

### October 2015 Torts Question # 3

#### 1. What tort causes of action, if any, can Peter reasonably assert against David? Discuss.

##### Strict Liability

One who possesses domestic animals belonging to a normal class that has dangerous propensities will not be strictly liable for damages resulting from such propensity. A balancing test that weighs the utility of the activity against the risk of harm is used to evaluate whether Defendant will be held liable for the animals' actions.

David owns a herd of dairy animals which produced milk and cheese that he sells. The animals in his herd are a product of a cross-breed of a domestic goat and a wild breed of sheep. They have the appearance of large goats but have a much more aggressive nature as a bighorn sheep. The males have large curved horns similar to those of the bighorn and become more aggressive when agitated. David has a herd that has a dangerous propensity to become aggressive when agitated. The need to have dairy animals is for the production of milk and cheese in order to produce and sell to individuals. David must not expose others to an unreasonable risk of harm. Peter will argue that David knows of the propensity of the herd, especially the male and did not take steps to assure his neighbors' safety. However, since David can eliminate the risk of the potential harm from his herd by making sure they remain in their pen and not wandering onto the neighboring property, or warning of the danger in order to eliminate the risk, dairy herding is not an abnormally dangerous activity.

Therefore, David should not be held strictly liable for his conduct.

##### Negligence

Negligence requires a showing that a duty was owed, that the duty was breached, and that the breach was the actual and proximate cause of damages.

##### Duty

A duty to act as a reasonable prudent person under the same or similar circumstances.

David owed a duty to properly maintain his pen where he had a herd of dairy animals that he used to produce milk and cheese, and to maintain and correct any problem as a reasonable prudent person would do under the same or similar circumstances.

Therefore, David owes a duty of due care to his neighbor, Peter.

##### Breach

A breach is a failure to act as a reasonable prudent person under the same or similar circumstances.

The lock on a gate into a pen that held 40 of the cross-bred goats was beginning to pull free from the wooden support post to which the lock was attached. David failed, during his annual inspection, failed to examine the gate support post. The lock in fact pulled out and the gate swung open and the animals wandered onto Peter's property. Thus, David's conduct of not properly inspecting his animal pens, the lock would not have been pulled out allowing the gate to swing open and his animals wandering onto Peter's property establishes he fell below the reasonable person standard of care.

Therefore, David breached his duty owed to Peter.

### **Actual Cause - Successive**

"But for" not properly inspecting the animal pens and then taking steps to correct the rotting wood Peter would not had David's animals wandering on his land. Further, Peter attempted to herd the animals back onto David's land with an electric cattle prod when one of the larger horned male goats turned and rammed Peter knocking him to the ground. Thus, but for David's failure of keeping the goats on his land, and not on his neighbors, Peter would not have been injured.

"But for" the successive negligent act of David in failing to keep his goats in the animal pen and the emergency room doctor not examining Peter for a concussion, Peter would not have sustained paralysis in his upper limbs.

Thus, David and Doctor are the actual cause of Peter's injuries.

Therefore, David was the actual cause of Peter's injuries.

### **Proximate Cause**

It is foreseeable that while operating a dairy farm with cross-bred goats, that the goats could escape and injure a neighbor.

However, David will argue it is not foreseeable that Peter would try to herd the goats back onto his land with a cattle prod. Further, it is not foreseeable that once one is injured, and taken to the emergency room that the doctor would not examine Peter's head since he did mention he had a headache, and had just been knocked to the ground by a goat.

### **Intervening, Superseding Cause**

An intervening cause is one that occurs after the negligent conduct of defendant but before the harm. An independent, intervening act is an abnormal response to stimulus created by defendant's negligence. The fact that the intervening force was not reasonably foreseeable does not excuse defendant from liability as long as result was foreseeable.

David will argue that the doctors act of failing to examine Peter for a concussion was an indirect and independent act of David's failing to keep his goats in their animal pen and off Peter's property. David's failure to inspect, or maintain the goat pen was not the result of Peter sustaining paralysis. Thus, the doctor's act was an intervening act.

However, the doctor's negligence of failing to check to see if Peter had a concussion is a foreseeable act. Thus, the negligent act of a third person, i.e. the doctor, is always foreseeable and will not cut off David's liability.

Therefore, David's conduct was the proximate cause of Peter's injuries.

### **Negligent Trespass**

Negligent trespass is the negligent entry onto the land of another.

