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Exam ID: 558 Great exam!
Course: torts
Professor Name: Suzuki
Exam Date: Thursday, December 14, 2006

1.

Alleged Grounds for Negligence

We must first determine the grounds for alleged negligence (who we can sue and why) in a negligence action. Cases are either misfeasance (meaning the actor's action caused the harm) or they are non-feasance (meaning the actor commits an omission when he had a duty to act.) Generally, a Plaintiff's attorney would prefer to frame their issue, if it is possible as a misfeasance issue because proving a duty is easier. The defense will prefer to argue it is a case of non-feasance because of the general rule of no duty to act except in limited situations. In this case, as an attorney for Polly, I would sue the bar (Dapper Diego's Cantina) where she was injured, focusing on the misfeasance aspect of the claim: the bar holding a dangerous dancing contest. There is also a non-feasance claim of them failing to keep the bar safe and clean for dancers. I will analyze the merits of each argument.

Duty

Duty is generally imposed based on forseeability of the class of plaintiff's injured and for policy reasons. In the misfeasance action listed above, the general duty is to exercise reasonable care under the circumstances to protect those who are forseeabily exposed to risks of harm arising from the actor's conduct. Thus, the question becomes was someone entering this dancing contest within a foreseeable class of plaintiffs who may be injured during the contest. As Polly's attorney I would argue yes, it is

foreseeable that by holding a contest in a crowded bar, having girls who have been drinking climb up onto the bar and dance while drinks are being served and spilled on the same bar and people are grabbing onto them it is foreseeable that one of the dancers could be injured. Additionally because they had Polly sign a wavier it seems that they knew it was a dangerous contest. The defense would likely argue it was unforeseeable if perhaps the bar had done many of these contests before and no one was ever injured.

In the non-feasance claim there is actually no general duty to act at all, unless there is a special relationship between the parties or a limited duty role applies. Assuming that the owners of the bar, then a landowner limited duty rule would apply. In the case of a landowner there are two different rules that different states apply. The first is the Status Trichotomy which was applied in the Ruvalcaba case. Here, the duty that is owed to the injured party is based upon their status as either a licensee, invitee, or trespasser. We must determine which of these Polly would have been. An Invitee is someone who enters with the owner's knowledge for mutual benefit of both parties. I believe Polly has a strong argument to be an invitee as she probably paid a cover to get it, we know she spent money on drinks and entering the contest. The duty owed to an invitee is reasonable care to protect from danger that the owner knows or could reasonably discover. If, however (as the defense would argue), Polly was only a licensee-meaning she entered with consent for her own convenience the duty would be not to injure her willfully or through gross negligence and to protect her from danger of which they actually know by either fixing the danger or warning her. If she was a licensee, the defense would likely argue that they did warn her by having her sign and

read the waiver. I do not believe that would suffice as adequate warning of the danger. The third status is a trespasser who is someone that had no legal permission to be there and the only duty to them is not to injure willfully or grossly negligent. Because Polly is 21 and there is no reason to think that she snuck into a bar, I do not believe she would be a trespasser. Thus, because of her argument that she was there to do business with the owner and for mutual benefit, I believe she would most likely be considered an invitee and the duty then would be to use reasonable care to protect her from danger that the owner knows or should know of. If, however the court in this state would rather follow the Rowland v. Christianson case where the court did away with the status trichotomy and went back to a general duty rule of protecting against foreseeable harm, I believe Polly would still have a strong claim. She would need to prove that the harm was foreseeable and she was not protected against it.

There are strong policy arguments to enforce duty for both claims. First off, to deter bars from such dangerous contests and from having a dangerous, wet bar and allowing people to dance on it. At the same time, allocation of loss and fairness to the plaintiff are also important policy considerations. By enforcing such a duty I do not believe it would lead to any administrative concerns because there are probably not going to be a flood of cases coming into court from this type of situation. Also from an economic standpoint, it seems that enforcing a duty might be more beneficial since it would decrease injuries and medical expenses for those injured.

I do believe the court would find that the bar owed a duty to Polly.

