

SAN LUIS OBISPO COLLEGE OF LAW

TORTS

MID-TERM EXAMINATION

FALL 2019

Professor R. Allen

Instructions:

There are Three (3) questions in this examination.

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

QUESTION 1

Dirxx, was a big fan of renowned comfort cook Rachel Fay. He liked to watch her show and try to cook her recipes. One day he started making "Blackened Salmon" when he realized he had no Paprika. He immediately jumped into his car to drive to the nearby grocery store. Unfortunately, he forgot to turn off the burner to his pan of sizzling oil and butter.

When Dirxx returned to his street, it was full of fire trucks and emergency medical responders. His stove had caught the pan of oil and butter on fire. The fire spread throughout the entire apartment complex. The fire ruined the personal and real property of everyone in the complex, largely because of an unusual gale wind that came in from the ocean that afternoon.

Among the things destroyed in the inferno was "Lulu." Lulu was his next door neighbor's dog. Lulu's owner, Patrice, had stood on the sidewalk in front of his home and listened in horror as he heard the howls and cries of his burning dog. Patrice suffered severe burns on his hands when he tried to re-enter his apartment to save Lulu. In the end, neither Patrice nor the emergency responders could reach poor Lulu.

What causes of action, if any, could Dirxx's next door neighbor Patrice bring for Patrice's losses, including the loss of Lulu? What defenses, if any, could Dirxx assert? Discuss.

What causes of action, if any, could Dirxx's neighbor Paul, who lives on the far side of the apartment complex bring for the loss of his personal property in the fire? What defenses, if any, could Dirxx assert? Discuss.

QUESTION 2

Donald was a very scary person. When Pammy saw his true colors, she broke up with him. That was several weeks ago. Since then, Donald has constantly called, texted and messaged her. At first the calls were innocuous. He would ask to come over to get his toothbrush. He would invite Pammy over to his apartment to collect her Steely Dan records. Eventually, however, Donald turned dark.

Hundreds of texts made it clear that he was following Pammy. In some text messages, for instance, he would ask her why she was wearing certain outfits. He would tell her she looked like a prostitute. He would ask her whom she was seeing. One text read:

If I catch you with another man, I will kill you and him.

On Friday morning Pammy took a copy of the single message to the police. She asked for protection. Pammy was told they could do nothing about Donald because the text message in question was "mere words."

On Friday night, Donald surprised Pammy by showing up at her doorstep. When she opened the door, Donald pushed her back into her apartment. He demanded to see her cell phone so he could confirm she was "cheating" on him. When Pammy refused, Donald rifled through her purse and took her cell phone. Seeing no calls or texts to or from another man, he violently threw the phone at the wall in frustration. For several hours Donald screamed at Pammy and hit her. With one punch, he broke her nose and a bone in her cheek area. He demanded that they get back together. He explained if she did not agree, then he would kill her. Around 3:00 am, Donald fell asleep. Before he fell asleep, however, he put his arm around Pammy's neck so he could feel her movements and kept a knife to her all night.

Unbeknownst to Donald, Pammy's niece, Dylan, was hiding in the closet during the entire episode. As a result, he now suffers from permanent anxiety, headaches, and nausea.

In the morning, when Donald went to the bathroom, Pammy ran to a neighbor's house for help.

Pammy comes to you. She wants to know if she and Dylan can sue Donald for any intentional torts.

Question 3

Robert, a PG&E inspector, was going door-to-door following the most recent power shut offs inspecting residential meters. To do so, he would have to access the side or rear yards of PG & E customers. Due to the high volume of meters that required inspection, as well as the general urgency created by the shut offs, PG &E was unable to notify its customers of the inspection by robo-calls, texts or otherwise.

As Robert approached Butch's house, he could see over a three-foot high perimeter fence that the meter was located at the rear corner of the house. Rather than announcing himself, or using a gate, Robert simply jumped over the three-foot fence and started walking toward the meter. As Robert got approximately fifteen feet into the side yard, Butch's dog, a 150-pound Rottweiler name "Satan" ran around the corner straight toward Robert. While "Satan" looked exactly as his name suggested, he was, in fact, a fairly docile dog who simply wanted to greet and play with this new person in the yard.

Robert, however, had no way to understand the dog's intentions, and immediately turned around to flee from this devil-looking 150-pound mass of fur and teeth. As Robert ran toward the fence he placed his hand on one of the vertical fence boards to vault over. This board had significant dry rot, and with force of Robert's hand broke causing Robert to fall awkwardly and break his ankle. Unfortunately, the momentum of the fall caused Robert to roll further forward to a point that his cheek was impaled by a broken and jagged sprinkler riser that Butch had meant to repair but hadn't got around to yet.

Robert sues Butch for his injuries under both strict and general liability theories. Discuss what legal theories might be available. Butch disputes the claims and denies that a trespassing Robert is entitled to anything. Discuss any defenses available to Butch.

