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GRADING SHEET
SCHWARTZ TORTS 2003

EXAM NUMBER 128

BICYCLE V. DOCTOR

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A

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Memo to employer re: Billy's action against Dr.

The first issue need to address is that I am presuming that all of the alleged tortious acts occured in New Mexico. Hence, I will be using New Mexico law to analyze Dr.'s (D's) liability.

To recover from D, Billy (B) needs to prove all of the various elements of tort. If one element cannot be proven, then B's action will not be successful. B has a good chance of recovering from D. I will analyze why this is so below. My memo be broken into sections that correspond to the elements of tort. Further, I will describe the potential difficulties and disadvantages B will encounter in collecting damages through such an action.

I. ACT

The first thing we need to determine is how to classify D's conduct. Was it an affirmative act that resulted in harm to B (misfeasance); or was it an ommission of an act that led to B's harm (nonfeasance). This is important because how a court decides the question directly relates to whether D owed a duty (see below) to B. A person may be liable in tort for failing to act, but it is generally harder to find that the nonactor owed a duty to a plaintiff.

Misfeasance

We will want to describe D's conduct as an affirmative act, hence a case of misfeasance. In essence, we will want to argue that D negligently performed her duties in administering care to Patrick (P). Her affirmative act consisted of telling P that he may be HIV positive. We will want to argue this because it is easier to create a duty in D.

Nonfeasance

D can try to argue that this is a case of nonfeasance. In essence, she will say that she did not *do* anything. This will be tough for D to aruge. She might try to say that her ommission consisted in failing to inform P that he was HIV negative. She will want to argue this because a duty is generally harder to create when there is nonfeasance as opposed to misfeasance.

Ultimately, whether D's conduct is characterized as nonfeasance or misfeasance is immaterial because we can find that D owed a duty to B in either case.

II. **DUTY**

As stated above, how we define duty depends on whether we define the act as misfeasance or nonfeasance. But we must also look to foreseeability and policy to find a duty. I will analyze the duty D owed to B both under misfeasance and nonfeasance.

Misfeasance

1. Foreseeability - D does not owe a duty to B unless a reasonable person (RP) in her shoes could foresee that her conduct would cause harm to B. B must be a foreseeable plaintiff. Or, another way to put it, B must be in the "zone of danger" created by D's conduct.

A good argument can be made that B was a foreseeable plaintiff. D knew that P was very distraught. She knew he was "neurotically concerned" and that he was "irrational". Hence, it's arguable that a RP in D's shoes could foresee that P would act irrationaly when told that he *might* be infected with HIV. If P acted irrationally, it's foreseeable that his actions (as a result of D's conduct) could cause harm to a member of the general public

D will argue that it was foreseeable that her act would cause harm to P, but not to the general public (which B is a member of). Further she might argue that she could not foresee Emily (E) striking B.

D's argument should fail because, in determining duty, we look only whether a plaintiff was in the zone of danger, and not to the type of harm. If B is in the zone of danger created by D's conduct then B is a foreseeable plaintiff.

2. Policy For misfeasance we also have to see if policy *precludes* a duty, even though the harm was foreseeable. We look to statutes and common law.

There presumably is no statute that would preclude D owing a duty to B (perhaps the medical malpractice act??)

For common law policy we ask if the harm was too "remote" – in essence would it be good public policy to preclude a duty. It would be difficult to see a court precluding a duty for public policy concerns here. If D were said to not have a duty, then doctors would not care whether their actions would cause harm to the general public. Dr's should be concerned about the public welfare!

Nonfeasance

1. Foreseeability – the same analysis above applies here. Only the act would be an ommission – "would a RP in D's shoes foresee harm to the plaintiff for failing to tell P that he was not necessarily HIV positive?" ... or that she didn't *do* anything to B?