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Breach

In determining breach we consider what the standard of care was that the bar owed to Polly and if they acted reasonably in light of that standard of care. In the misfeasance argument (hosting a dangerous contest) the duty is to reasonably protect her from foreseeable harm. In order to determine if the standard was breached, there are different forms of evidence which may be used. First, is Learned Hand's Risk Calculus which was set out in US v. Carroll Towing: B<P*L meaning if that the burden of preventing the harm (here not having the dangerous contest on the bar) is less than the probability that someone would get hurt and the seriousness of the potential injury then a duty was breached. Here, the burden seems slight, either don't have the contest or have it on the ground where it is safe for girls to dance. The probability of harm is something that would need to be researched, how many different times has someone been injured, how often does someone almost fall (we know of once since Polly had seen it before) and for the likely injury we would need to decide what is the common injury of someone falling off of a bar. Customary practices of other bars might also be used to show breach, like was done with other construction agencies in the Hagerman case. Although custom is not determinative unless it is a professional care standard, it can be useful to prove breach if the bar owner deviated from custom.

Looking at the non-feasance argument (failure to keep the bar clean and safe) we could also look at Hand's Risk Calculus. Here the burden would be keeping the bar clean and safe compared to the same likelihood of injury and potential harm as stated above.

Again, I believe it is a strong argument that the burden of keeping the bar clean would be less than the likelihood and seriousness of injury to a dancing contestant.

Causation

Causation is simply showing a connection between the negligent conduct of the defendant and the injuries of a plaintiff. To determine causation the "but for" and/or "substantial factor" test are applied. They are essentially the same test-but sometimes substantial factor is easier for a jury to understand. In this case looking at the misfeasance argument the question becomes "But for the bar's negligence –having a dangerous dancing contest on a bar – would Polly have torn the ligament in her knee?" or "Was the bar having a dangerous dance contest a substantial factor in Polly tearing her ligament?" I believe that it is clear that the bar was a cause in fact. Had there been no contest she would not have been on the bar and fallen, thus tearing her knee.

Looking at the non-feasance issue "But for the bar's negligence – failing to keep the bar clean – would Polly have torn her ligament?" or "was the bar failing to keep the bar clean a substantial factor in Polly's torn ligament?" Again, I believe they are a cause in fact since if the bar was clean she probably would not have fallen down. However, it is closer here and the defense would likely argue that there could have been many factors why Polly fell, besides the bar being unclean. Looking at Ingersol v. Liberty Bank the court held that when a man fell down stairs which were poorly maintained, although it was possible there were other causes for his fall, possibly a heart attack, it was a question

for the jury. They ruled that the plaintiff did not have to rule out each and every remote possibility-instead if she can show that the defendant was one of many reasonable causes that the jury could infer to have been the cause, it is a question for them to resolve. If, on the other hand there are many possible causes, at least one of which the defendant is not responsible for and all are equally probable, then the plaintiff cannot recover. As Polly's attorney, I would argue there could have been other causes (someone pushing her, someone grabbing her, her shoe breaking or something like that) those are remote and the jury could infer from the evidence that it was the wet bar that caused her to slip and thus, it is a jury question. Looking at another case, the defense may argue it is more like Saezler v. Advanced Group, where although an attack was committed-the untaken precaution of the defendant would not have necessarially prevented the accident. Here, they would argue had the bar been clean and dry she still could have fallen off. I would argue that Saezler was a very policy based case-it was a low income housing development and the court didn't want to impose a burden on the landlord that would make him raise rent. This case would impose a small burden on a bar owner to keep the bar clean and I believe a court would hold differently.

In a causation case, it is sometimes helpful to bring in scientific evidence. In order to do that the Daubert Trilogy requires expert testimony to have sufficient scientific reliability to be heard by a jury, so they look at the respect the evidence has in the community, if it has been repeated and the error rates. However, to get an expert before a jury to testify on this, it must be shown that it is something a lay person juror would not understand without an expert. Here, it seems that any lay juror would understand

slipping and falling off of a wet surface, and it is unlikely expert testimony would be admitted.

Scope of Liability

Scope is based almost solely on forseeability and policy. In order to determine scope of liability 3 questions are asked: Was the plaintiff a foreseeable victim; was the injury a foreseeable injury; and was there any intervening cause that would cut off liability to the defendant?

Both the misfeasance and non-feasance arguments may be looked at together. In both, it appears Polly was a foreseeable plaintiff since she was one of 10 women who were dancing on the bar which was wet. Particularly because someone had almost fallen once before, and if we could show that it was a common event she would look to be quite foreseeable. Polly's injury also seems to be foreseeable. When someone falls off a bar, they could tear a ligament in their knee. It does not seem out of the ordinary, and even in cases where the injury might seem to be unordinary (like the collapsed lung in Justi), the courts will send the question to a jury unless as a matter of law no reasonable juror could differ on the opinion of it being unforeseeable. As for intervening events, it does not appear that there was one her, but the defense would likely argue that there was. They would argue that some customer pushed her or bumped her which caused her to fall, and thus it was an intervening even that the bar was not responsible for. However, based on Polly's testimony that no one pushed her she just slipped, this argument seems to be weak.