Answer Outline

Issue	Rule	Analysis	Concl'n	Points Allotted
P v D				
Intentional Torts				
Trespass to Land (2 points)	Rule (3 points)	Pushed into Pammy's apartment (4 points)	(1 pt)	10
Trespass to Chattel (2 points)	Rule (3 points)	Grabbed phone and threw phone against wall (4 points)	(1 pt)	10
Conversion (2 points)	Rule (3 points)	Grabbed phone and threw phone against the wall (4 points)	(1 pt)	10
Battery (2 points)	Rule (3 points)	Hit her; broken nose and cheek bone (4 points)	(1 pt)	10

Actual Cause (2 points)	But For; Substantial Factor (4 Points)	Apartment would not have burned down; hand would not have been burned? (2 pts)	(1 pt)	9
Proximate Cause (2 points)	Dependent Foreseeable Intervening Act - rescuer (2 points)	P's attempt to save dog RF unless reckless (2 points)	(1 pt)	7
Proximate Cause (2 points)	Independent Unforeseeable Intervening Act - Act of God (2 points)	Unusual gale wind (2 points)	(1 pt)	7
Patrice's Damages (2 points)	General and Special Damages; Loss of Consortium (2 points)	Property; Medical expenses; pain and suffering; companionship of dog (2 points)	(1 pt)	7
Patrice's Damages (2 points)	Indirect NIED; <i>Amaya; Legg v. Dillon;</i> <i>Thing v. LaChusa</i> (6 points)	Is a dog a close relationship; he heard but did not see - is that sufficient (2 points)	(1 pt)	11
Defenses (2 points)	Comp Neg (<i>Li v. Yellow Cab</i>) (2 points)	P duty to P is set by RPP. Patrice injured his own hand (2 points)	(1 pt)	7

	Contributory Negligence (2 points)	P duty to P is set by RPP. Patrice injured his own hand (2 points)	(1 pt)	5
	AOR (2 points)	P knows fire is lethal; P tried to enter anyway (2 points)	(1 pt)	5
Paul v. D				
Duty (2 points)	All foreseeable plaintiffs (2 points)	Other side of complex? (2 points)	(1 pt)	7
SOC (2 points)	RPP (2 points)	Turn off the burner (2 points)	(1 pt)	2
Breach (2 points)	<u>Blyth</u> ; <u>Carroll</u> <u>Towing</u> ; Hand Balance Test (2 points)	Burden of turning off the burner against probability of fire (2 points)	(1 pt)	2
Actual Cause (2 points)	But For; (2 Points)	Apartment would not have burned down (2 pts)	(1 pt)	2

Proximate Cause (2 points)	Paul-Attenuation (2 points)	Reasonably foreseeable to burn far side of complex? (2 points)	(1 pt)	7
Paul's Damages (2 points)	General and Special Damages (2 points)	Property. Anything else? (2 points)	(1 pt)	2
Total Points				105

Answer Outline Q1-Torts-Fall 2019-RAllen

Issue	Rule	Analysis	Concl'n	Points Allotted
Patrice v D				
Negligence (2 points)	Over-arching Negligence elements (2 points)			4
Duty (2 points)	All foreseeable plaintiffs (2 points)	Other people in the complex (2 points)	(1 pt)	7
SOC (2 points)	RPP (2 points)	Turn off the burner (2 points)	(1 pt)	7
Breach (2 points)	<u>Blyth</u> ; <u>Carroll</u> <u>Towing</u> ; Hand Balance Test (2 points)	Burden of turning off the burner against probability of fire (2 points)	(1 pt)	7

Assault (2 points)	Rule (3 points)	Yelled at her for hours; punched her (4 points)	(1 pt)	10
IIED Direct Victim (2 points)	Rule (3 points)	Hit; threatened; falsely imprisoned (4 points)	(1 pt)	10
IIED Indirect Victim (2 points)	Rule (3 points)	Heard incident; Anxiety, headaches, nausea (4 points)	(1 pt)	10
False Imprisonment (2 points)	Rule (3 points)	Arm around neck; Knife to back (4 points)	(1 pt)	10
Total Possible Points				80

Torts-Q2 Answer Outline-Fall 2019 – DSpini

Issue 1 (25%): Dangerous animal/dog bite strict liability analysis:

- No evidence in hypothetical of prior dangerous propensities of Satan the dog
- Dog "fright" vs. dog bite situation: strict liability would not apply
- Duty of landowner in relation to animal regarding unknown trespasser vs. foreseeable, if unexpected, licensee

Issue 2 (50%): Premises liability analysis:

- General duty of owner or possessor of land (*Rowland v. Christian* and *CACI 1001* analysis)
- Actual vs. Constructive notice/known or should have known analysis
 - o Was there notice of rotted fence board
 - o Was there notice of broken sprinkler riser
- Obligations required of landowner to discharge duty: repair, make safe, or warn
 - o Further discussion of *Rowland* factors, including likelihood and seriousness of harm and difficulty/cost of protecting against risk of harm

-Significance of Robert's status (trespasser, licensee, guest – under *Rowland* doesn't eliminate duty, but may affect level of duty and care required

Issue 3 (25%): Defenses available:

- Comparative fault of Robert
 - o Could have announced himself
 - o Could have used gate
 - o May have overreacted to Satan

1)

Patrice v. Dirxx

Negligence

Negligence occurs when the duty for the standard of care is breached, causing damages/injury, with no defense.