2. Policy – here we look to whether policy *creates* a duty because nonactors generally do not owe a duty. Here we find a policy. There is a policy that says that Dr's giving drugs to a person and not informing them of the effects are responsible for the harm done by their patients. We can successfully analogize this to D's conduct. She mistreated P and should be held responsible for the act of this third party.

III **Breach**

I will analyze breach in two components (1) standard of care owed; and (2) proving the breach.

1. Standard of Care Owed

For breach, the baseline standard of care is the RPUC standard. Who a RP is, or what circumstances a jury can consider are factors to consider here. The fact that D is a Dr is the primary factor.

The "substantive" aspect of this "professional" rule is that a Dr. has a duty to do what a reasonable Dr would do, giving due consideration to the locality involved. We do not have to ask what a Dr. in the *exact* locale would do; rather we consider what a Dr. in a similar locale would do. Geographical isolation and attendant lack of facilities are aspects the jury can consider.

D, a Dr., is a "professional" because (1) their primary concern is for their clients and not money and (2) Dr's have an oversight board setting standards of care.

Hence, we hold D to the standard of what a reasonable Dr. would do in her situation. To determine what this is, B will have to have a professional testify as to what this standard is (there is an exception to this discussed below).

D may also try to argue that she was overworked. She will say that she did the best she could given the circumstances. However, this should fail because D had "more patients than she could reasonably handle." A reasonable Dr. would not have accepted that many patients.

2. Proving the Violation

Here the "evidentiary" aspect of the professional rule comes into play. The rule is that B is required to provide an expert witness to testify as to what the standard of care is, *unless* the negligence is so obvious to the average layperson that an expert does not need to tell them that the standard of care was breached. B's case that D violated her standard of care is satisfied under either scenario.

A. Expert Witness – We have a Dr. Flycatcher (F) who is willing to testify that Dr's should not release positive HIV test results to patients until both the ELISA and Western Blot tests come back positive – unless there are good reasons to do otherwise. Here, D released the results of the ELISA test before getting the results of the Western Blot test – a violation. There was no "good reason" to do so. D knew P was upset and should have known that telling him he had failed the ELISA test could result in harm.

D's counterargument is that F is a primary care physician – not an infectuous disease specialist. F does not know what the standard of care for such specialized medicine is. In essence, she will argue that B has to provide an infectious disease specialist to set the standard. Secondly, she will argue that F is from suburban NY and that they do things differently back east than we do out here in the boondocks of NM.

D's couterargument should fail because (1) if the standard of care for primary care physicians is at the level F suggests – then it can only go higher for specialists. D should not be allowed to have a *lower* standard of care for specialists. Further, although

we may consider geographical locations, this should only come into play regarding lack of equipment or facilitites. Here, there is no issue of lack of facilities – the issue is how a Dr. should interact with a patient. This should be the same in NM as in suburban NY

B. Negligence Perceived by Layperson - Secondly, it may not even be necessary to have professional testify in this case. This is because it's reasonable to believe that an average layperson could determine that D acted negligently in telling P that his first test came up positive. P knew that D was emotionally unstable and it doesn't take an expert to tell us that she should have known that D might run out and hurt someone had she told him his first test was positive.

D's counterargument will be that she reasonably told him that he "could" be HIV positive and that it was uncertain until the Western Blot test results came back. However her argument should fail because a layperson could easily see that a reasonable Dr, knowing that their patient is unstable, should know that it would be negligent to inform that patient that they might be HIV positive.

Finally, D might argue it is the custom of Dr's in New Mexico to honestly tell their patients what they know – as soon as they know it. This argument should fail because, although a breach of a custom will usually show negligence, that doesn't necessarily mean that adherence to a custom disproves negligence. This is because a whole industry might be lacking. Usually a professional gets to set the standard of care

but a judge can still determine that such a standard is beneath standards for public policy reasons.

IV CAUSATION

D's act or omission to act must have caused B's injury. Here we look to two elements (1) Cause-in-fact; (2) Proximate (legal) cause).