Advocacy is very important in framing the issue for SOL. As Polly's attorney I would want to frame the issue where it seems very foreseeable that she might have been injured. I would say something like "Was it reasonably foreseeable that a woman dancing on a dangerous contest upon a wet, unclean bar would fall off and injure her knee?" The defense would want to frame the issue to make it seem less foreseeable and more freakish of an incident. Something like "Was it reasonably foreseeable that a woman, who had watched these type of contests before and signed a waiver would be dancing on the bar, with 10 other woman who were not injured, and that she would slip, actually fall all the way off of the bar onto the ground and tear a ligament in her knee?"

There are exceptions to the forseeability rule of Scope of Liability. The first is the medical malpractice complications rule. This means that even if the medical malpractice is not foreseeable, the plaintiff can recover from the initial tortfeasor for all of the harm, including that done by the malpractice. This is very Policy driven in that it is usually very hard and expensive for the plaintiff and time consuming for the court to go after a doctor for malpractice. Instead, the plaintiff just recovers from the initial tortfeasor and then that person (here the bar) can go after the doctor. This seems to be a possibility for Polly to recover even for her staph infection. It would be like the Association for Retarded Citizens v. Fletcher case where the court allowed the mother of a child who drowned in a pool to recover for all damages even those which may have been done by a doctor. In that case, the defense failed to prove there was malpractice and so the plaintiff could recover for all of the damages. Here, this seems like a good argument for Polly to make in order to recover the full cost from the bar.

A second exception is the eggshell plaintiff rule. It means that "you take the plaintiff as you find her." So even if the defense could prove that Polly tearing her ligament was a freak, unforeseeable consequence and that a normal person would not have been as severely injured, the court would likely rule they were still liable. Like Pace v. Ohio DOT, it appears that Holly may not have followed instructions completely in regard to taking her pills as regularly as she should have-but in Pace even though the victim was not particularly healthy, didn't take his diabetes medication on time and had a drug history, he was still able to recover for his injuries. I believe the same would apply to Polly.

Damages

Assuming Polly could prove her negligence claim (focused on either misfeasance, nonfeasance or both) she would be able to recover damages in order to make her whole. There are 3 typical categories damages can be sorted into. First, compensatory damages. These would be future and past medical bills and future and past lost wages from the accident. In determining medical expenses Polly must show that they were reasonably and necessary and were reasonably priced. In looking at earnings losses, she could recover past from the date on injury to date of trial-and if she cannot work in the future she could recover those as well. The defense attorney would likely argue that a torn ligament should not keep her from being able to work as a paralegal for long and thus would argue to limit recovery to a reasonable absence from work. In determining these future damages, inflation rates, reduction to present value (if she got a

lump sum payment) or time value of money (if she got payments spread out in the future) would need to be considered. The second category is "emotional damages" and include Pain and suffering and Loss of Enjoyment of life. Although some courts look at them as one in the same, I believe it makes sense to consider them separate. Pain and suffering must be sensory perceived to recover-I believe Polly would have no problem with that. They include compensation for all physical pain, mental suffering and motional harm. These are sometimes hard to prove, and we would rely on Polly's testimony to explain the pain she had suffered. For Loss of enjoyment of life (LOEL) this includes her inability to engage in enjoyable productive activities she used to do. For example, if she was a skier or runner and was unable to do this, she should be able to recover for that. Additionally, if she has a spouse, or maybe even is in a serious relationship where they live together, that person could bring a Loss of Consortium claim. These claims are derivative of Polly's claim, meaning if she was not able to recover, the spouse could not either. These claims would be to recover the effects her injury had to the spouse including loss of companionship, affection, and support. The final type of awards are punitive damages-meaning they are to punish the defendant for wrongdoing. These are rare and only allowed in negligence cases where the defendant acted particularly outrageous. Examples where these have been allowed are State Farm v. Campbell where State Farm convinced the clients not to take a deal which was good for them and then stuck them having to pay the whole judgment, which was much larger, and in Mathias where there were bed bugs and the hotel had knowledge and did nothing. I do not believe

we could show that the bar acted with a degree of reprehensibility to recover punitive damages.

