

MONTEREY COLLEGE OF LAW
REPLACEMENT TORTS FOR KCCL

FINAL EXAMINATION

FALL 2020

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Instructions:

There are three (3) questions in this examination.

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

QUESTION ONE

DAN turns his TV to a cable channel that programmed 120 consecutive hour-long episodes of a show called "Zombie Attack". DAN watches all 120 hours, only rarely dozing and only eating junk food. At the end of the 120 hours, DAN is extremely fatigued and he is convinced that a zombie attack is imminent. DAN also believes that his neighbor across the street, PAM, is a zombie leader.

Five minutes later, DAN's phone rings and it is PAM who calls to tell DAN that his dog has been digging in her yard and she had to chase his dog away. DAN screams into the phone, "I will chop off your zombie head!" Puzzled, PAM hangs up her phone.

Thirty minutes later, DAN is in his front yard looking for zombies when PAM calls across the street from her front yard. She politely asks if DAN could keep his dog out of her yard. DAN draws a metal sword, steps into the street, and shouts back at PAM, "This is the zombie-killer that will do the trick!"

Two houses away, a neighbor named TOM sees DAN with the sword in his hand and hears the word "killer" shouted by DAN. TOM sprints towards DAN and hits him in the head with a metal bar, knocking him out.

An hour later, it has become dark and DAN is awake in his house. DAN is still woozy from being knocked out, still extremely fatigued, and still under the belief that PAM is a zombie leader. DAN sees PAM's car in front of her house and decides he needs to frighten any zombie. DAN takes an open jar of sleeping hornets and sneaks across the street, then places the jar in the car's back seat.

Unknown to DAN, PAM's boyfriend, PAUL, has walked to her house after she phoned and told him about DAN's behavior. PAUL borrows PAM's car to return home and, when the car warms up after a few blocks, the hornets swarm and sting PAUL several times. Due to bee-sting sensitivity, PAUL has to go to the hospital.

1. Discuss PAM vs. DAN using the tort causes of action of:

A. Assault, and

B. Trespass to Chattels.

Discuss the likelihood of success for each cause of action.

2. What tort causes of action, if any, may DAN bring against TOM, and what is the likelihood of success for each cause of action?

3. What tort causes of action, if any, may PAUL bring against DAN, and what is the likelihood of success for each cause of action?

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QUESTION TWO

PAT is a seventeen-year old senior in high school. DOUG is an adult who owns and operates DOUG's DONUTS, a store that creates and sells fresh donuts daily. DOUG's daughter is PAT's schoolmate and DOUG has previously met PAT. Wanting a part-time job during her senior year, PAT goes to DOUG's DONUTS during business hours and asks for an employment application.

DOUG gives PAT an employment application and instructs her to complete it at one of the plastic tables provided for customers. DOUG then tells PAT he must leave the store to make a nearby delivery, and that she should remain until he returns. PAT agrees.

When PAT is alone in the store, she looks behind the counter and sees fresh donuts in an area marked "Employees Only". PAT looks around, makes sure she is alone, and steps behind the counter to take one of the donuts. As PAT is biting into the donut, she hears a noise and jumps to move out of the "Employees Only" area. Her sudden movement has her step in a puddle of cooking oil on the floor behind the counter.

PAT's foot slips in the cooking oil and she falls backwards, striking her head on the cement floor. DOUG returns a minute later and takes PAT to the hospital where she is treated for a serious concussion. At the hospital, PAT is negligently given too much medicine (powerful steroids) by one of the staff and PAT also suffers a damaged liver.

PAT sues DOUG for both her head and liver injuries. During discovery, it is revealed that DOUG had recently fired his janitor, in order to save \$300 per month.

1. What tort causes of action, if any, may PAT bring against DOUG and What is the likelihood of success for each cause of action?

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QUESTION THREE

The Diver-AI is a high-grade breathing regulator used by scuba (underwater) divers. DONNA is an experienced scuba diver who purchases a new Diver-A I with the intention of personally using it while scuba diving during a tropical vacation.

DONNA schedules her vacation and she invites her friend, PAULA, to accompany her. Although DONNA has extensive experience, DONNA knows that PAULA has no scuba training or experience. DONNA reassures PAULA saying, "Don't worry, I will take care of everything and protect you." PAULA agrees to go and they depart to a tropical resort, taking the Diver-A I with them.