1. Actual Cause

Here we do a but-for analysis. But for D telling P he might be HIV positive, B would not have been injured. This requirement is satisified because D's action set in motion the chain of events that caused injury to B – P left, told E, E got distressed and drove fast, hitting B, causing injury to B

2. Proximate Cause

Here is where the fun is. D's action must be the "proximate" cause of B's injury. The question a court is really asking is whether D's actions were too "remote" in time/space to be the "legal" cause of B's injury. In New Mexico – we do a *Polemis* like test – a hindsight test. We ask was B's injury a result of the "natural and continuous sequence" of D's actions.

This is not much of a hurdle to overcome. Admittedly this will go to the jury and it will be up to the jury to decide if D's actions were really too remote or not. In this case, they are arguably not – there is a direct chain of events, and the timeframe from act to injury is not that great.

D however will try very hard to get an Independent Intervening Cause (IIC) instruction. In essence, she will say that there were other causes that turned aside the natural course of events and produced that which was not foreseeable as a result of D's earlier act. D will argue that (1) Larry's (L) act in giving a faulty test result was an intervening cause, (2) P's act of irrationaly running out and telling E the results of the test was an interevening cause; and finally (3) the real intervening cause was E's reckless driving and this was the true proximate cause of B's injury.

D's request for the IIC should fail however. This is because, now in NM, the negligence of others are not to be considered as IIC's unless the acts were criminal, intentional, or extraordinarily negligent. Further, there is no "act of God" that acted as an IIC in this scenario.

D will try to argue that E's acts were either (1) criminal or (2) extraordinarily negligent. Although, technically, E's driving may have been a crime – the speeding was arguably foreseeable and *Herrera* tells us that even criminal acts may not be IIC's if the criminal act was foreseeable. Further, E's speeding can hardly be described as extraordinarily negligent. Going 55 in a 35 mile an hour zone happens frequently – it is not extraordinary.

The reason NM has this IIC rule is because we now have comparative negligence and several liability. Hence, all negligent parties can be assigned blame. It is up to the jury to apportion blame and the plaintiff has to recover from each tortfeasor. This is hard

on the plaintiff's, however, NM has also done away with contributory negligence – this is a boon to plaintiff's.

In our case, had there been contributory negligence, B probably would not be able to recover since his act in not looking in darting out in the street can be construed as negligence. Here however, the jury will apportion the blame to B – first they will determine what % of fault to assign to B. Then, with the remaining fault, they will assign a % to D, to L, to P and to E. Since L cannot be found and P and E are judgment proof, B will only be able to recover from D.

Hence, it is our job to see that D gets assigined as high as a portion of blame as possible. We will want to play down the negligence of L, P and E as much as possible (we will also want to play up the fact that B is 8 years old and many 8 year olds run in the streets – that's why we have speed limits. In essence – we want B's comparative fault to be as little as possible).

This is the difficulty B faces in this case. We need to make B as sympathetic as possible and play up D's negligence. We also want to sympathize with L, P and E. D was L's boss – she arguably took charge of him in a "borrowed servant" doctrine. Hence we can probably find D responsible for L's negligence as well.

V. **INJURY**

We did not cover this in class really. But suffice it to say that we need to prove that B was injured. This is not difficult in this case. B suffered "great injury.

QUESTION 2

To: NMSC Advisory committe

Re: UJI 13-305, 13-306

It is my belief that the two above mentioned jury instructions need to be replaced. I will tell you what problems I see with the exisiting jury instructions, what I suggest as a substitute and the advantages and disadvantages of the new instructions.

Problems

The main problem with the existing jury instructions on proximate cause is that they combine two separate approaches to the proximate cause issue. UJI 13-305 takes a *Polemis* / hindsight approach. There is no question of foreseeability addressed. That is, except if there is an IIC. In which case we add UJI 13-306. 13-306 adopts a *Wagon Mound* / foresight approach. Here we look to determine if an IIC causes "that" (presumably the harm) which was not foreseeable.