Sometimes, there are jurisdictional caps on damages. This means that only a certain amount can be recovered. There are policy reasons for and against these caps. Reasons for them are that it is fair to the defendant and doesn't violate due process since he knows what he will have to pay. Arguments against them is that they are unfair to the plaintiff-it might allow someone less severely injured to recover all expenses and not allow a severely injured person to recover the total expense. Aditionally, caps can discourage an attorney from taking a case if they know it is likely a small recovery allowed.

Defenses

There are several possible defenses which can be raised by a defendant, and the burden of proof rests upon the defendant. Depending on jurisdiction there could be either Contributory Negligence or Comparative Fault. Contributory Negligence means that if the plaintiff was at all at fault (acted unreasonably) then there would be no recovery. In this case, if the court used CN, I believe Polly would not be able to recover. They would likely say that by getting up on a bar, in a crowded place, knowing people fell before, seeing it was wet, and having been drinking she was contributorially negligent. Because this is such a severe doctrine –all or nothing-many courts have turned to Comparative fault. This compares the amount of fault of the plaintiff with that of the defendant and awards recovery accordingly. If there is pure comparative fault, the jury would assign

percentages and the plaintiff could recover whatever % the defendant was negligent, no matter how slight. So in Polly's case, for example, if a jury decided she was 60% negligent and the bar was 40%, she would be able to recover 40% of the damage award. Some jurisdictions have a statute that modifies CF to only allow the plaintiff to recover when she was either equally or less at fault compared to the defendant. Thus, in the above example, she would get no recovery, but if it were reversed and she was 40% at fault and the bar was 60% she would recover. It is hard to determine the percentage of fault but Wassell v. Adams looked at balancing the costs of each of their negligence. I believe that although Polly was somewhat negligent, the bar would have been greater negligence because they knew the bar was wet, apparently had people fall more than once and she would be able to recover.

A second defense is assumption of risk. Here, we appear to have an express assumption of risk by Polly signing the paper which said "I waive liability for injuries caused by other patrons." However, we are not alleging the injury was caused by other patrons, but by the negligence of the bar itself. In order to prove AR, the defense must show that Polly knew, appreciated and voluntarily assumed the risk. Looking at what she signed, it seems she may have assumed the risk of being injured by another customer, but not by negligence of the bar itself. The language in an AR contract must be clear and unambiguous and cannot be overly broad. Although there may be an argument this was overly broad, I do not believe that would really matter since the injury was not caused by another plaintiff. Policy concerns are also looked at here to determine if her waiver is

void because it is something that should be regulated by policy, but again, the waiver doesn't seem to apply to her injury.

Since express AR seems to fail, the defense might argue that there was an implied assumption of risk involved. Again, they must show she knew, appreciated and voluntarily assumed the risk. Here, she had seen others dance before, knew that she could fall and knew how wild the bar was that night. However, she may not have really appreciated the risk of being seriously injured, which is what I would argue. I would analogize to Murray v. Ramada where the man knew it was dangerous to dive since he warned his brothers, but the court said it was a subjective test as to whether he really appreciated the risk of seriousness of injury. I would argue she did not really appreciate the risk. I don't know if her being impaired by alcohol would effect her ability to appreciate the risk, but if that could be used to argue that I would bring that up as well.

whose defense claim is this?

I would also need to check the statute of limitations on these type of cases to determine when it starts to run. It is likely it began running when Polly was injured on July 8 and the date now is December 14, so I would have to consider if a claim could still be made.

All of the elements considered, I do believe that Polly could prove a prima facie case of negligence against the bar. Her biggest obstacle would probably be the defenses of implied assumption of risk and comparative fault. While I believe these defenses make the case close and it could go either way, I believe I would take her case. I might

like to research if there were any caps in this jurisdiction to see what my contingency feel would likely be first.

If I had more time I might also analyze a claim against the sponsor of the contest, Jose's Marvelous Tequila (Grounds would be them hosting an unsafe contest, duty is that of reasonable care to prevent foreseeable plaintiffs from injury, breach would be looking at the hand's risk calculus and seeing if they acted reasonably in the situation, scope would center around if there was an intervening event-likely they would say they had a right to rely on the third party (the bar) to prevent the harm and cite to the McLauglin v. Mine Safety case where they used the heat blocks and damages would be similar to those raised above and so would the defenses.