

Monterey College of Law

Torts Midterm

Fall 2021

Professor B. Soukup

General Instructions:

Answer Three (3) Essay Questions.

Total Time Allotted: Three (3) Hours.

QUESTION ONE

DAN was producing and starring in a movie called “Rusty”. The film “Rusty” was a cowboy movie being filmed in New Mexico. **DAN**, and the cinematographer, **PENNY**, insisted on using real firearms so that the scenes looked like the real Wild West.

One of the firearms used was a Colt 45 handgun for some of the fighting scenes. Although the Colt 45 could fire real bullets, it was supposed to only shoot blanks (gunshots without a bullet) during the fighting scenes on the movie set. The crew in charge of the firearms, sometimes used the Colt 45 to target practice in the desert during their off time. To hit their target, the crew placed real bullets into the Colt 45. The crew oversaw all safety on the set for firearms used by the actors.

During a lunch break one day, **DAN** was rehearsing his lines a little further out from his trailer. He noticed that crew was out target shooting and he could hear the firing of a gun not far from where he stood. Back on the set, **DAN** had a fighting scene. He was supposed to reach for his gun and point it and fire it into the distance at a group of outlaws. As **DAN** fired the handgun, it struck and hit **PENNY** who was using the camera to film the scene. The handgun still had real bullets inside and one of the bullets struck and killed **PENNY**. Behind **PENNY** stood **TIM**, the film director, who also fell to the ground when the bullet struck **PENNY**.

DAN ran from the scene and while distraught, picked up his cellphone and called **TIM**'s wife, **FAITH**, and told her he had accidentally killed her husband. **FAITH** was so alarmed that she fainted and hurt her back. **TIM** was not killed, and only suffered minor injuries from his fall. **FAITH** has since the call had panic attacks whenever she sees a call come in from the set.

New Mexico Civil Code section 123 states:

All firearms used on any movie set, amusement park, or entertainment industry must be registered with the county Sheriff's department or be subject to a \$1,500.00 fine.

Upon, police investigation, it was determined that the firearm that was supposed to be used during the filming of the outlaw scene was a shotgun (that also fired blanks) but that **DAN** had instead used the Colt 45 which was handed to him by one of the crew right before he went out onto the set. **PENNY** later dies from the bullet wound.

PENNY's family decides to sue for wrongful death of **PENNY**.

Discuss the legal causes actions for:

1. **PENNY v. DAN**
2. **TIM v. DAN**
3. **FAITH v. DAN**

MCL
Torts – Section 1
Fall 2021
B. Soukup

TORTS

QUESTION TWO

PABLO, a ten-year old boy, lives next door to a church called Saint Diego Church (**DIEGO**). The church also includes a large cemetery. **PABLO** and other kids in his neighborhood have always been intrigued by the festivals the church holds. One of these festivals happens in the autumn on November 1st when the cemetery grounds have hundreds of relatives come to celebrate the Day of the Dead. (A celebration honoring the deceased, normally held at nighttime). The church customarily leaves the gates open to the cemetery that night rather than locking them at 5:00 P.M. The cemetery also has a lighted footpath used in darker winter months when the sunsets earlier.

PIA, always visited on the Day of the Dead to honor her deceased mother and father who were buried at the graveyard, and she always took a few candles to light and a bouquet of orange marigold flowers that she grew in home garden. Orange marigolds had symbolic meaning as they were supposed to “attract the soul” to the grave. **DIEGO** also sold candles and flowers for people coming that evening at the cemetery gate.

On the evening of the Day of the Dead, **PIA** had been working late and she rushed out the door of her home having forgotten her candles and flowers. Rather than turning back **PIA** decided she would just purchase the candles and flowers at the cemetery. **PIA** purchased these items and she then preceded to her parent’s gravesite and put the flowers in a vase and lit some candles. On her drive home, **PIA** started to suffer from an allergic reaction that caused her eyelids to swell. Although she slowed down and tried to stop her car, she ended up hitting a tree and suffered a broken arm. Later in the hospital it was discovered **PIA** had an allergic reaction to a dye found on carnation flowers. **DIEGO** had supplemented the dyed orange carnations into the marigold flower bouquets to save money.

PABLO woke up at midnight and saw the lure of the glowing candles in the cemetery from his bedroom window. He snuck out of his house to investigate. The gate to the cemetery was open and **PABLO** entered and crept around looking at the elaborate gravesite displays. **PABLO** thought he was all alone, but suddenly heard quiet moaning and became frightened. He tried to make his way to the exit but because it was very dark, he kept losing his way. Panicked, **PABLO** started to run and tripped over a garden hose on the side of the path, that had been left to water the flowers. In doing so, **PABLO** fell into a large group of lit candles and severely burned the side of his face.

Discuss the legal causes of action for:

1. **PIA v. DIEGO**
2. **PABLO v. DIEGO**

TORTS
QUESTION THREE

PETER was a high school student who enjoyed taking drama classes. This year he got a part in the school play of the Wizard of Oz as the Scarecrow. One of his friends, named **DAVID** got a part as a Flying Monkey. All the students took their parts seriously, but once in while everyone liked to play pranks on each other to keep the mood light.

