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Exam Number 434

TORTS FINAL GRADING SHEET - 2004

QUESTION ONE

- (1) Does Rent have a duty? 8 (10 pts.)
- (2) Does Shrink have a duty? 5 (6 pts.)
- (3) Did Shrink breach the duty? 1 (8 pts.)
- (4) To what standard should Kid be held? 7 (8 pts.)
- (5) Were Kid, Rent, Shrink the prox cause of any injury? 11 (12 pts.)
- (6) Are Kid, Rents, Shrink liable for subsequent injury? 5 (5 pts.)
- (7) Is Rider comparatively negligent? 3 (6 pts.)
- (8) What allocation of damages is best for Rider? 2 (5 pts.)

QUESTION TWO

Purpose of tort law (expansive v. narrow view) 11 (15 pts.)

TOTAL ----- 59 (75 pts.) (+?)

1. Rider's best argument in response to Rents' motion to dismiss based on their duty argument.

The Rents will likely file a motion to dismiss based on the notion that they have no duty to the plaintiff. In New Mexico, the judge decides both the foreseeability and policy aspects of duty (Hererra), although this area of the law is somewhat unsettled and is debated often. This duty is owed to all foreseeable plaintiffs and is narrowed based on policy. A duty can be found based on statute, contract, or a common law analysis. In this case, the Rents have no duty under statute or contract, so the duty must be analyzed based on common law.

### **Common Law Duty:**

First, because there is likely an issue of an omission in this case (The parents failed to prevent the kid from stealing their car), Rider will likely argue that based on their special relationship with their son, the rents have a duty to him and to those who he could possibly injure. Rider could argue that because New Mexico is moving towards an Andrews approach, where there is a duty to everyone in society, the Rents should owe a duty to him and that this duty would be to use ordinary care (Heaven v. Pender). The rents on the other hand, would argue that it was not foreseeable that their son would not know how to stop the car even if it was foreseeable that he would steal the car. Roxy would argue that even if the Cardozo approach is taken, it is foreseeable that he would steal the car, because he threatened to do so. Furthermore, Roxy would argue that for

policy reasons it is important to hold parents liable for the actions of their minor children.

If society failed to do so, children would commit horrendous crimes because nobody would stop them. This policy would all but force parents to control their children.

2. Rider's best argument in response to Shrink's motion to dismiss based on their claim that there was no duty.

### **Common Law Duty:**

First, if Shrink's liability is measured based on an omission, a duty to act must be established based on his special relationship with Kid. This special relationship creates a duty to protect those who would be foreseeably injured by the Kid (Tarasoff). In this case, the doctor did not attempt to protect anybody. The issue becomes whether or not Rider was one who would be foreseeably injured by Kid. Rider would argue that she was a foreseeable plaintiff, because angry children steal cars and children don't know how to drive. Shrink would then argue that it was not foreseeable, because he had never discussed anything like stealing a car in his sessions with Kid. Furthermore, he would argue that he never saw the kid as a risk to society, and therefore, had no duty to protect people he might injure. The doctor must first determine that there is a risk before he has a duty to act. The judge would then apply a policy analysis to determine whether or not it is appropriate to hold shrinks liable for the injuries caused by their clients. Rider would argue that Shrinks are in control of their clients and therefore have a duty to warn society and have a duty to prevent the clients from causing harm.

**Statute as duty:**

If the court did not find that the special relationship created a duty to warn Rider, in this case, a statute might create a duty to act. In New Mexico, duties can be created by statutes if the statute was created to benefit the plaintiff. In this case, Doctor Shrink would argue that the possible plaintiffs that this statute was designed to protect do not include drivers on the road. Possible plaintiffs could include the child or people at the child's school, but would not include people who the student does not know. Rider would argue that she is in the class of plaintiffs that the statute is designed to protect, because the accident occurred close to the child's house and it was foreseeable that this sort of thing might occur. Rider would argue that child abuse leads to bad behavior and that bad behavior leads to accidents. Therefore, the statute was designed to prevent accidents caused by distressed children.

3. If Shrink owes a duty to Rider, what is Rider's best argument to show that Shrink breached this duty?

In New Mexico, there are several ways to determine breach. The duty is to act as a reasonable person would under the circumstances (Ordinary Care-Heaven v. Pender). In most cases, the reasonable person is an objective standard, although in cases of young age and physical handicap, it is subjectivized. In cases where mental handicap is an issue, the law is unsettled. The reasonable person standard is further subjectivized when a

professional is involved. A professional is required to use the skills she has when acting with ordinary care and is therefore held to a higher standard. In these cases, the professional's testimony is determinative and determines what a reasonable professional would have done. However, in cases where technical knowledge is the only issue, expert testimony is not determinative, nor is it in the case of industry standard. After the reasonable person standard is determined, there are several ways to determine what this reasonable person would do under the circumstances. One is the Learned Hand formula where the burden on the defendant is measured against the possibility times the severity of the loss. The second way is to use the professional standard established by expert testimony. The third measure, which is not determinative is the violation of a statute.

