

Q1-98-MODEL ANSWER

Exam Name: Remedies_Midterm_Fall 2017

ID: 

Q2-

1) Q1 - Excellent

Dan (D) was found liable in tort, thus tort law will govern.

Compensatory Damages

Under tort law, compensatory damages are used to put the plaintiff back in the position they were in prior to the injury. Damages can be general and special and include economic losses as well as non-economic. The damages are award in the form of monetary compensation to make the plaintiff whole.

To recover Paul(P) must show that D caused the injury and the damages are certain, foreseeable, and unavoidable.

Prius

Under tort law, when dealing with damaged property the injured party is entitled to either the cost to repair the property or the fair market value of the property, which ever is less.

Here, the prius was totaled. Thus repairing the vehicle is not an option, and even if it was odds are repairing an eight year old car that suffered major damage would be more expensive than the fair market value. D cause the injury by driving under the influence and it is reasonably foreseeable he could hit another car while doing so.

As such, P will be able to recover the fair market value of his prius. ✓ 5

Past Medical Costs

Here P has already incurred \$500,000 worth of medical costs. D will be liable for the total amount.

D can argue that P was fully insured and his insurance company paid the medical expense. As such P did not incur any damages. ✓

However this is an incorrect assertion.

the **Collateral source** rule provides any compensation received by the injured party that is unrelated to the tortfeasor will not be offset when determining damages. The most common example of the collateral source rule is insurance coverage. It is against public policy to reward the defendant for the plaintiff's forward thinking. Additionally, insurance premiums would be significantly higher if the defendant could avoid liability because the plaintiff's injuries were covered by a third party. ✓ 10

Even though P's insurance paid the medical expenses, D will still be liable for the entirety of the bill.

It should be noted the most insurance companies have clause in their policies for a scenario like this that requires the injured party to pay back any money received for the medical bills if a judgment is recovered from the defendant.

Future Medical Costs

An injured party can recover for future damages. The plaintiff must show that the damages are more likely than not to occur. The facts indicate that P will need on going medical care and will live with chronic pain for the rest of his life, which is in line with an individual who needed both of his legs surgically repaired. It is unlikely D can make a valid argument that would not allow P to meet this burden. Thus P will be awarded future damages.

Expert testimony will be needed to establish what P's damages likely are. ✓

It will then be up to the jury to determine what monetary compensation would be appropriate to fully cover P's needs to make him whole. Once the jury reaches a total, that amount will be discounted to present value and given to P in one lump sum. It is assumed the P will invest the money like a reasonably prudent person and the interest earned on the lump sum will sufficiently cover all of the future costs. ✓ 15

It should be noted the court has the power to lower (remittur) or raise (additur) the judgment if the award is grossly disproportionate to the damages.

Pain and suffering and loss of society

As part of non-economic damages a plaintiff that has been injured is entitled to damages for the pain and suffering that was caused by the defendant. Additionally, if the injury is so severe that it becomes impossible to perform certain activities that the plaintiff enjoys performing they can recover for loss of society. ✓ ?

Here, P was in a very significant accident and suffered horrible injuries. These injuries will force him to live with chronic pain and he will never be able to ski and run marathons again.

The jury will be tasked with determining an appropriate monetary compensation for P's pain and suffering as well as his loss of society. 20

Under the golden rule, P cannot ask the jury "what these losses would be worth to you" Case law has held this line of questioning is too prejudicial to the defendant.

Lost Wages

If a plaintiff is injured and can no longer work, they would be entitled to damages for lost wages.

Because of the accident P will not be able to resume his job as a roofer. P intended to continue working at his current rate of \$50,000 a year for another 10 years.

P will argue that since he no longer can work as a roofer making \$50,000 a year he is entitled to \$500,000. However, P has a duty to mitigate his damages and find another job.

P will contend that because of his injuries he can no longer find another job and he is entitled to the full reimbursement of the lost wages.

D will point out that P hated his job as a roofer and because of the injuries, P was able to turn his hobby into a full time job. A very lucrative full time job at that. Without this time to fully devote to his craft P would not have been successful. And because of this opportunity D has the right to offset some of the damages. D will argue that P now made 5 million dollars because of the injury and any damages that could be awarded to P must be offset because of this windfall. However, this logic seems flawed. D will only be able to offset as much as the \$500,000 because the offset will not cover any additional damages just money from lost wages. ✓

Additionally, D's argument ignores several crucial facts.

