sufficiently identifying a plaintiff (3) is published to a third party (4) causing (5) damages. *BUT NOT PERFECT* (2)

*OK* A defamatory message is one that would instill upon the recipient a strongly negative judgement on some aspect of the plaintiff's character. It must be distinguished from an expression of opinion by the reasonably prudent person (RPP) test. If a statement is not defamation *per se*, the plaintiff must provide some explanation of why the otherwise benign statement is defamatory. Oral defamation is called slander, while written is called libel. Doug's statement about Pedro that "everyone in his family, including Pedro, is a revolutionary communist and that type does not belong in the legal profession" is clearly slander *per se*.

Pedro is identified by name in the statement. Pedro is presumably a student and a private citizen. Private citizens are offered more protections against defamation than public officials or public figures. A public official is an employee of the government, such as the president, whose conduct represents and reflects matters of public interest. A public figure is a person such as a celebrity, who has an important influence on the general public or matters of public interest. There may be a possibility that Pedro is a public

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official or public figure due to being a "revolutionary communist." If so, he must show clear and convincing evidence of actual malice in order to assert a claim of defamation. Clear and convincing is a standard that is more than a "preponderance of doubt", but less than "beyond a reasonable doubt." Actual malice may occur when the publisher knows of the falsity or acts in reckless disregard of the truth. Doug will argue that he did not meet the standard for malice if he reasonably believed that the information in the confidential student file was true. However, the call to "fail" Pedro may be enough ill-will to establish malice.

Publication can be spoken or written, and must be understood as defamatory by a third party and understood to refer to the plaintiff. Publication can be both intentional and negligent. Repeat publication also brings liability if the defendant knew or should have known it to be defamatory. Here Doug will be liable for publication to a third party. First, he intentionally spoke to Paul, and also negligently allowed for Dick to overhear what he said. Pedro was identified by name in the statement. The fact that Dick "was shocked to hear" the slander, it is likely that he understood it to be defamatory.

Damages for defamation are divided into general, pecuniary, and punitive damages. General damages are presumed for *per se* defamation and awarded to cover any non-business damages. Pecuniary damages are awarded when there are measurable monetary damages, and is not applicable here. Punitive damages are awarded to a private plaintiff regarding a matter of no public interest, or in all other situations, when the defamation was with malice. Pedro will receive general damages, unless being a revolutionary communist raises a public safety/national security concern.

#### Pedro v. Doug - Similar torts

When a defense for defamation based on reasonable belief on truth could be raised, Pedro could instead argue that Doug unreasonably disclosed private facts about him to

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the public. This tort requires the facts to be disseminated to the public. Unfortunately this would not stand against Doug because he only communicated it to a single third person. Portrayal in a false light could also tempting but fails against Doug for the same reason, because his communication of the material was only to Paul.

**END OF EXAM**

THIS IS A SUPERIOR  
- YOUR ORGANIZATION IS  
WONDERFUL SHOWING ME  
THAT YOU REALLY UNDERSTAND  
THIS AREA OF LAW.  
- YOUR ANALYSES IS VERY VERY  
GOOD SHOWING ME THAT  
YOU CAN DISTINGUISH THE  
IMPORTANCE OF FACTS.  
- THANK YOU FOR  
BEING IN THE CLASS  
90%

2)

I. Pam v. DULL-MART

A. Strict Products Liability

YES

To recover on a theory of Strict Products Liability, Pam must plead and prove the following elements of the prima facie case: 1. A seller in the business of selling (not an occasional seller), sold the 2. product, that was 3. defective, 4. used without inspection or change, 5. causing, 6. physical harm (to a human being), and 7. to a user or bystander.

a. Seller

In this fact pattern, Pam, was harmed when the G-100 Food Processor that her mother, Peggy, bought at DULL-MART STORE, became extraordinarily hot and exploded, sending a piece of metal into Pam's arm. DULL-MART STORE is a store that is in the business of selling goods to consumers, and is not an occasional seller of the G-100 Processor, such as a seller on Craigslist.

b. Product

The fact pattern indicates that the G-100 Food Processor was sold to Peggy by the DULL-MART STORE.

c. Defect

The Restatement defines products defects into three categories: 1. manufacturing defects, 2. design defects, and 3, informational defects.

i. Manufacturing Defect

Manufacturing defects occur when the product departs from its intended design \* even though all possible care was exercised in the preparation and marketing of the product. The facts do not indicate that a manufacturing defect occurred. According to the product manual of the G-100 Food Processor, it is designed to only process non-fibrous foods and there is an alternative product, the G-200 that is designed to process celery and other fibrous foods. Therefore, it does not appear that the G-100 food processor sold to Peggy included a manufacturer's defect.