A new Diver-AI requires a certain lubricant to be applied to an internal diaphragm in order for the apparatus to operate correctly. Avoiding that lubrication protocol may result in product failure and expose the diver to harm. That information is clearly printed on a bright orange sticker applied to every Diver-AI and is within the common knowledge of all experienced scuba divers. After her purchase of the item, DONNA removes the orange warning sticker in order to scratch her initials on the item. PAULA never saw the orange warning sticker or any information about proper lubrication of the Diver-AI.

While at the tropical resort, DONNA neglects to lubricate the Diver-AI. DONNA allows PAULA to scuba dive alone while using the new Diver-AI regulator. No instructions are given to PAULA by DONNA, other than a suggestion not to dive too deeply. While swimming underwater, PAULA attempts to see how deeply she can dive and, while fifty feet underwater, the Diver-AI does not function correctly. PAULA panics and begins to drown. PAULA is rescued only after she suffers serious injury.

What tort causes of action, if any, may PAULA bring against DONNA and what is the likelihood of success for each cause of action?

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Sorry, there is no answer outline for this exam.

1)

Pam v. Dan

Assault

Assault is a volitional act intended to cause unconsented reasonable apprehension of immediate harmful or offensive contact of another.

Here, DAN has convinced himself that PAM is a zombie leader and she must be killed. DAN demonstrates his intent by drawing a metal sword and flashing it towards PAM. A person in PAM's shoes would regard DAN's act with reasonable apprehension of immediate harm. Generally, verbal threats (such as DAN saying, "I will chop off your zombie head" over the telephone) may not constitute imminent harm or danger to a person but in this case, DAN was brandishing a weapon on his person and that is likely to cause distress in any reasonable person. Moreover, all PAM asked of DAN was if DAN could keep his dog off her property and it is likely that she would not welcome DAN flashing his metal sword at her in an aggressive manner because that would create a harmful or offensive contact to her person.

Based on the facts stated in this case, DAN would be liable to PAM for assault. DAN would raise the defense of self-defense but his defense would most likely fail as the court would see that DAN was influenced by excessive TV that he willfully chose to engage in. DAN would raise the defense of duress but this defense would most likely fail because again, this state of duress was created by only DAN and aggravated by DAN. Therefore, PAM's cause of action for assault against DAN would be successful.

Trespass to Chattels

Trespass to Chattels is a volitional act intended to cause an interference with or misuse of another person's possession of chattels that results in damages to the chattels.

Here, DAN intentionally placed an open jar of sleeping hornets in the backseat of PAM's car. One may argue that DAN was still woozy from being knocked out by TOM and still

fatigued from his lack of sleep which may have caused him to believe that PAM was a zombie leader but DAN still possessed the intent to frighten the zombie that he believed was PAM. DAN possessed the intent to willfully take an open jar of sleeping hornets, sneak across the street and place that jar in PAM's car. DAN knew it was PAM's car and did not have lawful permission to use or enter PAM's car. DAN's acts infer that DAN possessed the intent to frighten PAM with an interference (putting an open jar of sleeping hornets) which would cause PAM the misuse of her car. Being that DAN placed a jar will sleeping hornets that was open, DAN intended to cause an interference and misuse of PAM's chattels. It is reasonable to argue that DAN's act would cause foreseeable damages to the car because once the car heated up, the warm environment inside would awaken the sleeping hornets and they would proceed to attack PAM which may cause PAM to lose focus of her car and get into an accident or wreck.

Based on the facts of this case, DAN is liable to PAM for trespass to chattels. DAN may raise the defense of self-defense (supra) and duress (supra) but he would not be successful because a reasonable person would not be able to believe that PAM was a zombie looking to harm DAN.

Dan v. Tom

Battery

Battery is an act intended to cause unconsented harmful or offensive contact with another person or something closely associated with that person.

Here, PAM's neighbor, TOM, saw DAN flashing his sword at PAM and heard DAN shout the word "killer". TOM jumped to action and ran towards DAN and hit DAN in the head with a metal bar, causing DAN to be knocked out. TOM, being PAM's neighbor, may have believed from DAN's holding of the sword and shouting the word "killer" that PAM was in physical danger. TOM intentionally hit DAN in the head with a metal bar which caused DAN to lose consciousness. A reasonable person would not welcome being hit in the head with a metal bar because such an act would harmful and offensive contact. Moreover, DAN never consented to TOM hitting him with the metal bar.