P will assert that he already wrote children's books on the weekend and there is no reason to believe that he would not have had stories published had the injury not incurred. Furthermore, the facts are silent on when he received this book deal and at the very least P would be entitled to the lost wages up until that point. ✓

It appears that D can make a convincing argument that P was able to mitigate his damages by finding a new career. More facts would be need to determine the exact amount D could offset, but it appears P will only be entitled to lost wages up until he signed his book deal, as the rest of the damages would be offset by his new career earnings. 30

Punitive Damages

If the plaintiff's injuries were caused by the willful, wanton and malicious conduct of the defendant, the court may award punitive damages to punish the defendant and deter similar conduct in the future. The damages must be reasonably proportionate to actual damages and should not exceed ten times the amount. The goal is to punish the defendant not bankrupt them.

P will argue that getting behind the wheel of a vehicle after consuming alcohol is extremely reckless behavior and would fall in the line with conduct that would justify punitive damages. This is an opportunity to send a message to D that his conduct is very dangerous and will not be tolerated. D's actions destroyed his life and allowing to D to escape without punishing him additionally will send the wrong message. 10

D will argue that will it was stupid to drive drunk that his conduct did not rise to the level necessary to justify punitive damages. Punitive damages should be reserved for the worst kinds of facts and while the accident was horrible the conduct was insufficient to justify further damages other the compensatory.

Here, it appears the punitive damages could be justified D's conduct was certainly negligent and could easily be determined to be grossly negligent. P suffered horrible injuries and his life will forever be changed. As such, Punitive damages probably will be awarded.

Pre and post judgment interest.

A court can award prejudgment interest on compensatory damages. The interest would start at the time of the injury occurred and would end when a judgment is rendered.

P's case took 5 years to litigate and should be compensated by prejudgment interest. 5

Additional P is entitled to post judgment interest until D satisfies the claim

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Q2 - 93 - Model Answer

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2)

Question 2.

Very Good Lawyer
1234 Remedies Way
Santa Rosa, CA

Alice Piebaker
4567 Shortening Drive
Santa Rosa, CA

Re: Lawsuit Against Frieda

Dear Ms. Piebaker,

First, let me say that I'm sincerely sorry that this has happened to you. I intend to do everything in my power to see that Frieda pays for her fraudulent and tortious actions and to prevent her from causing any future harm.

As I see it, you have several legal remedies available to you. I will do my best to explain these as clearly as possible.

Types of Remedies: In our justice system, there are two types of legal remedies - those considered at Law and those in Equity. I believe you are entitled to both. ✓

At Law: Frieda's Breach of Contract

You entered into a valid contract with Frieda, which she knowingly entered into intending to breach and did breach. At law, a Breach of Contract claim is usually met with a remedy called your "expectancy interest." The court wants to give the Plaintiff (you) the benefit of your bargain. Here, your expectation was that Frieda would be your dutiful assistant and help you win the state fair. Instead, she breached the contract by quitting a week in advance of the competition. This is a material breach. Obviously, the court can't go back in time and make her a better person who would perform, but the court can look at the evidence at hand and determine what is fair. This was, essentially, a contract for personal services. The court cannot order her to be a good friend to you, but it will recognize that as a result of Frieda's intentional fraud and deceit, she has been unjustly enriched by winning the prize money. ✓

At Law then, the court will likely order Frieda to pay you the \$1000 which she won using your stolen recipe. I think we could easily show that had you been able to enter the contest, you would have certainly won given your track record. This remedy is called Restitution, and it is one of the ways the court will right a wrong when the expectancy interest can't be directly addressed. Again, Frieda was UNJUSTLY enriched by stealing the recipe and the court will not want her to retain those "profits." ✓ X

You will also be entitled for any costs you incurred as a result of your reliance on the contract, specifically if you had paid for her travel costs or hotel room. The court calls these reliance damages, and if you were left on the hook for these costs, the court will want to see you reimbursed. ✓ 15

At Law - Fraudulent Inducement of Contract (Tort)

Although it seemed like just a breach of trust, what Frieda did to you by pretending to want to help, but planning to steal your recipe all along, is Fraud. She knowingly entered into the contract with the plan to breach ✓ 10

and deceived you for her gain and to your detriment. This Fraud permeates the entire situation and should be thought of as egregious. I believe, that despite your claim for Breach of Contract, you will also be entitled to something called Punitive Damages.