Duty

A duty can be established by the reasonably foreseeable person standard, by an affirmative act by the defendant, or by a special relationship.

RFP

A general duty is owed to act as a reasonably foreseeable person. Under Andrews, the duty would be owed to anyone, whereas under Carozza, the duty would only be owed to those in the zone of danger.

Here, Dirxx (D) owed a duty to his next door neighbor (P), who was in the zone of danger.

Therefore, D had a duty to P.

Affirmative Act by Defendant.

Here, D's acts did not directly place P in peril. D may have unintentionally started the fire but he did not directly cause P to go inside her home in attempt to save her beloved dog, Lulu (RIP).

Special Relationship

Special relationships pertain to parent/child, employer/employee, prisoner/jailee. Here, there was no special relationship between P and D that required P to owe a special duty to P. Although there were neighbors, there was nothing additional that required an extra duty to P from D.

Standard of Care (SOC)

The standard of care can be established by statutes, RPP standard, and customs.

Statues

Statutes can provide a SOC if P is part of the class the statute was designed to protect and the harm occurred that the statute was designed to prevent.

Here, the fact pattern does not indicate any statutes.

Therefore, there is no violation of SOC by statute.

Reasonable Prudent Person (RPP)

A person should act as a reasonable prudent person the same or similar circumstances.

Here, D had the SOC to act as a reasonably prudent neighbor (RPN) . As a RPN, D should act with reasonable care when at home and be mindful of his actions.

Therefore, D had the SOC as a RPN.

Customs

Customs are standard norms in an industry. The SOC can be above the RPP standard but should never fall below.

Here, D was a home cook who enjoyed trying recipes of his favorite cook, Rachel Fey. While using a burner was a standard norm in the industry, turning the burner on the abandoning the kitchen is conduct that falls below the custom norm

Therefore, D breached the custom SOC for home cooks.

Breach

Breach occurs when the duty for the SOC is violated.

Blyth Rule

As Lord Anderson stated during Blyth v. Birmingham Water Works, "Negligence is the omission of doing something a reasonable person would do, or doing something that a reasonable person would not do".

Here, D put oil and butter in a pan, causing sizzling in the pan. Sizzling in a pan produces sound (you can hear a sizzle), smoke (butter and oil don't upon meeting) and smell. The sound, smell and smoke would set off ones senses, which would cause a reasonable person to pay attention to the

item causing this reaction. However, D did not, and left his apartment after this step. Stepping away from a sizzling pan is conduct in which a reasonable person would not do.

D can argue that he intended to be gone for just a moment and that the grocery store is nearby. He can also say that he was waiting for the pan to heat up so it would be ready upon his return. However, the fact pattern does not indicate how long he was gone, how busy the store was, or if he took an alternate route.

Therefore, D breached the RPN SOC

Causation

In order to prove negligence, the defendant must prove to be both the actual and proximate cause.

Actual Cause

The actual cause is, "but for" the defendant's action, the result would not have occurred.

Here, for D to be the actual cause, we would have to prove that but for D leaving a sizzling pan on unattended in his apartment, the fire to P's apartment would not have occurred.

Substantial Factor Test

If there are several factors that cause injury to P, it is up to D to prove that they were not the factor to cause harm to P.

Here, there was the factor of the burning pan and the factor of the unusual gale of wind that came from the ocean. The issue is was it the fire from D's apartment that caused P's apartment to light on fire or the unusual gale of wind that pushed the fire into P's apartment, resulting in the apartment being destroyed. Since the fire would have not started but for the actions of P, P is the actual cause.

Therefore, P is the actual cause in fact.

Proximate Cause

D is be the legal cause if the result was a foreseeable result of P's actions.

Here, the fact pattern states that P's stove had caught the pan of oil and butter on fire. This act was a reasonably foreseeable of D leaving his stove on unattended. The resulting fire, causing damage to him and anyone in the zone of danger could be foreseeable, making D the proximate cause.

However, D could argue that the fire spreading to the entire apartment complex was not foreseeable. The facts indicate the spread of the fire was LARGELY due to an unusual gale of wind that came from the ocean. This would qualify as an act of god, an unforeseeable event.

Thus, D is the also the proximate cause.