Based on the facts, TOM may not be liable to DAN for battery because under these special circumstances, TOM was coming to the defense of others (his neighbor PAM) who he

perceived (as a reasonable person would if they saw someone they knew being physically threatened with a weapon as well as verbal insults) was in immediate danger.

Paul v. Dan

Battery

Battery is an act intended to cause unconsented harmful or offensive contact with another person or something closely associated with that person.

Here, DAN intended to frighten PAM by putting an open jar of sleeping hornets in her car without her consent because he wanted her to be harmed or offended by the hornets. Although PAM did not enter her car after DAN put an open jar of sleeping hornets and her boyfriend PAUL did, DAN's intent to cause PAM harmful and offensive contact without her consent was transferred to PAUL. A reasonable person would find DAN legally responsible because a reasonable person would be able to justify that DAN knew his act of putting the open jar of sleeping hornets would harm someone.

Based on the facts, DAN would be liable to PAUL for battery. DAN would likely assert that he did not mean to cause harm or distress to PAUL but his defense would not survive under the legal doctrine of transferred intent which states that when the intention to harm one individual inadvertently causes a second person to be hurt instead, the perpetrator is still held responsible.

Assault

an act intended to cause unconsented reasonable apprehension of immediate harmful or offensive contact of another

Trespass to Chattels

an act intended to cause an interference with or misuse of another person's possession of chattels, that results in damages to chattels

Here, DAN intended to cause an interference with or misuse of PAM's car by sneakily putting an open jar of sleeping hornets. While PAUL did not own the car, he was in legal

possession of the car. PAM knew that her car was in PAUL's control and possession. After DAN put the open jar of sleeping hornets in the backseat of PAM's car, he set forth an interference and misuse of another person's possession because DAN did not have PAM's consent to put an open jar of sleeping hornets inside her car. While we are not certain that DAN's act resulted in any damages to PAM's car, it is foreseeable that damages would occur as a result of DAN's intentional act. Giving PAUL's sensitivity to insects, it is foreseeable to see that once the car warmed up and awoke the sleeping hornets, they must have found PAUL behind the wheel and attacked him. If PAUL had begun driving PAM's vehicle by then, he may have collided with another car, another motorist or a pedestrian.

Under these circumstances, DAN may be found liable for trespass to chattels against PAUL. DAN may argue that it was not PAUL's car but PAM's but it will depend on the judge to determine the result.

Intentional Infliction of Emotional Distress (IIED)

IIED is an act of extreme and outrageous conduct intended or recklessly acted to cause severe emotional distress.

Here, DAN wanted to frighten PAM so he implanted the open jar of sleeping hornets in her car. This was a reckless act by DAN because a reasonable person would not want to put any person in danger of being attacked while they were operating a vehicle. In addition to DAN's act being reckless for the foreseeable harm it could cause such as harm to PAM as well as harm to other motorists and pedestrians, DAN's act of putting an open jar of sleeping hornets was extreme and outrageous conduct because it is not likely that a reasonable person would behave in the manner that DAN behaved or was behaving. So, while DAN's act was intended for PAM, it ultimately caused PAUL physical and emotional distress because he was an eggshell plaintiff, one who was predisposed to his bee-sting sensitivity.

Based on the facts, DAN will be found liable to PAUL for IIED. DAN will assert the defense of duress, but again, this will not be successful, as his conduct was perpetrated by his willful desire to engage in the activities that caused him to behave eccentrically..

END OF EXAM

2)

Pat v. Doug

Negligence

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

In order to bring a claim of negligence, Pat must show that Doug owed her a duty, breached that duty, the breach was the cause (both actual and proximate) of the injury, and that she suffered damages.

Duty

A duty under negligence is a legal obligation to conform to a certain standard of conduct to protect others from unreasonable risk. When a person engages in an activity, they are under a legal duty to act as an ordinary, reasonable prudent person. While no duty is owed to unforeseeable victims, or victims not within the "zone of danger", foreseeable plaintiffs are always owed a duty.