In one of the scenes, the flying monkeys attack the group, including the Scarecrow and the rest of the characters. The students were always supervised during this attack scene and given the “go ahead” and “stop” by the sound of a whistle the teacher/director named **DOUG** had stored by the stage.

One day during drama class, **DAVID** decided it would be funny to lock **DOUG** into one of the dressing rooms. After **DAVID** locked **DOUG** inside, **DAVID** went to the stage and blew the whistle. The group of students who played the flying monkeys began to “attack” the group of characters including **PETER**. **DAVID** also joined in but since no one blew the whistle to “stop” the physical attack continued and **DAVID** hit **PETER** in the nose, and it started to bleed.

DOUG hearing the commotion, was able to break the dressing room door and rushed to the stage. **DOUG** blew the whistle and stopped the attack before anyone else got hurt. **PETER** has since the attack had stage fright and has not been able to resume his role as the Scarecrow.

Discuss the causes of action: (Do not discuss Negligence)

1. **PETER v. DAVID**
2. **DOUG v. DAVID**

TORT QUESTION #1 FALL 2021
PENNY, TIM & FAITH v. DAN

ID# _____

<u>EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)</u>							
	Poor		Excellent				
NEATNESS/ORGANIZATION	0	1	2	3	4	5	_____
LAWYER-LIKE	0	1	2	3	4	5	_____

DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)

PENNY v. DAN

**I. NEGLIGENCE including Negligence per se (statute),
Hand Formula, RPP, and all 3 defenses for negligence.**

30 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

TIM v. DAN

**II. NEGLIGENCE including Negligence per se (statute),
Hand Formula, RPP, NIED, and all 3 defenses for negligence.**

20 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

**III. BATTERY
Including defenses of consent and necessity**

10 POINTS = FULL DISCUSSION
5 POINTS = PARTIAL DISCUSSION

FAITH v. DAN

**IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(including defense of consent)**

15 POINTS = FULL DISCUSSION
7 POINTS = PARTIAL DISCUSSION

**V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(including defenses to negligence)**

15 POINTS = FULL DISCUSSION
7 POINTS = PARTIAL DISCUSSION

TOTAL SCORE:..... _____

TORT QUESTION #2 FALL 2021
PIA and PABLO v. DIEGO

ID# _____

<u>EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)</u>							
	Poor		Excellent				
NEATNESS/ORGANIZATION	0	1	2	3	4	5	_____
LAWYER-LIKE	0	1	2	3	4	5	_____

DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)

PIA v. DIEGO

I. NEGLIGENCE
(Duty owed to Licensee/Invitee, Hand Formula, RPP, and Custom)

30 POINTS=FULL DISCUSSION
15 POINTS=PARTIAL DISCUSSION

II. DEFENSES TO NEGLIGENCE
(C/N and LCC, Assumption of Risk, & Comparative Negligence)

15 POINTS=FULL DISCUSSION
7 POINTS=PARTIAL DISCUSSION

PABLO v. DIEGO

III. NEGLIGENCE
(Attractive Nuisance, Duty to Trespasser, Hand Formula, RPP, and Custom)

30 POINTS=FULL DISCUSSION
15 POINTS=PARTIAL DISCUSSION

IV. DEFENSES TO NEGLIGENCE
(C/N and LCC, Assumption of Risk, & Comparative Negligence)

15 POINTS=FULL DISCUSSION
7 POINTS=PARTIAL DISCUSSION

TOTAL SCORE:..... _____

TORT QUESTION #3 FALL 2021
PETER and DOUG v. DAVID

ID# _____

<u>EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)</u>							
	Poor		Excellent				
NEATNESS/ORGANIZATION	0	1	2	3	4	5	_____
LAWYER-LIKE	0	1	2	3	4	5	_____

DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)

PETER v. DAVID

I. BATTERY (INTENTIONAL TORT)

20 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

**II. DEFENSE TO INTENTIONAL TORTS (BATTERY)
(Consent/Privilege)**

10 POINTS=FULL DISCUSSION
5 POINTS=PARTIAL DISCUSSION

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

20 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

**IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(Include defenses C/N, Assumption of Risk, Comparative Negligence)**

10 POINTS=FULL DISCUSSION
5 POINTS=PARTIAL DISCUSSION

DOUG v. DAVID

V. FALSE IMPRISONMENT (INTENTIONAL TORT)

20 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

**VI. DEFENSES TO INTENTIONAL TORTS (FALSE IMPRISONMENT)
(Consent/Privilege)**

10 POINTS=FULL DISCUSSION
5 POINTS=PARTIAL DISCUSSION

TOTAL SCORE:..... _____

1)

PENNY (P) v. DAN (D)

Battery

Penny is deceased - No battery action

To establish a prima facie case of battery, there must be a voluntary act done with intent to cause a harmful or offensive contact that actually results in harmful or offensive contact. Here, P's family may assert the intentional tort of battery. The act by D was volitional, or voluntary, and the actual result was a harmful contact. However, the issue of intent is critical in determining liability for battery. D did not intend to cause any harmful or offensive contact. Intent may also be proven if there was a substantial certainty on D's part that the result was likely to occur. Here, D acted on an assumption that the gun was safe, as the crew was responsible for gun safety prior to his handling the weapon. This could establish that he had a reasonable and subjective actual belief that the gun was safe. Therefore, the intent element of battery is not well established. However, if the court determines otherwise, and moreover that there was a known substantial certainty of harm, then D could still be found liable.