**Professional standard:**

Rider would argue that a reasonable doctor would not have failed to inform authorities about the abuse. Because Shrink is a professional (He has an ethical obligation to the community and has knowledge that could be called technical), an expert would probably be required to determine what a reasonable shrink would have done under the circumstances. Barring a *res ipsa loquitor* argument, which is not applicable to this situation, this expert's testimony would determine what a reasonable shrink would have done under the circumstances. The jury would have to follow this standard in determining breach. If the expert argued that a reasonable shrink would have told authorities, the jury would have to find that Shrink breached his duty. However, this is not always the case. In cases where the professional custom or standard is unreasonable,

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the jury can overturn the professional standard and employ the Learned Hand formula

This was done in the glaucoma case

### **Learned Hand Formula:**

The Learned Hand formula could be used to determine breach. If the burden on the Doctor was less than the probability of the loss times the loss, the doctor would be required to report the child abuse. This formula is problematic, however, because it is difficult for a jury to apply. However, in this case, the burden is quite low and the injury is severe. The issue would be the probability of loss. Rider would argue that the doctor could have attempted to warn possible plaintiffs or at least the parents of the child and that this would have represented a low burden. However, the doctor would argue that warning all possible plaintiffs especially considering that he could not predict what the kid would do and how he would injure people represents a significant burden. He would then argue that the risk was slight and that he didn't see the boy as a danger to society. He would argue that he first had to know that there was a risk.

### **Statute as evidence of breach:**

Even if the first two methods of proving breach were unsuccessful, there is a third way that breach could be argued. Violation of a statute if the statute is designed to protect the class of plaintiffs involved is evidence of breach, but is not always sufficient in and of

itself. If the person was acting reasonably and was trying to prevent a greater harm in the process of violating the statute, the jury could find that the defendant never breached a duty. In this case, the Rider would probably argue that it was unreasonable for the doctor to fail to turn the parents in for child abuse and that the social harm he was attempting to avoid was less significant than the social harm the statute was designed to prevent.

Shrink would argue that he was reasonable in his failure to follow the statute, because he was attempting to keep the kid in therapy thereby preventing a greater harm. He weighed his choices and decided that it would be better for the kid to keep him in therapy. These arguments could be used together to prove breach or lack thereof.

4. Rider's best argument in response to Kid's expected request for a jury instruction that he should be held to the standard of an emotionally disturbed child who does not know how to drive?

In New Mexico, the reasonable person standard is subjectivized in relation to age when the defendant is a minor. The person is required to act as a reasonable child of his age would act. However, Rider would likely argue first that because the kid was operating a car, he was performing an adult activity, and therefore should be held to an adult standard. The courts have recognized this argument as an exception to age subjectivization of the reasonable person standard.



Second, Rider would likely make an argument against subjectivizing the reasonable person standard as it relates to emotional disturbance. The law in New Mexico is unsettled in this area, so in this situation, policy arguments could occur. Rider would argue that if we don't hold emotionally disturbed people to the same standard as other people, we are compromising security for freedom. Furthermore, we are doing so at the expense of the person charged, because it is unlikely that the person will be accepted into society if he is not made to "pay" for injuries he caused. Kid would likely argue that emotional disturbance is similar to physical disability, which New Mexico does recognize in the subjectivization of the reasonable person standard

5. What arguments can Kid, Rents and dr. shrink make that they are not the actual or proximate cause of ANY injury and what are Rider's responses?

## **GENERAL**

In New Mexico, the proximate cause of an injury is determined based on the Polemis approach. This approach is backward looking. The injury must be the result of a natural and continuous sequence of events. The action must not be too far removed from the injury and it must be a substantial factor in the injury. Sometimes, the Wagon Mound approach is employed in New Mexico, but only in some cases. Examples include an act of god, an intentional tort, or a criminal act. The law is unsettled in this area, and there is room for argument. Furthermore, proximate cause is an inherently policy based discussion.

## **KID**

Kid has a weak argument that he was not the actual cause of the accident. If the court employs the but/for test, it would be quite obvious that this accident would never have occurred. However, the Kid could argue that he was not the proximate cause of the accident, because Rider had been drinking and was an independent intervening cause. Because drinking and driving (If she was over the limit) is a criminal act, jury instruction 3.06 could be given and the jury would be able to determine whether or not this drinking was an independent intervening cause. This too would be a weak argument, because it appears that Rider was not negligent. Rider would argue just that.