## ii. Design Defect

A product's design is defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by 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.

## Alternative Design Test

A manufacturer or distributor of goods may be liable for product's liability when the design of the product can reasonably be improved. The burden of proof is on the plaintiff, in this case Pam, to plead and prove that an alternative design exists and that the G-100 could be designed to avoid injury to consumers. Because the G-200, a comparable model, is available that can process celery and other fibrous foods, Pam will likely be able to demonstrate that the product should be redesigned and that there is a design defect.

## Benefit-Risk Balancing Test

The burden of proof will be on the defendant in this case, DULL-MART to prove that the G-100's product design's benefits outweigh its risks to consumers. The G-100 cannot process fibrous foods, which it is foreseeable that consumers would want to

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process in a food processor. Based on the fact pattern, the G-100 may overheat and explode if used to process fibrous foods, possibly resulting in injury. Although DULL-MART may argue that many consumers use the food processor without problems, the serious risk of injury will likely outweigh the benefits of having a potentially less-expensive and small food processor.

### iii. Informational Defect

A product with an informational defect is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe. In this fact pattern, the G-100 product manual did include a warning that the food processor has a small motor and should not be used with certain fibrous foods, such as celery. This information is included on page 55 of the manual. Based on Pam's injuries and Peggy's misuse of the product, it can reasonably be deduced that the warning included in the manual is inadequate. The warning is not easily seen to the user and Peggy simply discarded the manual in a drawer without reading it, which is a reasonable reaction by the ordinary consumer, under the Consumer Contemplation Test. A warning should be reasonable under the circumstances and sufficiently clear. The facts indicate that Pam and Peggy were not warned clearly or reasonably. The G-100 food processor should include a clear warning to consumers, and as a distributor of the G-100, DULL-MART is liable for selling Peggy the G-100 with an informational defect.

### d. Used without Inspection or Change to Design

The facts do not indicate that Peggy, nor Pam altered the design of the G-100. Furthermore, the facts do not indicate whether DULL-MART inspected and changed the

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design. It may be implied by the facts that the G-100 was used as purchased and was not altered along the chain of distribution. If it was altered by Peggy or Pam, they may be comparatively negligent and have a lowered recovery. If DULL-MART sold the G-100 without inspection for design defects, as indicated by the fact pattern, then they may also be liable in negligent products liability, which is outside of the scope of this analysis.

### e. Causing

The two types of causation in a strict product's liability case are proximate and producing cause. Proximate cause indicates that the use of the product was the reasonably foreseeable cause of the harm to the consumer or bystander. In this case, Pam's arm was injured after the G-100 exploded during use, emitting a shard of metal, which establishes proximate cause. Producing cause is the natural and continuous sequence producing an event, without which the event would not occur. Based on the fact pattern, it is reasonable to deduce that without Peggy using the G-100 product to process celery, an explosion would not have occurred and metal shards would not have struck Pam in the arm, injuring her.

### f. Physical Harm

Pam's bodily integrity was disrupted when she was harmed by the metal shard caused by the G-100 food processor exploding. Pam is a human child, and is therefore covered by a product's liability tort action.

### g. To a User or Bystander

Pam was injured when metal struck her in the arm when the G-100 food processor overheated and exploded.

## B. Bystander Liability Claims

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Because Pam is a foreseeable plaintiff, as a bystander. DULL-MART is liable for damages to Pam, including potentially her hospital bills and her absence from school.

### C. Damages

#### a. Physical Damages

Under modern products liability, the law enables bystanders injured by a defective product to recover damages for bodily injury. Pam's arm was struck by the metal shard when the G-100 food processor overheated and exploded. Pam's injuries resulted in her hospitalization and surgery. Pam may be able to recover special economic damages against DULL-MART for her hospital bills.

### D. Foreseeable Misuse

Although Peggy did not read the instruction manual that contained the warning on page 55, her use of the food processor to process celery was a foreseeable misuse. Consumers often use blenders and food processors to process celery and other fibrous foods. The court will likely grant Pam and Peggy damages under Strict Products Liability.