To the extent that there is some possibility that a fact finder could determine some substantial certainty existed, D would raise the defense of consent. Consent as a defense to battery depends on the scope of consent, and certain exemptions such as mistake, fraud, and duress. Here, to the extent that P consented to be on set, there was a limited scope of consent in that P did not consent to be shot at, even by a gun with blanks, as evident by the facts where D was "supposed to reach for his gun and point it and fire it into the distance." D would argue that his actions were within the scope of consent, and that there were no other exemptions to P's consent. P's family would argue that the scope of her consent was limited to reasonable and foreseeable risks, and did not include having a gun fired in her direction.

Keep in mind its the intent to do/perform the act, not the harm

?

If the intent element of battery is not adequately established, the defense is irrelevant. If the trier of fact determined that intent was satisfied, their evaluation of the scope of consent would be a significant factor in a defense against battery for D.

Assault

Penny is deceased. No assault action.

Assault requires the actual apprehension - perception of imminent likely offensive or harmful contact - which is absent here. There is nothing to indicate that P (or T) had sufficient time or awareness to be apprehensive of such a contact.

✓ **Negligence (Ordinary)**

A cause of action for negligence is determined by a duty, a breach of that duty, actual and proximate causation, resulting damages, and defenses.

✓ **Duty:**

Here, there are two elements of duty that are significant. First, D owed P a standard of care of a reasonably prudent person (RPP). A reasonably prudent person, P's family will argue, would not point a gun at someone even if they knew the gun to be safe.

Reasonable people, especially those involved in a movie where the use of guns is prevalent, should know the dangers and protocols for safety relative to the handling of firearms. Second, D owed P an additional standard of care because he was a producer on the movie where P was an employee. Here, the standard of care is about D's individual actions per se, but for his responsibility for the actions of the crew. Under respondeat superior, an employer is liable for the torts of their employees. The crew themselves had a professional duty as well, to which D would be liable for any breach under respondeat superior.

Excellent

Under both Cardozo ("zone of danger", majority opinion) and Andrews ("duty to all", minority opinion), D had a duty to P. ✓

✓Breach:

The crew "oversaw all safety on the set for firearms," and was "out target shooting," which establish facts that point to a breach of their duty. Here, there are two elements of breach which are both met.

The first is res ipsa loquitor, where the result speaks for itself. Absent negligence of some kind, the death of P (and injury to Tim (T)) would not have occurred. Instrumentality is necessary for res ipsa loquitor, and established here by the fact that the care for the firearms was in the exclusive control of the crew--employees of D. P's family must also show that P was not in any way responsible for the circumstances. Here, D will argue that P had an assumption of risk for being on the set in the first place, and that this negates the res ipsa loquitor. This is a fairly weak argument, as the result is far outside of the normal and reasonable expectations that P would have in being on the set.

The second is concurrent conduct, where even if one person's act is not individually negligent, if it happens in concurrence with other acts to create a risk, then the individual can be held liable. Here, to whatever extent D was not specifically negligent, his actions happened in concurrence with the additional negligence of the crew. The same is true for the negligence of the crew. The doctrine of respondeat superior states that an employer is liable for the actions of their employees when done in the scope of employment. Because D is liable for the actions of the crew under respondeat superior, this element establishes a significant likelihood that a breach occurred and that D is responsible for such.

✓Causation:

Define Causation first.

Res ipsa loquitor reserved when no one is actually the Δ.

yes

Statute →

Negligence per se → New Mexico statute? (OK, I see p. 6) ✓

Custom?
Vicarious liability?

D's actions are the "but-for" or actual cause of P's death. If he had not fired the gun, P would not have died. There were other causes of P's death. First, the apparent negligence of the crew in the loaded gun. This is another cause outside of D's immediate control. With multiple causes it is necessary to also look at substantial factor--D's actions were undoubtedly a substantial factor in P's death. Actual causation is satisfied.

Very nice analysis

For proximate - or legal - cause, we look at intervening causes. Here, D's actions were the direct cause of death, which definitively establishes proximate causation. For the crew, D's actions were an intervening cause. Here, D's actions were foreseeable (it is reasonable to assume that an actor with a gun on a movie set is going to use that gun) so the proximate causation relative to the crew's negligence is also established. Again, under respondeat superior, D is liable both for his own actions and, as producer (employer), responsible for the torts of the crew.

Additionally, where there are multiple parties who are a likely actual cause of the harm, per Summers v. Tice, all of the parties can be held liable, and the burden of proof shifts to them to show that they were *not* the cause of the harm. Under the facts in this case, it is unlikely that either party - D or the crew - could show evidence that they were not a substantial cause.

— Damages? Need to state as an element,

Defenses:

Define C/n first.

Contributory negligence may be present here. P, as the cinematographer, "insisted on using real firearms." This is a fairly weak argument, however, because there is nothing to suggest that this insistence was inherently negligent. There could be an argument by D that P was comparatively negligent, however this is a very weak argument as the facts do not suggest that P did anything out of the ordinary or outside of her usual duties and responsibilities.

Define comparative negligence

yes
also include Justice Cardozo (zone of danger) + Justice Andrews duty to all.