Here, the facts show that Pat, wanting a part-time job during her senior year, entered into Doug's Donuts and asked for an employment application. As a customer, Pat's duty is to act as a reasonable prudent person visiting a store as a customer. Also, Pat is a minor. Her duty is to act as a reasonable seventeen-year old would at a store. As a business owner, Doug has the duty to protect all invitees that come onto his property. Specifically, Doug owes an invitee protections from all reasonably and knowable traps.

Doug will argue that Pat was a trespasser when she entered an area marked "Employees Only" and therefore did not owe Pat a duty. Pat will argue that donuts are considered an attractive nuisance and therefore Doug should have foreseeably known that Pat was an anticipated trespasser. As an anticipated trespasser, Doug owes Pat a duty to protect her from known, man-made harms on the property. The cooking oil being on the floor is a man-made harm on the property. Although Doug, being the owner of a donut store and having experience, might have known about being more careful where he stepped, Pat does not have such experience.

As such, Doug may be liable to Pat if Pat is found to be an anticipated trespasser.

Breach

A breach occurs when the defendant's conduct falls short of that level required by the applicable standard of care owed to the plaintiff. Breach may also be determined by Res Ipsa Loquitur, Negligence Per Se, or the Hand Formula.

Here, the facts show that Pat entered into an area marked "Employees Only". Pat had to look around and make sure that she was alone before stepping behind the counter. Pat will argue that she was easily able to enter into the "Employees Only" section and that there was no specific sign as to the danger on the floor; specifically the cooking oil. Pat may also argue that the cooking oil being on the floor constitutes negligent business practices on the part of Doug. Further, Pat may also argue that Doug was negligent in leaving a 17-year old, minor, alone in a donut store unsupervised. Doug will argue that he did not breach his duty because there was a sign that said "Employees Only" and that she should not have crossed into that area. He will further argue that he was following customs that other businesses use when informing their customers of restricted areas. However, the facts additionally show that Doug fired his janitor to save \$300 a month. Having a janitor could have prevented the accident from occurring. Using the hand formula, spending \$300 a month for a janitor to clean the store and maintain its safety for all customers would be greater than not having one and possibly having an accident occur. The hand formula states that if the burden of taking precautions is less than the probability of injury times the gravity of any resulting injury then the party with the burden has liability. If Doug would have kept his janitor by paying the \$300, this would have resulted in having a cleaner store and, possibly, another employee at the store to watch Pat.

As such, Doug breached a duty to Pat by not staying in his store and supervising Pat.

Causation

When the defendant's failure to meet the applicable standard of care is causally connected to the plaintiff's harm, plaintiff must show that the defendant's actions are the actual and proximate cause of the plaintiff's damages.

Actual: An actual cause is found when the defendant's conduct is the cause-in fact of an event if that event would not have occurred but-for the existence of the conduct. Here, using the but-for test, but-for Doug not staying in his store and watching Pat, Pat would not have crossed behind the counter and slipped on cooking oil. As such, Doug is the actual cause of Pat's injury.

Proximate: Proximate cause is found when the plaintiff establishes that the defendant's negligence was a substantial fact in causing the plaintiff's harm, such that the harm was foreseeable and of the same nature as the risk created by the defendant. Here, the facts show that Doug had an "Employees Only" sign so that customers would not cross behind the counter. Although having cooking oil spilled on the floor is negligent on the part of any business owner, having some spill on the floor is foreseeable. Doug will argue that it was not foreseeable for Pat to cross behind the counter and slip on the cooking oil. However, this defense will fail because donuts are considered an attractive nuisance and therefore Doug should have foreseeably known that Pat would cross over. Doug also not cleaning up the oil spill should have foreseeably known that someone would fall because of it. As such, Doug's omission of not supervising Pat is the proximate cause of her injuries.

Damages

A plaintiff may recover any and all damages (past, present, and prospective), both special and general, as a result of defendant's negligence.

Here, Pat was injured when she slipped in cooking oil and fell backward, striking her head on the cement floor. Doug will also be liable for the damaged liver that she incurs as a result of medical malpractice.