## **THE RENTS**

The rents have an argument that they are not the actual cause of Rider's injuries. They would argue that no matter what they did, their child would have been angry and would have stolen the car. Therefore, they are not the but/for cause of the injury. However Rider would argue that the child abuse created the anger and was the but/for cause of the stealing of the car and the injury. If they had not abused him, he wouldn't have been "troubled" and wouldn't have stolen the car in the first place. If the jury found that the rents were the but/for cause of Rider's injury, proximate cause would be the issue. New Mexico, for the most part follows the Polemis hindsight approach to proximate cause. If the injury was the result of a natural and continuous sequence of events, the action

causing these events is the proximate cause of the injury. Rider would argue that the events were the natural and probable cause of the injury.

In this case, 3.06 might be given, because running the stop sign could be seen as a criminal act. 3.06 (Wagon Mound) is given in the event of a criminal act and is used to determine whether or not the criminal act was an independent intervening cause. The Rents could argue that in this case, because New Mexico is arguably moving towards the Andrews approach to duty, it follows that the courts should adopt the Andrews approach to proximate cause. The Andrews approach is forward looking and is based on foreseeability of the injury. This is determined by measuring whether or not an intervening cause was independent. Rider would argue against the 3.06 instruction and would say that New Mexico is a Cardozo state indicating the use of the Polemis approach to proximate cause. The Rents, on the other hand, would argue that New Mexico is moving towards the Andrews approach to duty, so we must also move towards the Andrews approach for proximate cause, because the two go hand in hand. Because Andrews does not limit duty, he must limit proximate cause if he is to limit liability at all.

### **DR. SHRINK**

Dr. Shrink would argue that if 3.05 (Polemis) is used, the sequence of events leading up to the accident was not continuous. He would argue that it was not continuous, because the kid went home and had a fight with his parents before stealing the car. Furthermore, Dr. Shrink would also argue for jury instruction 3.06. He would argue that stealing the

car was an independent intervening cause because it was not foreseeable. Rider would argue that using 3.05, Dr. Shrink was the proximate cause of the injury. She would argue that looking backwards from the injury, Dr. Shrink's action was not too removed and that it was a substantial factor in her injury. She would then argue that the jury should not be given 3.06, because there is no criminal act. The kid was taking his parents' car, not stealing it. However, Dr. Shrink would argue that driving without a license and running a stop sign are criminal acts and therefore 3.06 should be given.

If 3.06 were given, the jury would likely find that stealing the car and running the red light were independent intervening causes. They were not foreseeable to Dr. Shrink. He could not have known that the Kid would steal his parents' car.

6. What arguments are available to Rider to get damages that resulted from the amputation of the wrong leg and from the delay in the brain surgery from Kid, the Rents and Dr. Shrink?

### **General**

Successive tortfeasor liability in New Mexico is an unsettled area of law and is changing as we speak. If one actor is negligent and creates a situation in which it is foreseeable that the plaintiff will be further injured, the first actor will be held jointly and severally

liable for the second injury and liable for the first injury on his own. However, judges are split on several issues. First, it is unclear whether or not the law requires that the first actor commit a full tort in order to be held responsible for the negligent acts of a second actor. Second, how should the courts deal with the issue of joint and several liability? In most other areas of law, joint and several liability has been abolished in favor of several liability in an effort to be fair to the defendant.

### **KID**

Assuming the Kid is liable in tort for the first injury, Rider would likely argue that because the Kid committed a full tort, he should be liable as the first actor in a successive tortfeasor action and should be liable for 100% of the damages occurring from the hospital injury. These injuries included amputation of the wrong leg as well as a loss of chance that is easily proven. If she had gotten surgery sooner, she would have had a better chance of preventing bleeding in her brain. Kid would argue that even if he is responsible in successive tortfeasor liability, he should not be held jointly and severally liable, because joint and several liability is a remnant of an abandoned doctrine that is not applicable today. It has been abandoned in most other areas of tort liability and has no place in situations such as these. Rider would argue that as a policy reason, he should be held liable, because in this case, he created substantial risk and she should not have to bear that burden as a plaintiff. Kid will likely also argue for the abolition of successive tortfeasor liability saying that there is no reason to hold him jointly and severally liable

and that this should be treated as a concurrent tortfeasor case in which the jury apportions fault.

## **Rents**

Assuming the Rents breached a duty, Rider would argue that the rents put her at risk and are therefore successive tortfeasors. The argument would be the same as above, but the Rents would argue that even if they were negligent, they did not complete a full tort and are therefore not liable for the second tort. The law is unsettled in this area, so they might or might not win. Rider would argue that only breach of the duty is needed to become a successive tortfeasor.