The fact that NM now limits the use of the IIC instruction to cases of criminal acts, intentional acts, extraordinary negligence, or acts of God is problematic. This is because, as long as a plaintiff owes a defendant a duty, means that he can be liable for unforeseen harm. The problems are only magnified in the fact that NM has recently expanded the "forseeability" test of duty (e.g. *Torres (bagel shop)*

Take the recent case of the balloon fiesta parking fiasco. There, we have a minimally negligent tortfeasor (a) and a grossly negligent tortfeasor (b) causing harm to someone in a portapotty (c). Assume that B is judment proof. Assume also that C successfuly argues that A owes a duty to C. A is precluded from saying that B's negligent act was an IIC. Hence, it is up to a jury to apportion blame between B and A. If C is sympathetic and a jury does not like A, a danger exists that A may ultimately pay a large sum for a minimally negligent act that caused unforeseeable harm to C.

Obviously, the issue of foreseeability in duty and proximate cause is inextricably linked to this issue. I will address this issue after I give you my suggestion for the new proximate cause UJI.

Suggestions

I suggest writing ONE proximate cause UJI

UJI 13-307 "A proximate cause of an injury is that which directly produces a foreseeable injury

Advantages / Disadvantages

The biggest advantage my suggestion has is that it is simple and easily understood.

One of the disadvantages is that it limits liability to that which is "direct" and "foreseeable". Hence, to insure that plaintiffs are adequately compensated, I also suggest scrapping the UJI's for duty (at least in cases of misfeasance) and taking an Anderson (in *Palsgraf*) type approach to duty. In essence, defendant's owe a duty to society in general to act with reasonable care. The practical result of this is that the duty analysis will generally be skipped over. (Of course judges may still look at policy to find a D does not owe a duty if this is good public policy) But, ultimately, tort liability will be limited in the proximate cause analysis.

Tort liability will not be limitless because the harm suffered by a plaintiff must be (1) direct and (2) foreseeable. Of course what is "direct" and what is "foreseeable" are questions best left to the jury. Here a jury is free to interpret these simple words as they see fit. In cases where justice demands compensation, a jury will read "direct" and "foreseeable" broadly. In other (frivolous) cases, they will read the terms very narrowly.

Proximate cause should only be a matter of law (hence for a judge to decide) when a reasonable juror could find no other way. Hence, duty (in cases of misfeasance) should

be a matter of law. Everyone should have a duty to act with care – except in cases that it would be in the public interest for a D not to have a duty. These policy questions are best left to judges. They are better able to weigh the vagaries and competing interests of society. Juries will narrowly focus on the case at hand and may not take the "big picture' into account.

Foreseeability analysis would no longer be required in cases of analyzing duty in nonfeasance either. There, we would just have policy determining when to impose a duty to act. The foreseeability issue would be dealt with in proximate cause. If a nonactor had a duty to act, but didn't, and the resulting harm was unforeseeable, then the nonactor should not be liable.

Let's simplify our tort law. Doing so will relieve a burden on judges and juries, and will ultimately make our

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TORTS
Semester I, 2003

UNM School of Law
Final Exam

Professor Rob Schwartz
Friday, December 17, 2003
1:30 p.m. to 3:30 p.m.

INSTRUCTIONS

This final examination consists of two questions, which you must complete within two hours. The first question is worth 50 points; you should spend about 80 minutes working on it. The second question is worth 25 points; you should spend about 40 minutes on it. This is a closed book examination; you may not have any notes or outlines with you.

There is ample time to organize, outline, and carefully structure these answers. Please read each question carefully before you begin writing. You will be given ample credit for good organization, careful writing and creativity. If you write in a Blue Book, please write on only one side of each page. Your name should not appear anyplace in your Blue Book or in the text of your Securexam answer.

Good luck, and have fun.