Medical Malpractice

A defendant is only liable for dependent intervening causes that are foreseeable. In a medical malpractice case, the plaintiff needs to prove: (1) the basic norms of knowledge and medical care applicable to general practitioners or specialists, (2) proof that the medical personnel failed to follow these basic norms in the treatment of the patient; and (3) a causal relation between the act or omission of the physician and the injury suffered by the patient. The hospital's actions of negligently giving too much steroid to Pat is considered a dependent intervening cause of her harm. The hospital's actions are dependent because they would not have had to administer the medicine to Pat had Doug not been negligent. It is intervening because the hospital injected too much medicine and caused harm to Pat's initial head injury. Doug is liable for the negligence of the hospital because it was foreseeable that Pat would need to be taken to the hospital after sustaining her injuries. It is also foreseeable that a doctor might commit negligence during the course of the operation. As such, Doug is liable for the negligence of the hospital.

Defenses:

Contributory Negligence: A contributory negligence defense can be made when a plaintiff negligently causes parts of their injuries. In this defense, the plaintiff is barred from recovering against a defendant whose negligent conduct would otherwise make them liable to the plaintiff for injuries. Doug may argue that Pat was contributorily negligent when she crossed behind the counter and ignored the "Employees Only" sign. Doug may further argue that a seventeen-year old teen should have listened to the sign and not crossed it. Pat will argue that her not reading the sign did not directly lead to her damages. It was Doug's negligence in leaving her unsupervised and not cleaning up spills on the floor that directly caused her harm. If the court follows contributory negligence, Pat may not be barred from recovery.

Comparative Negligence: In this defense, a plaintiff's recovery is reduced proportionally to the plaintiff's degree of fault in causing damage. There are two types of comparative negligence: pure and modified. In a pure comparative negligence jurisdiction, the plaintiff will recover whatever percentage they are not responsible for. If the plaintiff is found to be 80% liable, then they will recover 20%. Under a modified comparative negligence jurisdiction, if the plaintiff's fault is equal to or greater than defendant's, plaintiff is barred from recovery; the standard percentage is 50%. Pat will argue that she fell because of Doug's negligence in not supervising her and not cleaning up spills on the floor. If the court follows a pure comparative negligence defense, Pat will be able to recover the percentage of damages that she is not liable for. If the court follows a modified comparative negligence defense, then Paula will have to show that she did not cross the set percentage level that bars her from recovery.

Assumption of the Risk: This defense arises when the plaintiff failed to exercise reasonable care, and that such lack of due care contributed proximately to plaintiff's injuries. This requires proof that the plaintiff knowingly entered into, or stayed in, a position of danger. Here, Doug will argue that Pat assumed the risk by crossing behind the counter and trying to eat a donut. Pat will argue that Doug should have maintained a clean shop and not have any spills on the floor and that there were no warning signs of dangers on the floor.

Conclusion

Pat may hold Doug liable for negligence in leaving her unsupervised, the damages that she received by having cooking oil on the floor, and damages as a result of the hospital's negligence.

END OF EXAM

3)

Paula v. Donna

Strict Liability

Strict liability is liability for damages regardless of negligence.

Abnormally Dangerous activity

Defendant is liable for damages that result from an abnormally dangerous activity if the damage is a result of the risk that makes the activity dangerous in the first place and if the damage was foreseeable.

Here, scuba diving is an inherently dangerous activity due to the need for breathing apparatus and the depths at which they dive. If there is an issue with equipment or training the result can easily be death. Paula is not trained or experienced at all in scuba diving, relying on Donna to keep her safe. The injuries that Paula suffered were exactly the type that make scuba diving dangerous; not being able to breathe and then almost drowning.

Donna would be strictly liable because scuba diving is an abnormally dangerous activity.

Negligence

Defendant's breach of a duty of care, owed to the plaintiff, which is the actual and proximate cause of the plaintiff's damages.

Duty

Conduct which is measured against a reasonable person under the same or similar circumstances.

Here, Donna is the expert at scuba diving and Paula is the novice. Donna has told Paula that she will take care of everything and protect Paula. A reasonable diving expert in the same situation would likewise want to take care of and protect a novice they are diving with, and make sure they are using the equipment for scuba diving correctly.

Therefore, Donna has a duty to Paula.

Breach

Failure to exercise the duty of care owed to the plaintiff.