Prox. Cause Zone of danger

Assumption of risk is the stronger argument for D as a defense against a claim of negligence. If D can prove to the finder of fact that P assumed the risk of harm, then his liability may be negated or mitigated. To make this argument succeed, D would need to show that P had full knowledge of the risk and willfully assumed that risk. For D, this argument would focus on looking at industry standards and the general understanding that there is a certain degree of risk on any movie set where firearms or other weapons are being used. D would also highlight the fact that P agreed with him that real firearms should be used.

P's family, in response, would argue that P did not have the extent of knowledge necessary to assume risk for the degree of negligence exhibited here. Because there are actual protocols and people responsible for gun safety, it is likely that the court would agree with P that any assumption of risk did not include the other circumstances showing negligence by the crew and D in this case.

✓ **Negligence per se**

For a claim of negligence per se against D by P's family, they would first point to the New Mexico Civil Code section 123. This code requires the registration of firearms to be used on a movie set. It is not clear from the facts at hand whether the gun used was registered or not, so if there were to be a claim of negligence per se, first there would need to be a demonstration that the statute was actually violated. However, even if this could be shown, the question would then arise if P was in the class of persons meant to be protected by this statute. The statute says nothing about the handling of firearms, and on its surface appears to be primarily a revenue-raising statute. It is likely that this would negate a claim for negligence per se. In addition, the harm must be of a type the statute is designed to prevent, and again, there is nothing to suggest that the purpose of the registration law is to prevent any type of harm--rather, it seems to be designed to simply

Excellent

good

ensure registration (perhaps for prevention of theft, tracing purposes, etc.) and/or the aforementioned raising of revenue.

If, however, the trier of fact was to determine that this statute was implicitly intended to protect P from the type of harm actually suffered, then P's family would have to show that there was actual and proximate causation, and resulting damages. Here, the causation and defenses analysis above for ordinary negligence would apply for negligence per se as well.

Tim (T) v. Dan (D)

✓ Battery

✓ To establish a prima facie case for battery, T would have to show the same elements as mentioned above for P's family. First, that there was a voluntary act, which is apparent. Next, that there was an intent to cause harmful or offensive contact or a substantial certainty that such contact was likely to occur. As above, to whatever extent D's belief that the gun was safe was a reasonable belief, the intent element of battery is not satisfied. However, if D's belief that the gun was safe is not reasonable, and the trier of fact determines that there was a substantial certainty, D's lack of a specific intent would not negate liability for battery. It is likely that if D was to be found liable for a battery against P, he would also be liable for a battery against T. As above, it is probable that the intent element would not be satisfied. (?)
yes

✓ Defenses to Battery? Consent? Negligence and Negligence per se

Here, the arguments above for P would apply equally for T. There is no significant difference between the two plaintiffs in terms of the class of persons to which they belong, their relationship to D, or the circumstances of their injuries. If a prima facie case

One was shot & killed.

→ Yes, but the causation was different as was the damages / Also defenses are different.

is established for negligence or negligence per se against D by P's family, T is likely to be able to establish a similarly valid case against D for his injuries.

- NIED?

Faith v. Dan

✓ IIED

Faith (F) may try to bring legal action against D for intentional or negligent infliction of emotional distress. For an intentional infliction of emotional distress (IIED), there must be conduct which is extreme and outrageous. There must also be an intent to cause distress or recklessness as to the likelihood of such distress. It is unlikely that this intent element could be established by F in a case against D. Therefore, it is probable that F would not succeed in a claim of IIED against D.

? why

- Defenses IIED?

NIED

In addition to IIED, we must also look at the possibility of a negligent infliction of emotional distress (NIED) by D against F. Per Dillon v. Legg, there are certain essential elements to a cause of action for NIED. First, that the person injured must be a close family member. F was T's wife, so this element is likely established (unless the jurisdiction has precedent or statute that states otherwise). Next, the person suffering the distress must be present and a direct witness to the traumatic event. Here, this element is *not* met, because F was not present, and only learned about the harm after-the-fact. She did not even personally witness the event. Therefore, it is unlikely that F would succeed in a cause of action for NIED. However, if the trier of fact determined that the immediate temporal proximity of the phone call was sufficient to establish the "presence/witness" element, then there might be a different result. In that case, the final element, that there was an actual consequence of the trauma, would be met as F "had panic attacks whenever she sees a call come in from the set."

Defences NIED?

It is unlikely that F would succeed under either a claim for IIED or NIED.

Conclusion

Dan is likely to be found liable for:

- a. Negligence (ordinary) under both his own actions and respondeat superior, as the producer (and therefore employer), of the crew.
- b. This would apply to both Penny and Tim
- c. Dan has a better defense for a tort involving Penny on Assumption of Risk than for Tim, because Penny insisted on using real firearms.

Dan is much less likely to be found liable for:

- a. Battery, on the grounds that he did not have the necessary intent.
- b. Negligence per se, on the grounds that the statute was not designed to protect the class or prevent the type of harm experienced here (and instead was really just a revenue-raising statute).
- c. This would apply to both Penny and Tim

Dan is also not likely to be found liable for any claim of action by Faith, including either intentional infliction of emotional distress or negligent infliction of emotional distress.