At Law - Punitive Damages

Punitive Damages are awarded in a Breach of Contract case, ONLY when the tortious act, here the fraud, is separate and distinct from the breach. A jury often gives these awards to punish the wrong doer and make an example out of them, to deter them from ever doing something like this again. Frieda has acted maliciously and I believe you will be awarded a sum of money to compensate you. ✓ 10

At Law - Intentional Infliction of Emotional Distress (Tort)

Although I believe you have suffered an emotional harm, you haven't had, at least in the eyes of the court, physical damage to your person as a result of Frieda's actions. Therefore, I wouldn't expect a jury to compensate you for the emotional toil this event has taken. 5

Equitable Remedies

An equitable remedy is available to someone when the issue at hand cannot be fully addressed by a remedy at Law. Here, Frieda has your stolen recipe and its very possible that she will continue to use it if we don't act. Because money damages, or damages at Law can only be litigated once, we need something called an injunction, combined with a declaratory judgment, to set things right and stop her from benefitting from stealing the recipe. ✓ 2

Injunctions - TRO, Preliminary Injunction, Permanent Injunction

An injunction is a way for the court to tell Frieda to either stop doing something or start doing something. Here, I think you will have a good case to pursue a Temporary Restraining Order (TRO), which will allow you to set a time for a Preliminary injunction and prevent Frieda from causing any more harm.

To receive a TRO, you need to demonstrate to the court that an emergency stop gap measure is needed. There is an irreparable harm that you need addressed immediately until the matter can be heard in front of a judge to determine if the TRO should be altered, canceled or made permanent. I believe an argument can be made for a TRO since without it, Frieda could sell the recipe to another party in the interim.

The TRO will only last for 10-14 days and does require us to let Frieda know what we're doing. If you think by telling her she will skip town or harm you, we can tell the judge that and receive the order without giving her notice. Here, I think we should ask for a TRO preventing Frieda from copying the recipe, sharing it, using it or baking any pies with it. Under Civ Pro Code Rule 65, the order will need to have very definite terms so Frieda knows what is allowed and not allowed.

Then, we should move to have this matter heard to receive a Preliminary Injunction. There, at a hearing, a judge will look at the situation more closely, examining if there is 1) an irreparable harm, 2) no adequate remedy at law, 3) If a prelim injunction would be too great a hardship on the defendant and 4) whether or not your case is likely to succeed on the merits. Frieda can appeal a prelim injunction.

You are positioned well to receive the Preliminary Injunction, as you have evidence about your history of baking, a track record of winning awards and a signed contract with Frieda. There is no remedy law to stop her use of the recipe, nor should this pose a significant hardship to her. At this stage, Frieda will have to be present and will have an opportunity to plead her case. From there, we would have a full hearing on the merits to determine if the injunction would become permanent.

Keep in mind, if we can't get the injunctions, the court will give you money damages instead to compensate you for lost future profits, etc. Also, if we DO get the injunctions, our only remedies if Frieda doesn't follow the order will be contempt.

Contempt can equate to being fined or being put in jail - something to compel Frieda to follow the order.

The last item that I think you should pursue, at the same time of the TRO, is seeking something called a **Declaratory Judgment**. This only happens when a case is ripe, as yours is since the recipe is stolen and likely being used by Frieda. Here, we don't ask the court to order Frieda to do something, but rather just ask the court to decide who's right and wrong. Is it your recipe or hers?? If we have the court's determination that it's your recipe, we can potentially avoid the preliminary injunction process and use the declaratory judgement to inform Frieda that she has no right to use it moving forward.

I know this has been a lot of information, but rest assured that I think you will not only receive adequate damages for the harm Frieda has caused, but that you will emerge from this ordeal better positioned to capitalized on your baking talents.

Warmly,

Very Good Lawyer

END OF EXAM