QUESTION 1

Dr. Dona Doctor, an incredibly busy and overworked infectious disease specialist, concluded her first encounter with her new patient, Mr. Patrick Patient, by assuring him that she would let him know immediately as soon as she heard anything from her lab with regard to his HIV test. She had fully counseled him on HIV and AIDS, and she understood that even though he did not seem like a high risk patient, he was neurotically concerned about his HIV status. In fact, Patient was utterly consumed with an irrational worry that he had "caught" AIDS from a coworker in the office who had just died as a result of infections related to AIDS. Doctor explained that the HIV virus that leads to AIDS could not be communicated through casual contact, and she was fairly certain that the test would be returned negative. She couldn't give it too much thought, though, because she was one of the few doctors willing to treat HIV and AIDS patients, and she had many more patients than she could reasonably handle.

Dr. Doctor ran her own lab in her office. As usual, her lab did an ELISA test, which is quite sensitive but yields some false positive tests. She asked her employee laboratory technician, Larry Laboratory, to expedite the test so she could console the increasingly nervous Patient, who insisted that he would stay in her office until the test result was available. When the result came back positive, she followed her normal procedure, which is to use the initial blood sample to conduct a more expensive and more time consuming, but more accurate, "Western Blot" test to confirm the result. Before that result could be returned, the nervous and impatient Patient walked from the waiting room into Doctor's office to find out what had happened. When she told him honestly that she was running a second test because the first showed that he could be HIV positive, he heard only that he was HIV positive. He wasn't concentrating when she told

him that there would be no certainty until the "Western Blot" test had been completed; he had already come unglued. His worst fears were realized.

He ran out of the office, drove home, and told his wife, Emily Patient, who was shocked and horrified. Terrified, worried, and uncertain about what to do, she decided that she had to see the doctor immediately. She flew out the front door, accompanied by her husband. They jumped into her car, and she started for Doctor's office. Out of her mind with fear that she, too, could be HIV positive, she drove very fast – 55 MPH down her residential street, which has a posted speed limit of 35 MPH – to get to Doctor's office. She didn't notice when an eight year old boy, Billy Bicycle, darted out into the street on his bicycle without looking to see if there was any traffic, and her car slammed into him, causing him great injury.

She stopped to render help and arranged to have Billy taken to the hospital. She then continued to Doctor's office, where Doctor apologized as she told her that Laboratory had accidentally given Doctor the result of a test performed on another patient; "we're so busy here, things just got a bit disorganized." In fact, she told the Patients, both the ELISA and the Western Blot tests confirmed that Patrick Patient was HIV negative. Patrick and Emily Patient returned home.

Billy's father has now commenced an action on Billy's behalf to recover the substantial damages sustained by his son. You are law clerk to the lawyer who represents Billy's father (and, thus, Billy's interest). He is concerned about the prospect of recovering damages because the Patients are uninsured and judgment proof, and Larry Laboratory has left the state without a trace. Your employer has informed you that he has engaged the services of Dr. Flycatcher, a primary care doctor in suburban New York, who will testify that doctors should not release positive HIV test results to patients until both the ELISA and Western Blot tests come back positive, unless there are very good reasons to do otherwise. Write a memo for your employer describing whether an action against Doctor might be successful, and describing the potential difficulties and disadvantages of collecting damages through such an action.

QUESTION 2

The current New Mexico Uniform Jury Instructions on Proximate Cause provide:

UJI 13-305. Proximate Cause. A proximate cause of an injury is that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred. It need not be the only cause, not the last and nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.

UJI 13-306. Independent Intervening Cause. An independent intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.

Because of your extraordinary success in your Torts class, the New Mexico Supreme Court Rules Advisory Committee has asked you to draft a short memorandum describing what problems, if any, you see in these jury instructions and suggesting substitute jury instructions on proximate cause that you believe would lead to greater justice in tort cases in New Mexico. Please draft the memorandum, making sure that you identify the advantages and disadvantages of the new instructions you suggest. If you believe the current instructions should not be changed, explain why and identify the disadvantages of alternative approaches.