#### a. Comparative Negligence

California is a comparative negligence jurisdiction. Comparative negligence may be asserted as a defense to reduce the defendant's damages pay outs. Comparative negligence is applied when the plaintiff's actions contributed to or caused the harm and it must be in conjuncture with the product. The negligence must go beyond the foreseeable negligence of using the product. An injured consumer's conduct won't be considered unless: 1. the misuse was of the kind that was not reasonably foreseeable, or 2. the use of the product was voluntary and unreasonably, with knowledge of the defective condition and appreciation of its danger. Ordinary carelessness by the consumer will nor bar or diminish

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the consumer's claim. The misuse of the G-100 food processor was reasonably foreseeable, but Peggy had already used the food processor to process celery and it had gotten extremely hot. Therefore, her conduct was voluntary and unreasonably and she should have appreciated the danger of the defective condition. Peggy's conduct amounted to more than ordinary carelessness. Pam did not contribute to the harm caused, however, so the court must determine if Peggy's comparative negligence will limit Pam's damages.

### **b. Assumption of Risk**

Assumption of risk occurs when the plaintiff voluntarily assumes the risk of harm arising from the negligent or reckless conduct of the defendant and bars recovery. Peggy used the food processor knowing that the food processor had previously become very hot while using to process celery without accessing the user manual or mitigating her risks. It appears that Peggy voluntarily and unreasonably assumed the risk that the food processor would overheat, which caused the explosion, leading to injury. Under the comparative negligence standard adopted in California, and under secondary assumption of risk, Pam may still be able to recover despite Peggy's misuse.

## **II. Peggy v. DULL-MART**

### **A. Strict Products Liability**

To recover on a theory of Strict Products Liability, Peggy must plead and prove the following elements of the prima facie case: 1. A seller in the business of selling (not an occasional seller), sold the 2. product, that was 3. defective, 4. used without inspection or change, 5. causing, 6. physical harm (to a human being), and 7. to a user or bystander.

#### **a. Seller**

See *supra*

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**b. Product**

See *supra*

**c. Defect**

The Restatement defines products defects into three categories: 1. manufacturing defects, 2. design defects, and 3, informational defects.

**i. Manufacturing Defect**

See *supra*

**ii. Design Defect**

See *supra*

**Alternative Design Test**

See *supra*

**Benefit-Risk Balancing Test**

See *supra*

**iii. Informational Defect**

See *supra*

**d. Used without Inspection or Change to Design**

See *supra*

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### e. Causing

The two types of causation in a strict product's liability case are proximate and producing cause. Proximate cause indicates that the use of the product was the reasonably foreseeable cause of the harm to the consumer or bystander. In this case, Pam's arm was injured after the G-100 exploded during use, emitting a shard of metal, which establishes proximate cause. Because of Pam's injuries, Peggy had to miss work, potentially resulting in financial damages. Producing cause is the natural and continuous sequence producing an event, without which the event would not occur. Based on the fact pattern, it is reasonable to deduce that without Peggy using the G-100 product to process celery, an explosion would not have occurred and metal shards would not have struck Pam in the arm, injuring her and that Pam would have to obtain medical care, resulting in time missed from work.

### B. Damages

#### a. Economic Damages

Plaintiffs in products liability cases may be able to recover for economic damages in the existence of a contract. A sale of goods to a consumer is a type of contract in privity. A contract in privity is a contract between two parties. Peggy had a contract in privity with DULL-MART and may recover for the monetary damages caused by loss of work to care for Pam due to the injury caused by the G-100's product defect.

#### b. Implied Warranty of Merchantability

The seller of goods, a merchant, such as DULL-MART, implies a warranty of merchantability for a good that "runs with the sale" and are imposed because of the transaction and despite any disclaimer of warranty. Implied warranties include that the goods are fit for the particular purpose of the buyer when that purpose is known to the

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seller and that the goods are of merchantable quality when they are bought from one who deals in goods of that description. Here, DULL-MART is in the business of selling goods, including the G-100 food processor, and an implied warrant of merchantability extends to Peggy and all foreseeable users against damages caused by the product.

### **C. Foreseeable Misuse**

See *supra*

#### **a. Comparative Negligence**

California is a comparative negligence jurisdiction. Comparative negligence may be asserted as a defense to reduce the defendant's damages pay outs. Comparative negligence is applied when the plaintiff's actions contributed to or caused the harm and it must be in conjuncture with the product. The negligence must go beyond the foreseeable negligence of using the product. An injured consumer's conduct won't be considered unless: 1. the misuse was of the kind that was not reasonably foreseeable, or 2. the use of the product was voluntary and unreasonably, with knowledge of the defective condition and appreciation of its danger. Ordinary carelessness by the consumer will nor bar or diminish the consumer's claim. The misuse of the G-100 food processor was reasonably foreseeable, but Peggy had already used the food processor to process celery and it had gotten extremely hot. Therefore, her conduct was voluntary and unreasonably and she should have appreciated the danger of the defective condition. Peggy's conduct amounted to more than ordinary carelessness and will likely lower her damages.