Damages

General

General damages include pain and suffering and hedonic damages.

Here, P can assert they are in both physical pain from the burns sustained on his hands and mentally in pain from the loss of her dog. Therefore, P can likely receive general damages from P.

Specific

Specific damages include loss wages, medical expenses, work-life expectancy.

Here, P can claim that due to the burns on their hands caused by the fire, he cannot work and now has medical expenses. The medical expenses are for the cost to treat and any future treatments, provided that P does the duty to mitigate future harm. Thus P can likely claim special damages.

Punitive

Punitive damages are punishable damages to D for malicious and wanton conduct,

Here, D was not malicious or wanton. His intent was to cook a meal from his favorite chef. Therefore, no punitive damages should be awarded.

Defenses

Comparative Negligence

Comparative negligence reduces D's liability when P has been negligent.

Here, D can assert that P went into the apartment on their own will to chase after their dog. There were fireman present who could have done this but they chose to do this on their own. Had they not done this, they would have not sustained the damage to their hands.

P can assert that they loved the dog like their own and they had no other choice.

Therefore, it is likely P would be found comparatively negligent.

Therefore, D is likely to be found negligent.

Negligent Infliction of Emotional Distress (NIED)

NIED occurs when is a contemporaneous observer, at the scene of the accident, and suffers physical injury.

Here, P observed the fire occur, was at the scene of the accident (the fire) and now has a physical injury (burned hands) as a result of the acts of P. P can state that she stood in horror as she heard the howls and cries of her beloved dog crying and that led them to try to save Lulu's life, with no success.

D can argue that the dog, although loved, was actually property and should not result in NIED.

Therefore, P has a strong case for NIED

Paul v. Dirxx

Negligence

Negligence occurs when the duty for the standard of care is breached, causing damages/injury, with no defense.

Duty

A duty can be established by the reasonably foreseeable person standard, by an affirmative act by the defendant, or by a special relationship.

RFP

A general duty is owed to act as a reasonably foreseeable person. Under Andrews, the duty would be owed to anyone, whereas under Carozza, the duty would only be owed to those in the zone of danger.

Here, Paul (the neighbor from across the apartment complex) was not in the zone of danger. Only upon the theory of Andrews would P have a duty to him.

Therefore, D had no duty to P.

Affirmative Act by Defendant

Here, D's acts did not directly place P in peril. D may have unintentionally started the fire but he did not directly cause the harm to P.

Therefore, there are no affirmative acts of duty by d here.

Special Relationship

Special relationships pertain to parent/child, employer/employee, prisoner/jailee. Here, there was no special relationship between P and D that required P to owe a special duty to P. Although they lived in the same complex, there was nothing additional that required an extra duty to P from D.

Standard of Care (SOC)

The standard of care can be established by statutes, RPP standard, and customs.

Statutes

Statutes can provide a SOC if P is part of the class the statute was designed to protect and the harm occurred that the statute was designed to prevent.

Here, the fact pattern does not indicate any statutes.

Therefore, there is no violation of SOC by statute.

Reasonable Prudent Person (RPP)

A person should act as a reasonable prudent person the same or similar circumstances.

Here, D had the SOC to act as a reasonably prudent person. As a RPP, D should act with reasonable care when at home and be mindful of his actions.

However, since the fact pattern indicates they were strangers, P can argue he has no duty to P

Customs

Customs are standard norms in an industry. The SOC can be above the RPP standard but should never fall below.

Here, D was a home cook who enjoyed trying recipes of his favorite cook, Rachel Fey. While using a burner was a standard norm in the industry, turning the burner on the abandoning the kitchen is conduct that falls below the custom norm

Therefore, D breached the custom SOC for home cooks.

Breach

Breach occurs when the duty for the SOC is violated.

Blyth Rule

As Lord Anderson stated during *Blyth v. Birmingham Water Works*, "Negligence is the omission of doing something a reasonable person would do, or doing something that a reasonable person would not do".

See explanation *supra*.

Therefore, D breached the RPN SOC

Causation

In order to prove negligence, the defendant must prove to be both the actual and proximate cause.

Actual Cause

The actual cause is, "but for" the defendants action, the result would not have occurred.

Here, for D to be the actual cause, we would have to prove that but for D leaving a sizzling pan on unattended in his apartment, the fire to P's apartment would not have occurred.

Substantial Factor Test

If there are several factors that cause injury to P, it is up to D to prove that they were not the factor to cause harm to P.

Here, there was the factor of the burning pan and the factor of the unusale gale of wind that came from the ocean. The issue is was it the fire from D's apartment that caused P's apartment to light on

fire or the unusual gale of wind that pushed the fire into P's apartment, resulting in the apartment being destroyed. Since the fire would have not started but for the actions of P, P is the actual cause.

Therefore, P is the actual cause in fact.