Here, Donna has not fully explained how to use the Diver-AI to Paula, and has even taken off the warning stickers that would have allowed Paula to read on her own. While Donna has told Paula not to dive too deep, that is not fully ensuring that Paula is diving safely. Also, Donna has allowed Paula to dive alone, something a reasonably prudent diving expert would not have done to their novice diving friend.

Therefore, Donna has breached her duty of care to Paula.

Causation

Plaintiff must show that the defendant is actual and proximate cause of the plaintiff's damages.

Actual/Factual Cause

"But for" the actions of the defendant, the harm to the plaintiff would not have occurred, thus the defendant is the actual cause of the plaintiff's damages.

Here, "but for" Donna not telling Paula about the lubrication requirements for the Diver-AI the Diver-AI would not have malfunctioned while Paula was 50 feet underwater, leading to her serious injuries. Likewise, "but for" Donna taking the warning sticker off, Paula would have been able to read the warning about lubricating the Diver-AI, and taken the proper steps necessary to ensure she was diving safely.

Therefore, Donna is the actual cause of Paula's damages.

Proximate Cause

It is foreseeable that the actions of the defendant would cause harm to the plaintiff, thus the defendant is the actual cause of the plaintiff's damages.

Here, it is foreseeable that by not telling Paula how to properly lubricate and use the Diver-AI, it would malfunction while she was using it. Again, it is foreseeable that taking the warning stickers off of complex equipment would cause a novice user of said equipment to not know how to properly use it, and thus the possibility of harm from misuse is greater.

Therefore, Donna is the proximate cause of Paula's damages.

Intervening Cause

An event that comes between the initial event in a sequence, and the end result, altering the natural course of events which might have connected a wrongful act to an injury.

Here, Paula ignoring Donna's warnings to not dive too deep can be considered an intervening cause. If Paula had not been so far down when the Diver-AI malfunctioned, she might have been rescued before suffering serious injury. However, due to her being a novice it is likely she would have still panicked in shallow water, and still suffered serious injury before being rescued.

Paula diving deeper than she should is not an intervening cause in Donna's negligence.

Damages

Plaintiff must show actual damages to person or property.

Paula suffered serious injury due to panicking and beginning to drown.

Defenses

Assumption of the risk

Complete bar to recovery for a plaintiff who placed themselves at risk with knowledge and acceptance thereof.

Here, Paula has relied on Donna's assurances that Donna will take care of and protect Paula. While Paula has assumed the inherent risks of scuba diving, Paula has not unreasonably assumed the risk of using the Diver-AI, as she is not aware of the risks. The sticker that Donna removed before letting Paula use the equipment would have laid out all the risks from misuse of the equipment. Likewise, Donna has only told Paula to not dive too deep, neglecting to mention the lubrication requirements for the Diver-AI. Without knowing all of the risks of misusing the Diver-AI, Paula has not assumed the risks.

Therefore, assumption of the risk is not a viable defense for Donna.

Contributory Negligence

At common law, plaintiff's contribution to their own injury is a complete bar to recovery. Modernly not used anymore.

Here, Donna can argue that if Paula had not dived as deeply as she did, she would not have panicked further causing her to drown, and would have been rescued easier.

If ignoring the warning to not dive deep is seen as a contribution to Paula's injuries, then she will be barred from recovery of damages.

Comparative Negligence

Apportions the negligence of the plaintiff and defendant accordingly. In a pure comparative jurisdiction, the plaintiff can recover even if their percentage of fault is over 50%. In a partial comparative jurisdiction they may be barred if it is 50% or more.

Here, Paula has ignored Donna's warning to not dive too deep, and has dived as deep as she can. While she is 50 feet underwater the Diver-AI doesn't function correctly, causing her to panic and start to drown. Due to her being so deep it was hard to rescue her before she suffered serious injury. Comparatively it would seem that Paula is less than 50% at fault for the accident. While she did ignore the warning about diving too deep, if the Diver-AI had been properly lubricated by Donna, it would not have malfunctioned. As the experienced diver it is Donna's responsibility to ensure that her novice friend is using the equipment properly.

In either a pure comparative or partial comparative jurisdiction, Paula would be able to recover as her relative negligence was less than Donna's.

END OF EXAM