85

😊
Excellent work.
Watch your defenses
Need to state rules,

TORT QUESTION #1 FALL 2021
PENNY, TIM & FAITH v. DAN

EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)

Use more headings DBCD

	Poor	Excellent	
NEATNESS/ORGANIZATION	0 1 2 3 <u>4</u> 5		<u>4</u>
LAWYER-LIKE	0 1 2 3 4 <u>5</u>		<u>5</u>

DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)

PENNY v. DAN

I. NEGLIGENCE including Negligence per se (statute), Hand Formula, RPP, and all 3 defenses for negligence.

30 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

Very good.

TIM v. DAN

II. NEGLIGENCE including Negligence per se (statute), Hand Formula, RPP, NIED, and all 3 defenses for negligence.

20 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

differentiate Causation of Tim from Penny.

III. BATTERY including defenses of consent and necessity

10 POINTS = FULL DISCUSSION
5 POINTS = PARTIAL DISCUSSION

FAITH v. DAN

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (including defense of consent)

15 POINTS = FULL DISCUSSION
7 POINTS = PARTIAL DISCUSSION

12

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (including defenses to negligence)

15 POINTS = FULL DISCUSSION
7 POINTS = PARTIAL DISCUSSION

12

TOTAL SCORE:.....

85

2)

In determining any legal causes of actions for Pia v. Diego, and Pablo v. Diego, we must first look at whether or not any harm was the result of an intentional act. Here, there was no intentional act to harm or cause a harmful result, nor any substantial certainty that such harm would occur. Therefore, intentional torts do not apply. This is a case of possible negligence. Further, there is no indication of any statutory violation, so negligence per se does not apply. Therefore, our analysis must focus on ordinary negligence.

OK. But not necessary intro

Negligence - Define rule first

Duty

To determine negligence by Diego against either Pia or Pablo, we must first determine the standards of care - the duty - owed by Diego to each of the prospective plaintiffs.

Diego is a public place - a church. As an owner/occupier, they owe a specific duty of care to visitors on their property. The extent of this duty varies depending on the class of the visitor. Most people who visit Diego will be considered *invitees* - people to whom a high standard of care is owed. This is by virtue of their being a public place. Anyone who utilizes the space when they are open to the public and in accordance with Diego's purpose as a church is a foreseeable plaintiff and owed a duty to inspect and to make safe. A *trespasser* is generally owed no specific duty of care, except under certain circumstances, several of which are met here. A frequent trespasser is where the owner/occupier knows that people are likely to trespass, and a discovered trespasser is someone who is known by the owner/occupier to have actually trespassed in the past. Additionally, where children (such as Pablo) are concerned, there is an additional rule for attractive nuisance. An attractive nuisance is where something on the property is known to attract children, or known to be likely to attract children. In this case there is an additional duty of care to ensure safety. The facts show that Pablo "saw the lure of the glowing candles," which strongly implies an attractive nuisance. Further, Diego normally would lock the gates to

the cemetery, but left them open on this occasion. This indicates that they were aware of the possibility of frequent trespassers.

Pia v. Diego

Duty: Diego had a duty to Pia as an invitee. She was there for a public purpose, for which Diego was open as the owner/occupier. Diego also had the duty of a reasonably prudent person (RPP). A high standard of care is owed to Pia as an invitee, and a reasonable standard of care is owed by Diego as a RPP. Although Diego did not fail in any duty to warn, or make safe, relative to Pia as pertains to their role as owner/occupier, they did have a high standard of care as a person selling flowers. Diego's knowledge of the likelihood of the dyed flowers causing a problem would be an essential issue for the trier of fact. If Diego had some knowledge of this risk, then they had a duty to protect, or at least warn. In evaluating standard of care, physical circumstances (such as an allergy) may be considered. good

To establish whether or not there was a duty, the court would likely look to the Learned Hand formula: that the burden to avoid risk must be less than the probability of risk combined with (times) the gravity of harm, or loss. Here, the burden to avoid the risk would have been for Diego to not use the dye. Using the dye was a cost-savings measure by Diego, so the amount of money they saved would serve to determine their burden to avoid the harm. Next, the court would look at the likelihood that an allergic reaction would occur, and consider that together with the degree of loss. If the money saved by using the dye is less than the likelihood and risk presented by the possible allergic reaction, then Diego certainly had a duty to prevent the harm.

Breach: Breach is typically a matter of fact. We must also look to see if there is a res ipsa loquitur situation, or concurrent conduct that suggest negligence. Here, neither of these apply. Under res ipsa loquitur, the conduct and circumstances speak for themselves to

indicate negligence. This means that the result must be something that would not occur absent some form of negligence. Here, Pia's allergic reaction is a result that could possibly occur under different circumstances. However, the other elements of res ipsa loquitur are met--that there was instrumentality under the direct control of Diego, and that there was no fault on the part of Pia. There is no relevant concurrent conduct. If the allergic reaction could not have foreseeably occurred absent negligence, the court may find that res ipsa loquitur is established here, and therefore supports a negligence claim.

Even absent a finding of res ipsa loquitur, there is still the basic fact that Diego "supplemented the dyed orange carnations ... to save money." ^{This may be} Is this a breach of the duty owed to the general public by a reasonably prudent person? The finder of fact would determine the answer to this, which would in turn establish whether this element is met. As mentioned above, the hand formula of burden compared to probability and loss would be used in this determination.