Proximate Cause

D is be the legal cause if the result was a foreseeable result of P's actions.

Here, the fact pattern states that P's stove had caught the pan of oil and butter on fire. This act was a reasonably foreseeable of D leaving his stove on unattended. However, D could argue that the fire spreading to the P's apartment complex was not foreseeable. The facts indicate the spread of the fire was LARGELY due to an unusual gale of wind that came from the ocean. This would qualify as an act of god, an unforeseeable event.

Thus, D is the not the proximate cause.

Damages

General

General damages include pain and suffering and hedonic damages.

Here, P can assert the loss caused him emotional distress due to the loss of his belongings. Therefore, he may get minimal damages for general.

Specific damages include loss wages, medical expenses, work-life expectancy.

Here, P may get damages if they had to miss work due to fire. Therefore P may not get special damages.

Punitive

Punitive damages are punishable damages to D for malicious and wanton conduct,

Here, D was not malicious or wanton. His intent was to cook a meal from his favorite chef. Therefore, no punitive damages should be awarded.

Defenses

Assumption of Risk (Primary)

One who primarily assumes the risk is not negligent when there is no duty to care.

Therefore, D is unlikely to be found negligent.

END OF EXAM

2)

Assault-

is the creation of reasonable apprehension that immediate physical harm will occur.

Here, Donald is sending Pammy threatening text for weeks on ends "If I catch you with another man, I will kill you and him" Mere, words are usually not enough to satisfy an assault their had to be some reasonable apprehension that immediate physical harm will occur. He does stalk her, and send her messages that would indicate he is following her around. If he was close enough to act on his threats, and Pammy believed immediate physical harm was about to occur then he may be guilty of assault. However, we know Donald is close (because he sees her) but we do not know if he is close enough to immediately act on his threats. However, on Friday night when Donald shows up at her house after sending violent text messages he "throws her phone violently" This violent act of aggression, along with his previous words would lead a reasonable person to believe they were in danger of immediate physical harm satisfying the elements of assault.

Pammy likley has a case against Donald for assault.

Battery-

Battery is the intentional harmful touching of another without consent.

Here, once Donald "pushed" Pammy he has crossed over the line into battery. The push was forceful enough to force her back into her apartment (harmful), it made contact with Pammy's person and nothing in the fact pattern constitutes consent. Donald also commits battery when he punches her and breaks her nose. Again, we establish harmful contact without communicated consent from Pammy. Also, the intentionalness of Donalds actions (punches and Pushes) are not accidental acts such as bumping into someone in a crowded bar. They are intentional violent acts with intent to cause harm.

Pammy likley has a case against Donald for Battery.

Trespass of Chattel

Occurs when a party takes possession of the property of another, greatly interfering with the use or devaluing the worth of the property.

Here, Donald grabs the cell phone/purse without the consent of Pammy and starts going through her text messages. He has committed trespass of Chattel by taking the cell phone and depriving Pammy the use of the phone. However, once he destroys the phone (completely not partially) he has now entered into conversion. It is not stated in the facts whether throwing the phone against the wall has broken it or even damaged it. It most likely would, however it is not stated here. If he damaged the phone he would have to pay back the loss of market value that the phone has incurred.

Donald will be liable for any damage for throwing the phone through Trespass of Chattel

Conversion-

Occurs when the plaintiff's property is completely destroyed, lost all market value or will never be returned through the action of the defendant.

Here, Donald smashes the phone against the wall. However, we get no facts to support that the phone is completely broken. Violently throwing a cell phone is likely to break it but that fact is not stated here. If Pammy can recover her phone, in good working order then conversion has not occurred.

It is unclear whether Pammy has a case for the intentional tort of conversion.

Trespass of Property

Intentional entry onto the property of another without their consent (damage not needed).

Here, Donald pushes Pammy back into the apartment. It can be inferred that he entered the property with her because he was able to go through her purse shortly after. Donald forcefully pushing his way into the apartment without the consent of Pammy can be considered Trespass.

Pammy likely has a case for the intentional tort of Trespass of Property.

False Imprisonment-

Intentionally confining someone within fixed boundaries without their consent and with no reasonable way to escape.

Here, Donald falls asleep. Before he does he places a knife to Pammy's neck so that he can feel if she moves away from him. Donald intentionally confines Pammy (knife to neck, wants to know if she moves). Within fixed boundaries, the knife and arm around her neck could be construed as fixed boundaries, she can't move away from them without the threat of death or GBI. Pammy did not give consent to be confined. There is no way to escape because of the threat of death or violence.

Pammy likely can pursue of tort of False Imprisonment against Donald

False Imprisonment- Dylan

(definition above) Here, Dylan is in the closet while she is watching her Aunt get abused. Dylan could argue that he was confined because he did not want to be hurt, within the fixed boundaries of the closet and had no way to escape without causing her Aunt or herself more harm. However, Donald has no knowledge that Dylan is there and therefore did not intentionally confine or imprison her.