#### **b. Assumption of Risk**

Assumption of risk occurs when the plaintiff voluntarily assumes the risk of harm arising from the negligent or reckless conduct of the defendant and bars recovery. Peggy used the food processor knowing that the food processor had previously become very hot

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while using to process celery without accessing the user manual or mitigating her risks. It appears that Peggy voluntarily and unreasonably assumed the risk that the food processor would overheat, which caused the explosion, leading to injury. Under the comparative negligence standard adopted in California, and under secondary assumption of risk, Peggy may still be able to recover despite misuse.

**END OF EXAM**

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Paul v. Davis - Intentional Misrepresentation

Intentional Misrepresentation is an (1) a false claim, concealment, or omission, (2) of a material fact, (3) made with fraudulent intent, (4) causing, (5) reasonable reliance and damages, (6) to a foreseeable plaintiff.

Good Davis made multiple false claims. First, Davis said "I see you're also a lodge brother" and gives him a secret handshake. Second, Davis claimed that Pete's Mongoose needed a new engine. Finally, Davis claimed that his Mongoose had a new engine. All of these turned out to be false.

\* Of the three false claims, the second and third are the most likely to be viewed as material facts, because the Mongoose engine was important to their agreement.

Evidence of fraud is most apparent in Davis's use of the ring. Davis knows it is false when he represents himself as a Woodchuck Lodge brother. There is not enough evidence to be absolutely certain that Pete's Mongoose was in good condition or that he knew his own Mongoose did not have a new engine.

It is clear that all three claims were with the intent to induce Paul into buying his Mongoose, and they did, in fact, play a substantial part in making the sale.

For Paul to claim he reasonably relied on a misrepresentation, he must show that the misrepresentations were not (1) transparently false, (2) that they were not mere opinions, and that his relationship to the defendant would show that he reasonably could be trusted. None of Davis's lies were obviously false. However, his statement about Pete, "Don't be a fool and buy junk from Pete", will likely be excused as an opinion or privileged as acceptable commercial competition. Finally, if the court finds that reliance on the lodge

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NEW ENGINE?



ring claim is reasonable, they will also find that Paul's would reasonably believe Davis was nothing more than a friendly salesman.

Paul's damages were \$90,000 -- the cost of a new Mongoose engine.

Defense of Contributory Negligence??:

DEFENSE OF CAPITALISM/PURITANISM

While normally a plaintiff does NOT have a duty to inspect for misrepresentation, Davis, if found to not have intentionally misrepresented the engine, may attempt a contributory negligence defense of matter of public concern. Because Paul works for the City of Smallville, and could potentially recover from the city, that Paul was negligent to not inspect the Mongoose prior to purchase, as it is a very expensive piece of equipment.

Pete v. Davis - Interference with Contractual Relations:

The facts state that Paul was negotiating with Pete. Assuming that there was, at least, a contract to negotiate a sale, Pete may have an action against Davis for Interference with Contractual Relations. Pete must show that Davis (1) intended (2) to interfere with a pre-existing contract (3) causing (4) damages.

Pete would argue that Davis attempted to sell the Mongoose to him only after he had told Davis about his ongoing negotiations with Pete. However, Paul would testify that Davis actually approached him before learning of his contract with Pete. It may be difficult for Pete to prove that Davis intended to interfere.

Davis's offer and comments about Pete interfered with his pre-existing contract with Paul.

Causation can be shown by cause in-fact and proximate cause. But not for Davis's interference, Paul would have continued negotiations with Pete. Alternatively, Davis's interference was a substantial factor in causing Paul to stop negotiations with Pete. There

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is no break in the chain of causation between Davis's statements, and Paul's cease to negotiate with Pete.

Pete suffered damages for the ceased sales negotiations with Paul. Beyond that, he will have a hard time claiming monetary damages, because there was no pre-existing sales contract, and he cannot claim damages for speculative profits.

BUT WAS THERE A PROSPECTIVE ADVANTAGE?

Pete v Davis - Injurious Falsehood

Injurious falsehood is a standard below defamation that applies to trade. It is an (1) intentional (2) false claim (3) to a third party, (4) causing (5) economic damages, (6) without consent or privilege.

Davis said "Don't be a fool and buy junk from Pete", "He is not a Woodchuck brother and that machine needs a new engine". Intent can be inferred by this statement and the fact that he also has a Mongoose for sale.

Further investigation is needed to determine whether this statement is false.

Paul is a third party and foreseeable customer of Pete's.

Causation is the same as described above.

Pecuniary damages will again be difficult to assert without proof of a pre-existing sales contract.

Pete did not give consent. Davis's comments may be privileged if found to be true or reasonably false.

**END OF EXAM**