Causation: Diego is a "but-for" cause of Pia's injury. If Diego had not substituted dyed carnations, Pia would not have suffered the injuries. This establishes actual cause. Proximate cause is also necessary for Diego to be liable. Here, we have an intervening cause which is Pia hitting a tree. ~~This is clearly a dependent intervening cause.~~ Pia's difficulty driving was a direct consequence of her eyes swelling shut, which was caused by the dye in the carnations. Therefore, Diego is the cause of Pia's injuries, as both actual and proximate causation are satisfied. *How foreseeable is it someone could get an allergic reaction?*

Damages: There is clearly a physical manifestation to base the damages on. Pia was physically injured, both by the allergic reaction, and the subsequent broken arm.

Defenses: Diego may try to argue that there is contributory negligence on Pia's part in that she did not stop driving when the allergic reaction happened. Even though she "slowed down and tried to stop her car," if the trier of fact determined that she herself

Custom?

What about Custom? Do cemeteries get locked at night?

Cardozo v. Andrews Needed. Zone of danger vs duty to call

Do not pose this in essay

No, the intervening cause is Pia's sensitivity (allergy)

had a duty to stop driving and failed to meet this duty, then Diego might be excused on the grounds of Pia's contributory negligence. Given that she began driving before the allergic attack, and then tried to stop the car when the allergic attack began, this defense would most likely fail. /good

Next, Diego would argue that there was comparative negligence on Pia's part. Again, this would look to Pia's conduct when driving, in particular her response to the allergic attack. If Pia has some negligence in such a way, it is almost certain that it would be less than 50%. Under pure negligence (where recovery is allowed even if plaintiff has a minority of comparative negligence) or partial negligence (where recovery is not allowed if plaintiff has greater than 49% negligence), this would still allow Pia recovery for whatever portion of negligence remained by Diego.

Finally, Diego would point to the assumption of risk when Pia visited the cemetery, and purchased the flowers. There are some weaknesses inherent in this argument. First, Diego had the cemetery open specifically for the day of the dead ceremonies, and there was nothing to indicate to Pia that this would be a dangerous situation. Without knowledge of the risk, Pia was not informed and therefore did not assume any risk by her presence. Next, for the flowers, Diego knew that orange marigolds were important and had "symbolic meaning" to people such as Pia. It is unreasonable to expect Pia to have known or predicted the risk of dyed flowers. She had no warning, and so no way of voluntarily assuming any risk when she purchased the flowers. /nice

Conclusion

To succeed in a cause against Diego, Pia would have to prove that Diego had a duty, primarily under the RPP standard and potentially under the owner/occupier standard as well, to warn of and/or prevent the allergic reaction from the dyed flowers. Whether Diego knew the dye carried a substantial risk for causing an allergic reaction would be a critical determination in establishing liability.

If Diego knew, or should have known, that the dye represented a risk; and if their burden (cost) to avoid this risk was less than the harm combined with probability of harm, then they are liable for negligence to Pia.

Pablo v. Diego

Pablo is a minor, and could be seen as a trespasser. In asserting a claim against Diego, he will argue that (1) Diego owed him a standard of care as an *invitee*, not a *trespasser*, and (2) if he was a trespasser, because he was a minor, Diego owed him a higher standard of care under the attractive nuisance doctrine.

elements? define (rules)

nice intro

Duty: When Pablo entered the property, the gates were open. However, this was late at night and it seems no one else was around. The fact that the gates were open lends credence to a claim by Pablo that he was actually an invitee. It was a public place, the candles were still lit, and the gates were open. These all point to a strong possibility that he had a legal right to enter the property. This would make him an invitee.

At the same time, no one else was around, and it was very late at night. Pablo "snuck" out of his house, and "crept around" the cemetery. These facts point to his knowledge that he should not have been there, and therefore support the position that Pablo was a trespasser. Diego will argue that Pablo was a trespasser by way of these facts, and so there was no special duty owed to him.

If Pablo was an invitee, then there was a high standard of care owed, and Diego may have breached their duty by leaving a garden hose out where it could be an obstacle. If Pablo was a regular trespasser, there would be less liability. There is, however, another key point that must be examined, which is the attractive nuisance doctrine. The facts show that Pablo and "other kids in his neighborhood have always been intrigued," and that Pablo "saw the lure of the glowing candles." Diego should have realized the reasonably

it was left by side of path - was Pablo's running c/n?

foreseeable chance that children would trespass during the festival given these facts. The attractive nuisance doctrine requires an additional duty to secure and make safe anything known to be appealing to children that could also present a danger. Lit candles are both attractive to children, and inherently dangerous. Further, the additional obstacle of the garden hose is a foreseeable risk. It is likely that the attractive nuisance doctrine applies here, establishing a higher duty of care owed by Diego.