Dylan does not have a case for the intentional tort of false imprisonment .

Intentional Infliction of Emotional Distress-(I.I.E.D)

Intentional Infliction of Emotional Distress is the extreme and outrageous infliction (through words or actions) of emotional damages.

Pammy has a strong case for this because she is stalked, threatened and slept next to with a knife at her neck. A reasonable person may have emotional damages from such actions. The fact pattern, however does not give us any insight into her emotional well being. If she has mental suffering or duress she certainly can recover. These actions by Donald are certainly extreme and outrageous.

It is unclear whether Pammy has a case for the intentional tort of Intentional Infliction of Emotional Distress.

Dylan-

Dylan is a of close relationship to Pammy and present at the time of the commission of the act so he can recover for the intentional tort of I.I.E.D.

Here, Dylan is in the closet and witnesses Pammy be abused, threatened and cuddled by a man wielding a knife. These actions are certainly out of the ordinary and would cause a reasonable

person to be emotionally distraught. Dylan also suffers from permanent anxiety, headaches and Nausea (damages)

Dylan has a strong case against Donald for (I.I.E.D)

END OF EXAM

3)

ROBERT V. BUTCH

Negligence

Negligence is the failure to conform conduct to an appropriate standard under the circumstances where there is a legal duty to protect others from unreasonable risk.

Duty

Duty is a legal obligation to protect another from unreasonable risk caused by one's own conduct or by forces within one's control. Writing for the majority in the landmark case *Palsgraf v. LIRR*, Justice Benjamin Cardozo established the majority rule that a duty is owed only to reasonably foreseeable plaintiffs within the zone of danger. Justice Andrews's dissent in the same case argued for minority that a duty is owed to the world in general to avoid unreasonable risk. In addition to foreseeability, an affirmative duty may arise when the defendant has a special relationship with the plaintiff, when the defendant's own act created the risk, by contract, by statute, or by the undertaking of a gratuitous rescue. While there is no duty imposed in most jurisdictions to rescue, once undertaken a rescue must be carried out with reasonable care so as not to leave the victim in worse position than he was previously.

Butch has a duty to protect those who may foreseeably be harmed by his conduct. It is foreseeable that unexpected visitors may arrive for legitimate or even privileged reasons, however it is not necessarily foreseeable that those visitors will jump over a three-foot fence and begin walking towards the rear of the house without announcing themselves. Butch may have been aware due to the extraordinary circumstances of the power outage that a PG&E inspector might be coming by, but unless Robert can produce a preponderance of evidence to show that Butch should reasonably have expected an inspector to arrive unannounced, despite the lack of notice from PG&E his presence may not be found reasonably foreseeable.

Conclusion

It is likely that the finder of fact will determine that Butch did not owe a duty of care to protect Robert from unreasonable risk because Robert's unannounced presence inside Butch's fenced yard was not reasonably foreseeable.

Standard of Care: Reasonably Prudent Person

The reasonably prudent person is a legal fiction; a conglomerate of the experience, faculties, and morals of the average citizen, with annoyingly perfect 20/20 hindsight. When considering negligence, courts use the reasonably prudent person as a measurement to objectively determine what an ordinary person, with subjective limitations peculiar to the defendant, e.g. physical disabilities, would have believed or done under the particular circumstances in which the defendant found themselves. The standard of reasonable care requires only that the defendant conform his conduct to what a normal member of society would reasonably do in order to limit risk to others.

As a reasonably prudent homeowner, Butch would understand that others will traverse his property from time to time, and so would take reasonable care to ensure that known hazards are repaired and mitigated, or at least put up signs to warn in the areas that a reasonable homeowner might expect someone to enter. For example, it would be reasonable not to leave an artificial hazard on the sidewalk or near the mailbox. Or to repair sprinkler risers if they were in the grass very near the sidewalk so that a passerby wouldn't trip and be injured.

Conclusion

Butch had a duty to conform his conduct to the standard of a reasonably prudent homeowner to avoid injury to those foreseeably present on his land.

Standard of Care: Landowner/Occupier

A landowner/occupier has varying duties to those who come onto his land, depending on their status. To an invitee, who is present for business or public purposes that benefit the activities of the landowner, a fairly high duty is owed. The landowner must use reasonable care in all of his activities and also inspect, warn, and make safe both natural and artificial hazards. For a licensee, someone who is there for social purposes, the landowner must use reasonable care in his activities and warn of any known but hidden hazards, whether natural or artificial, that the guest would not easily notice on their own. For trespassers, if unknown, the landowner has no duty, not even to discover the trespasser. However, when the trespasser is known to be on the land, or if the landowner knows that trespassers frequently come on his property, then he must exercise reasonable care in his activities and warn them of artificial hazards. Known or likely trespassing children impose a special

duty when there is an artificial hazard that constitutes an attractive nuisance. Certain other people may be privileged to come onto property, e.g. to fight a fire or reclaim property in hot pursuit, and are owed a duty of reasonable care in landowners activities and warning of artificial hazards. Jurisdictions are split on whether there is a duty to warn them of natural hazards as well.

