

June 2018 Baby Bar
Question 2 Torts
Model Answer

1. Is Carole likely to prevail? Discuss.

Carole v Larry

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

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

Carole will argue Larry, as her lawyer, owed a duty to properly negotiate her claim and timely file the lawsuit against Swim Wonder. A reasonable prudent person would take those steps reasonably necessary to assure that the lawsuit against Swim Wonder was filed in a timely manner prior to the running of the statute of limitations.

Therefore, Larry owed Carole a duty of due care.

Breach

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

In September 2016, after Carole hired Larry to negotiate with her health insurer, he suggested he should file a negligence claim, on her behalf, against Swim Wonder. In September 2017, when Carole contacted Larry about her negligence claim against Swim Wonder, he told her the claim was barred by the two year statute of limitations. Thus, Larry's conduct of not filing the lawsuit prior to the statute of limitations running shows he fell below the reasonable person standard of care.

Therefore, Larry breached his duty owed to Carole.

Actual Causation

"But for" Larry's failure to timely file the negligent claim against Swim Wonder, Carole would not have been barred to bring a suit for her injuries.

Thus Larry is the actual cause of Carole's damages.

Proximate Cause

Carole will argue when she hired Larry to help her negotiate with her health insurer, he suggested she brings a negligence claim against Swim Wonder. It is foreseeable when you fail to file a claim in a timely manner that that claim will be barred by the statute of limitations.

Larry's negligence in failing to file the claim in a timely manner is foreseeable.

Therefore, Larry's failure to file Carole's lawsuit is the proximate cause of Carole's damages.

Damages

Carole in order to recover damages from Larry will need to show she would have prevailed in her lawsuit against Swim Wonder. Discussed Infra.

2. If Carole does prevail, how will her damages be determined? Discuss.

Products Liability

When a product is defective and causes injury, the manufacturer, distributor or retailer may be liable under one or more theories of recovery governed by products liability. In a products liability lawsuit, the product can be defective in design, manufacture and/or warning.

Negligence

Defined Supra.

Duty

A manufacture of a product owes a duty of due care to inspect, discover, and to correct or warn of any defect. The duty is owed to all foreseeable persons who may be a user of their product.

Swim Wonder is the manufacture of a swimming pool that Carole dove into and broke her neck. Swim Wonder owes a duty of due care to warn or correct known defects associated with the swimming pool and/or to eliminate the harm that can be caused from the use of such product. Since Carole was diving into the swimming pool, she is a foreseeable user.

Therefore, Swim Wonder did owe a duty to Carole.

Breach

Where the product is defective in manufacturing, design or there is a lack of warning, a Plaintiff may establish a breach if the product does not meet the ordinary consumer expectations of the average reasonable consumer.

Design Defect

A design defect is found when a product is inherently dangerous in its design.

When Carole drove into the swimming pool manufactured by Swim Wonder she broke her neck and became disabled. Generally, persons using a swimming pool will dive into the swimming pool in order to enter the pool. Thus, a swimming pool not allowing those using the pool to dive in, and without a posted warning if the swimming pool is to shallow, shows the swimming pool was inherently dangerous in its design.

Therefore, due to the design defect of the swimming pool, Swim Wonder breached its duty of due care owed to Carole.

Actual Cause

But for Swim Wonder's failure to adequately design the swimming pool in order to allow persons using the pool to dive into the pool, Carole would not have broke her neck and become disabled when she used the swimming pool.

Therefore, Swim Wonder is the actual cause of Carole's injuries.

Proximate Cause

It is foreseeable when Swim Wonder, a manufacture of the swimming pool, failed to adequately design that the swimming pool in order to allow swimmers to dive into the pool, Carole would not have dove into the pool and sustain injuries to her neck making her disabled.

Therefore, Swim Wonder is the proximate cause of Carole's permanent disability.

General damages

General damages allow recovery for personal injury and property damages.

Since Carole suffered permanent neck injuries because of the design defect of the swimming pool, she will receive damages which flow naturally from Swim Wonder's failure to adequately design the swimming pool. Thus, Carole will r her pain and suffering.

Therefore, Carole is entitled to general damages.

Special Damages

Special damages allow recovery for those damages which are plead and proven.

Carole will be able to recover for any medical expenses or lost income that is plead and proven.

Therefore Carole is entitled to special damages.