Breach: As a matter of fact, if Diego owed a heightened standard of care to Pablo because of the attractive nuisance doctrine, that duty was certainly breached by the lack of supervision, keeping the candles lit late at night, leaving the gate open, and leaving out the garden hose. → *Could they have lighted the path? They did it in winter - why not fall?*

Causation: Diego's negligence was the actual cause of Pablo's harm, as "but for" the aforementioned breach Pablo would never have been hurt. The only intervening cause here is the "quiet moaning" that Pablo heard, unidentified by the facts, and his resulting fear. If this intervening cause was foreseeable, then it does not interrupt the chain of causation, and Diego is the proximate cause of Pablo's injuries. If this intervening cause was unforeseeable, then Diego has a strong argument that they were not the proximate (legal) cause of the harm. Here, the trier of fact will balance between two factors: (1) a child being scared by random natural noises is a foreseeable occurrence when they sneak into a cemetery at night--a factor that benefits Pablo's claim; and (2) there is no way that Diego possibly could have foreseen this--it is essentially a natural event, or an "act of god," that is unforeseeable and therefore benefits Diego's claim and potentially negates their liability. It is likely that the trier of fact would side with Pablo that this was a foreseeable danger. However, this determination would swing the case in Diego's favor if found otherwise.

Defense: Contributory Negligence

Cardozo v. Andrews needed

good

needed

Diego will argue that Pablo had contributory negligence, because he went into the cemetery which was itself inherently negligent. There are two problems with this argument. First, we must hold Pablo to the standard of a reasonable ten-year-old, not a reasonably prudent adult. Second, given the open gate, and aforementioned attractive nuisance, it is unlikely that contributory negligence can be established.

Defense: Comparative Negligence

It is possible the court would determine that there was some degree of negligence by Pablo. As with Pia, however, it is highly unlikely that this would be a majority (over 49%) amount of negligence, and so under both the pure and partial comparative negligence rules, Pablo would still have a right to recover damages. At most, a defense of comparative negligence might reduce the liability of Diego by a percentage equal to Pablo's comparative risk.

Defense: Assumption of Risk

For an assumption of risk defense, Diego would need to show that Pablo had knowledge and understanding of the risk he was assuming. Given his age, and the attending circumstances (especially attractive nuisance), this argument is not likely to succeed.

Conclusion

It is possible that Diego would be found at least partly liable for Pia's injuries. This would only be the case if the trier of fact determined that there was enough of a substantial likelihood that was known to Diego, or should have been known by Diego, that the dye in the flowers would cause a serious allergic reaction. It does not help Diego's case that the dye was used as a cost-savings measure.

It is likely that Diego would be found liable for Pablo's injuries. Per the attractive nuisance doctrine, Diego had a duty to prevent this foreseeable injury that they failed to uphold by leaving the cemetery unattended, and the gates open, with candles lit, and a garden hose as a present obstacle.

(90) Excellent,
See notes for
other details.

TORT QUESTION #2 FALL 2021
PIA and PABLO v. DIEGO

EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)

	Poor					Excellent						
NEATNESS/ORGANIZATION	0	1	2	3	4	5	6	7	8	9	10	<u>5</u>
LAWYER-LIKE	0	1	2	3	4	5	6	7	8	9	10	<u>5</u>

DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)

PIA v. DIEGO

I. NEGLIGENCE

(Duty owed to Licensee/Invitee, Hand Formula, RPP, and Custom)

30 POINTS=FULL DISCUSSION
 15 POINTS=PARTIAL DISCUSSION

Cardozo/Andrews

25

II. DEFENSES TO NEGLIGENCE

(C/N, Comparative Negligence & Assumption of Risk)

15 POINTS=FULL DISCUSSION
 7 POINTS=PARTIAL DISCUSSION

15

PABLO v. DIEGO

III. NEGLIGENCE

(Attractive Nuisance, Duty to Trespasser, Hand Formula, RPP, and Custom)

30 POINTS=FULL DISCUSSION
 15 POINTS=PARTIAL DISCUSSION

Cardozo/Andrews

25

IV. DEFENSES TO NEGLIGENCE

(C/N, Comparative Negligence & Assumption of Risk)

15 POINTS=FULL DISCUSSION
 7 POINTS=PARTIAL DISCUSSION

15

TOTAL SCORE:.....

90

3)

Peter v David

✓ Battery

Battery is when a person performs an intentional act that causes a harmful or offensive touching of another. ^{new paragraph} In this case, David (D) hit Peter (P) in the nose, which caused it to bleed. Because D intentionally touched P by hitting P, which was harmful as evidenced by it causing P's nose to bleed, D performed an intentional act that caused a harmful touching of P. In this scene of the play, the students are directed to attack each other by a teacher/director, Doug. D will argue that because this was a part of the play, P consented to this harmful touching. However, this argument would likely not work. There are no facts that show that it was expected the kids would actually hit one another. Plays involve acting, but rarely involve actually hurting other actors. P will argue that being hit in the nose exceeded the scope of his consent. D will also argue that pranks were common place, and P deciding to continue to participate in the play despite the pranks was also proof of consent. However, nothing in the fact pattern suggests it was common that these pranks ever rose to physical violence. Therefore, a court would still likely find that D's act exceeded P's consent. It is also questionable whether it can be said P consented at all. Typically, Doug would blow the whistle to give the "go ahead" for the actors to start attacking one another. In this case, D had locked Doug in a dressing room and D blew the whistle instead. P could argue that he only ever consented to participate in this act when Doug blew the whistle, since that insured a teacher was watching, making the act more safe. Because D blew the whistle, P would argue he did not expressly consent, nor could P's consent be implied. It is possible a court could agree that P did not consent at all. ^{new paragraph} Because D at the very least exceeded the scope of consent in addition to satisfying the battery elements, a court would most likely find D liable for battery.