In this case, much depends on Robert's status on Butch's land. Robert may argue that he was an invitee since his purpose benefited Butch by getting the power turned back on faster, however it was not a purpose driven by Butch's own activities, therefore Robert is not an invitee. Nor is he a licensee or social guest, since there are no facts to suggest that he knows Butch at all. Robert is either an unknown trespasser, in which case Butch has no duty of care for him, or Robert is a privileged entrant due to his inspector position with a state sanctioned major utility.

Robert's purpose on Butch's property, to read the meter, is likely privileged and foreseeably so since Butch knows that his meter is read on a regular basis, however it possible that Robert exceeded the scope of that privilege when he jumped over the fence and failed to announce himself.

Conclusion

The jury will likely find that Robert was owed the duty of care of a privileged entrant due to his status as a PG&E official, however they may also find that Robert exceeded the scope of his privilege and became an unknown trespasser due to the mode of his entry.

Breach

Breach is the failure to conduct oneself with the appropriate standard of care to avoid creating undue risk to others. *Blythe v. Birmingham Water Works* defined it as the failure to conduct oneself as a reasonably prudent person under reasonably anticipated circumstances. In *U.S. v. Carroll Towing Co.*, Justice Learned Hand provided the formula $B < PL$ for assessing whether the burden of adequate precautions was lower than the level of the risk and the severity of the harm that might result.

If Robert was a privileged entrant, Butch had a duty to protect him from Butch's activities as well as warn him of any artificial hazards (and possibly natural hazards as well). The broken sprinkler riser was known to Butch, and it was an artificial hazard, or possibly it was there due to Butch's gardening activities. The fence board full of dry rot was also an artificial hazard, however Butch had no duty to discover it, so if he was unaware it was rotten, he had no duty to warn anyone about it. Satan, the ironically named Rottweiler, is also an

artificial hazard; animals on the land, if they are not natural inhabitants but have been introduced by the landowner, are considered artificial hazards.

In the case of the sprinkler riser and the dog, the burden of warning potential entrants is slight. Beware of Dog signs are available at any hardware store for a modest price and it wouldn't have taken much to put an empty flower pot over the riser. The dry rotted fence could also have been dealt with by a sign, though Butch may not have had a duty to warn of the fence. The likelihood that someone would be injured as Robert was is rather slight, though the injury of a broken ankle and impaled cheek is severe enough that reasonable precautions, if not too burdensome, should have been taken.

Conclusion

Butch breached a duty of care to warn privileged entrants of the sprinkler riser and the dog. If he knew of the dry-rotted fence, he also breached his duty to warn privileged entrants about the fence.

Causation

In addition to showing that the defendant was negligent, the plaintiff must also prove by a preponderance of the evidence (as must all elements of negligence be proved) that the defendant's negligent breach was also the actual and proximate cause of the harm suffered. Actual cause is determined either by the "but for" test or based on whether the defendant's conduct was a substantial factor in causing the harm. An act that is both the actual and direct cause of the harm is almost always also the proximate cause of the harm. When intervening forces arise that act to change or amplify the trajectory of the forces set in motion by the defendant's conduct, proximate causation may be cut off if the intervening force is independent and unforeseeable, or if the defendant's conduct becomes too attenuated from the harm that results.

Actual

It is not certain that Robert wouldn't have been injured even if Butch had posted appropriate warnings. He might not have noticed the Beware of Dog sign since the fence is likely long and Robert approached from an unexpected vantage. He also might still have hit his face against the flower pot covering the sprinkler riser while fleeing from Satan. Butch's

negligence is not the but for cause of Robert's injury, but it is still a substantial factor since it is likely that the precautions would have significantly reduced the risk or severity of Robert's injury.

Proximate

There were multiple intervening factors, including Robert's own unpredictable entry, the behavior of the dog, and Robert's subsequent attempt to vault over the fence. It is possible that a jury might find that Butch's failure to post warning signs was too far removed from the injury that Robert sustained. However the jury might also find that it was reasonably foreseeable that someone who was not warned about the enormous and ferocious looking dog might be frightened into running madly away and injuring themselves in some fashion.

Conclusion

Butch's failure to post warning signs was a substantial factor in Robert's injury and a jury may find that it was also the proximate cause due to the foreseeability that someone would run away from Satan.

Damages

Damages are the harm complained of. They include general, special (or pecuniary), and punitive damages. General damages include pain and suffering and other forms of hedonic loss. Special damages are economic, based on costs of medical care, replacement of property, lost wages, etc., anything that can be enumerated. Punitive damages are reserved for cases of outrageous or malicious negligence, to express society's abhorrence and censure, and to act as both a general and specific deterrence.