David owes a duty not to subject his herd onto Peter's land. The lock on the pen where the herd was located pulled out and the gate swung open allowing the herd to wander onto Peter's land. If David would have inspected the pen post he would have discovered that the wood was rotting around the screws where the lock was located. Thus, David's failure to act was negligent. Peter tried to return the herd back onto David's land when a larger horned male turned and rammed Peter knocking him to the ground. The animal continued butting him and striking Peter a few times. David knowing that his herd is a cross-breed and the males become aggressive if agitated, it is foreseeable if the herd is able to escape from the pen that a neighbor could be injured, especially when they are trying to return the animals to their proper owner.

Peter did suffer a serious concussion and broken bones, thus damages.

Therefore Peter can recover for negligent trespass.

## **2. What defenses, if any, can David reasonably raise? Discuss.**

### **Defense - Contributory Negligence**

In a contributory negligence jurisdiction, conduct of plaintiff which falls below the reasonable person standard of care is a complete defense to a negligence cause of action.

David will argue that Peter's conduct of using an electric cattle prod to deliver shock to the herd constituted negligence, in part because Peter had no business shocking the herd. Further, Peter could have notified his neighbor, David that his herd was on his property. If Peter did not use the cattle prod he would not have agitated one of the males in the herd and sustain injury.

However, Peter was trying to get the herd off his property and back onto David's. He was not aware of the propensity with the herd. After all they look like large goats. However, most goats that have horns would attack anyone that was prodding them with a cattle prod, delivering an electric shock. Thus, Peter's conduct did fall below the standard of care to which he should have conformed to protect his own safety. Thus, he will be held accountable for his own injuries.

Therefore, contributory negligence is a valid defense.

### **Last Clear Chance**

If the court finds that Peter did contribute to his injuries he will argue the "last clear chance" doctrine to overcome David's contributory negligence defense.

To avoid the harsh effect of plaintiff's contributory negligence, some jurisdictions will hold that a Plaintiff is not barred from recovery where a defendant had the last clear chance to avoid the accident just before it occurred, but failed to do so. It appears from the facts that David could have taken precautions to prevent the herd from escaping onto his neighbor's property. Further, he could have posted signs giving notice that the herd, especially the male are aggressive and do not under any circumstances agitate them. Had Peter been aware of the aggression of the large goat he would not have attempted to return the herd. Hence, David had the last clear chance to avoid the accident if Peter would have either been warn of the potential danger, or the animal pen had postings warning about its danger.

Thus, David had the last clear chance to prevent Peter's injury.

### **Defense - Comparative Negligence**

In other jurisdictions where plaintiff's conduct falls below the standard of reasonable care including the amount of plaintiff's negligence, will be apportioned according to fault.

David will argue if the court finds Peter's conduct fell below the standard of care owed, the court will apportion his own fault against David's and render judgment accordingly. However, as argued supra, Peter will likely not be found to be negligent under the circumstances.

Therefore, comparative negligence is not a valid defense.

### **Assumption of Risk**

One, who assumes the risk when he has knowledge, comprehension and an appreciation of the danger and voluntarily elects to encounter it, cannot recover for injuries or damages resulting from defendant's negligence.

Since David did not post any warnings of the potential harm of the large goats, Peter did not have any knowledge or comprehension of the danger. Further, Peter did not know if the large goats were actually a cross-breed between goats and wild sheep. Since Peter had no knowledge of the goat's propensity, he did not voluntarily elect to encounter the injury of being butted by the goat in David's herd. Therefore, Peter did not knowingly and voluntarily assume the risk.

Therefore, assumption of the risk is not a valid defense.

### **3. What damages, if any, will Peter be able to obtain against David? Discuss.**

#### **General Damages**

General damages are damages that reasonably or naturally flow from the tort and they do not need to be specifically pleaded. General damages allow recovery of compensation for pain and suffering.

Peter should recover for any damages which reasonable and naturally flow from David's tortious conduct, which would include the pain and suffering damages he sustained.

Therefore, Peter will be entitled to general damages.

### **Special Damages**

Special damages are those damages unique to Plaintiff and they must be specifically pleaded and proved. Further, special damages must be foreseeable, reasonable in amount and not too remote.

Peter should receive damages for any medical expenses and lost wages resulting from David's act.

Therefore, Peter is entitled to special damages.