Start new paragraph for defenses

Break out your conclusion

 Assault

An assault is one intentionally performs an act that causes another to have the apprehension of a harmful contact, and the plaintiff does apprehend that contact. Here, P will argue D hitting him in the face caused him to apprehend a harmful contact. D may argue that while it was not normal to actually hit each other, it was common in that scene for actors to act as if they would hit each other. Because of this, D may argue that P did not actually have the apprehension of a harmful contact until the contact happened. If someone is unaware of the defendants act or has no apprehension of a harmful contact, no assault occurred. In other words, D will argue that because he regularly acted as if he was going to hit P in this play, P would not have been actually thought D was going to hit him. P and D were also friends, making it even more unlikely that P would have experienced apprehension that he would actually be hit by D. Therefore, it is possible that a court would find it likely that P would not, in fact, have actually believed D was about to hit him, would therefore not have had the apprehension of a harmful contact, and thus not find D liable for assault.

✓ Intentional Infliction of Emotional Distress (IIED)

IIED occurs when one intentionally performs an "extreme and outrageous" act that causes severe emotional distress that causes damages to physically manifest. In this case, P will argue that D punching him in the face was an extreme and outrageous act. P will also argue that this extreme and outrageous act caused actual damages in that it gave P stage fright, and because of that P was not able to continue in the role of the Scarecrow. D will argue that hitting someone in the nose, while violent, would not necessarily rise to the level of being extreme and outrageous. However, given the context, a court will likely reject this argument. Being hit in the nose may not rise to the level of extreme and outrageous in a situation where two willing participants get into a fistfight, but that is not what happened in this case. In this case, P was in a situation where he had no reason to

fear real physical violence, and was suddenly violently hit in the nose by D hard enough to make him bleed. It is likely a court would find being subjected to violence completely without warning is extreme and outrageous. Because this act by D was intentional and damages resulted, the elements for IIED would be satisfied. Therefore a court would likely find D liable.

Negligent Infliction of Emotional Distress (NIED)

A person can be found liable for NIED if they negligently cause another severe emotional distress. A person negligently causes severe emotional distress if they breach their duty of care and the severe emotional distress causes damages. In this case, D had a duty to P to act as a reasonably prudent high school student acting in a play. D breached this duty by not acting as a reasonably prudent high school actor when he punched P in the face. But for D's punch, P's resulting emotional distress that manifested in stage fright would not have occurred. The stage fright is the damage in this case. D would have no defenses in this, as P was not negligent in any way, and did not assume the risk of being hit in the nose when he signed up to act in a play. Because of this, P would almost assuredly be found liable for NIED, if sued for this.

Doug v David

False Imprisonment

False imprisonment is when one acts to intentionally confine or restrain a person in a bounded area. The person must be aware of their confinement and have no reasonable means to escape. Here, D intentionally locked Doug in a dressing room, as D thought it would be "funny". Doug was also clearly aware of his confinement, as he ended up breaking down the door. D will argue that because Doug broke down the door, Doug had a reasonable means of escape, and as such all the elements for false imprisonment were

Break out to a new ¶

yes - but told not to discuss negligence so no points

not met. Doug will counter this by saying despite his ability to break the door, it could not be considered a reasonable means of escape. A court would likely agree that breaking down a door is not a reasonable means of escape, as justice would not be served if Doug could not collect damages because he just so happened to be strong enough to break down a door. Assuming the court found Doug's means of escape unreasonable, the court would almost assuredly find D liable for the false imprisonment of Doug.

its harmful to P. -

not reasonable.

was there an

open window or other door?

→ Defenses? Consent? The planks?

END OF EXAM

90

Excellent.

work on breaking into shorter paragraphs w/ headings. (sub-headings)

TORT QUESTION #3 FALL 2021
PETER and DOUG v. DAVID

EXAM PRESENTATION (TOTAL POINTS AVAILABLE = 10)

	Poor					Excellent					
<i>more paragraphs Separation</i>											
NEATNESS/ORGANIZATION	0	1	2	3	4	5					<u>4</u>
LAWYER-LIKE	0	1	2	3	4	5					<u>5</u>

DISCUSSION OF ISSUES (TOTAL POINTS AVAILABLE = 90)

PETER v. DAVID

I. BATTERY (INTENTIONAL TORT)

25 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

24

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (INTENTIONAL TORT)

25 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

24

**III. DEFENSES TO INTENTIONAL TORTS (BATTERY & IIED)
(Consent/Privilege)**

5 POINTS=FULL DISCUSSION
3 POINTS=PARTIAL DISCUSSION

5

DOUG v. DAVID

IV. FALSE IMPRISONMENT (INTENTIONAL TORT)

25 POINTS=FULL DISCUSSION
10 POINTS=PARTIAL DISCUSSION

24

**V. DEFENSES TO INTENTIONAL TORTS (FALSE IMPRISONMENT)
(Consent/Privilege)**

5 POINTS=FULL DISCUSSION
3 POINTS=PARTIAL DISCUSSION

5

**VI. TRESPASS TO CHATTEL
(Whistle)**

2 POINTS = BONUS POINTS

/

TOTAL SCORE:.....

90