General

Robert will likely claim pain and suffering for his injuries. He may also claim hedonic loss while his ankle is broken, or if it is permanently disabled.

Special

Robert may claim damages for past, present, and future medical care and the cost of accommodations for the injury and any future disability. If Robert suffers permanent disability due to his broken ankle, he may be unable to continue to work in his present job, which presumably

requires a lot of walking. If he claims loss of future wages, the amount will be discounted by the formula $PV = \frac{\$1}{(1+i)^n}$ where PV is present value, i is the standard interest rate, and n is the number of years to avoid over payment by a lump sum at present value. If Robert is offered a different job at PG&E, he has a duty to take it to mitigate Butch's damages.

Punitive

Butch's act was nonfeasance, so it is unlikely that a jury would find he was in any way outrageous or malicious. Therefore punitive damages are off the table, no matter what you think about someone who would name a dog Satan.

Conclusion

Robert will base his damage claims on pain and suffering, loss of enjoyment due to the broken ankle, and compensation for his out of pocket expenses and loss of wages either temporarily or permanently if he cannot work.

Strict Liability

Those who keep wild animals on their property may be strictly liable for any damages caused as a result. Strict liability occurs when the conduct is deemed sufficiently hazardous to hold someone liable simply for doing it, whether or not they have breached a duty of care.

Because Satan was not actually a wild animal, or even a particularly vicious domesticated dog, Butch is unlikely to be found strictly liable for him. Although Satan appeared menacing, he was in reality fairly docile and simply wanted to greet and play with Robert. Butch presumably knew of his dog's nature.

Conclusion

It is unlikely that Butch will be found strictly liable for Satan since his dog was known to be friendly and was not a dangerous wild animal.

Negligent Infliction of Emotional Distress

When a plaintiff suffers severe emotional distress due to negligence that impacted him directly, or as a bystander contemporaneously observing the impact of negligence on a close family member and suffering either physical harm due to shock (*Dillon v. Legg*) or

simply more severe emotional reaction than would an ordinary observer (*Thing v. La Chusa*), he may also recover for negligent infliction of emotional distress.

Since Robert was injured, he may claim NIED in any jurisdiction if his encounter with Satan also caused severe emotional distress.

Conclusion

If Butch is found negligent, Robert may support a claim for direct NIED if he can show severe emotional distress.

DEFENSES

Assumption of Risk

When a plaintiff is aware of a risk and proceeds anyways, he may be said to have assumed that risk. It may be primary, when the plaintiff had no duty of care, or secondary when the plaintiff acted unreasonably in the face of the risk.

When Robert jumped over Butch's fence, he knowingly assumed the risk of what he might find on the other side. If he knew there was a risk that Butch might have a dog, then Robert acted unreasonably in the face of that risk by not announcing himself. If Robert was acting in an official capacity, he may also be subject to the Fireman's Rule, which automatically assumes the risk of an emergency responder when acting as a privileged entrant on another's property.

Conclusion

If Robert knew, or should have known, that Butch had a dog, he assumed the risk by jumping over the fence.

Contributory/Comparative Negligence

Traditionally, comparative negligence cut off a plaintiff's right to recover if he was shown to be even slightly negligent in placing himself within the risk of the defendant's conduct. Modernly, many a majority of states practice some form of comparative negligence, permitting apportioned recovery based on how much negligence each party showed. CA is in the minority of the majority after *Li v. Yellow Cab Co.* introduced pure comparative negligence. Partial comparative is more common and may either be aggregate (allowing plaintiff to recover if he is less negligent than all defendants

combined) or individual equity (allowing plaintiff recovery only if he is less negligent than each of the defendants).

Robert has a duty of care to protect himself from unreasonable risk. It is foreseeable that people keep dogs in their yards, and that sometimes those are big and mean dogs. It is also foreseeable that someone with a fenced yard will not expect anyone to jump over the fence and so feels safe in leaving various hazards without warning signs.

Conclusion

If Robert is found to be contributorily/comparatively negligent, he will either be barred completely from his claim, or his damages will be reduced accordingly. If he is more negligent than Butch in a partial comparative jurisdiction, he may also fail to recover.

No Duty to Unknown Trespasser

See rule *supra*.

Butch argues that Robert was an unknown trespasser, and therefore he had no duty to exercise reasonable care in his activities or to warn Robert of any hazards. If Butch is successful in asserting his claim that Robert was trespassing, either because he did not have privilege or because he exceeded the scope of his privileged entry when he jumped over the fence, then Robert's claims will fail and Butch may have a cause of action against Robert instead.

Conclusion

If Robert was an unknown trespassor, his claim will fail and Butch will have a cause of action against Robert for trespass to property.

END OF EXAM