## **Dr. Shrink**

The argument here is the same as the one against the Rents.

7. Will Rider be liable for any part of her own damages b/c she is comparatively negligent?

Because New Mexico abolished contributory negligence, Rider will still be able to sue for her injuries. However, if the court does find that she was negligent and contributed to her injuries, the jury will apportion fault and she will be responsible for her percentage of fault for the first injury. This brings up interesting questions about successive tortfeasor

liability. Is she liable as a successive tortfeasor (assuming liability for injury one is established) for putting herself at risk for further injury? She would argue no

8. If Rider's action is successful, what allocation of liability among all of the tortfeasors is ultimately best for Rider?

If Rider is successful, she would hope that Dr. Shrink is most liable and that the parents and kid are less liable (because the second tortfeasor can't pay). Dr. Shrink likely has more money than the other two parties. The parents may be judgment proof.

Furthermore, they are only responsible for \$3,000 of the damages their child caused. The kid is likely judgment proof and may not be held accountable in the first place because he is a child.

### **Question #2**

I agree with the statement that tort law *is* another way that society regulates itself and insures security for its members. Furthermore, I agree with the second part of the statement that policy is inherent in tort law. The judge uses policy (couched in arguments of foreseeability and special relationships) to determine which cases constitute a prima facie negligence claim.

However, I do not agree with the statement in this question, because I don't think that this should be the purpose of tort law. Tort law, in my view is a piecemeal attempt at

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regulating conduct and spreading loss amongst the members of society. I find it to be a Band-Aid approach that overlooks other possibilities. For example: in socialist societies, it is the job of the government to assume the burden of loss of its people. This makes for a community that is tightly knit, not one that is focused on blame. If the government paid for our healthcare and compensated victims when doctors were negligent, tort reform would be a non-issue. Insurance would be a non-issue, because it would not be for-profit.

Tort law, while it ensures continuity and security for society, does so in an imperfect manner. However, Tort law is only a symptom of a greater problem. If capitalism is the system we desire, tort law makes sense. It regulates in a capitalist society what the state would regulate in a socialist society. However, security versus freedom is not an issue that the tort system can adequately deal with. This should be the job of the state, because the state can do it more effectively.

One of the reasons I find tort law to be so frustrating is that in some cases, it makes sense to hold the defendant liable for injuries caused and in other cases it doesn't. However, in tort law, it is not necessarily true that the law will fall on the correct side of the issue. The law doesn't necessarily take into account the nature of the parties involved (Individuals v. Corporations). Fairness needs to have more of a place. Perhaps this is where policy comes in, however often policy is another term for greed rather than fairness.



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Second, it is unfair to plaintiffs that they will receive no compensation if the defendant is judgment proof. If the state took responsibility for actions of members of society, this would be a non-issue. Everyone would receive compensation. We as a country need only determine which is more important: Punishment or Compensation to victims. Personally, I believe punishment is somewhat ineffective and isn't a reasonable goal of a civilized society. Therefore, compensation makes more sense.

Finally, if we are to accept that tort law is one way to compensate victims, I believe that policy is an important aspect of tort law. Therefore, I agree with the second half of the quote that the judge determines whether or not the plaintiff has a case based on policy. However, this opens the doors for interpretation that could be scary. If a president has the opportunity to appoint life-long judges who have different views concerning what states a claim, the law can change for the worse. Therefore, not only must tort law include policy, there must be reasons to back up this policy that are accepted as timeless. This is where foreseeability comes in.

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**510-003 Torts  
Fall Semester 2004**

**UNM School of Law  
Final Examination  
Three Credits**

**Professor Schwartz  
Thursday, December 16, 2004  
1:30 – 3:30 p.m. (2 hours)**

**Examination Format**

1. **Laptop** computer users: Start the Securexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, & date of exam. Make sure to number each bluebook in order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

**Professor's Instructions**

This examination consists of two questions, which you must complete within two hours. The first question, which has eight subparts, is worth 60 points; you should spend about 95 or 100 minutes working on it. Make sure that you respond to all eight subparts. The second question is worth 15 points; you should spend about 20-25 minutes on it. Assume that the events described in the first question occurred in New Mexico. We strongly urge you to read the entire question before you begin preparing your answer for that question.

This is a closed book examination; you may not have the class materials or any notes or outlines with you.

There is ample time to organize your answers to these answers. Please read each question carefully before you begin writing. You will be given credit for good organization, careful writing and creativity.

**Good luck, and have fun**

## Examination

### QUESTION 1 (60 points; 95-100 minutes)

3,000 - 1 - 1 fork kid's  
actions  
Foreseeable

Fourteen year old Kid Rent ("Kid") had been acting out by missing school, fighting with his peers, and engaging in other similar behavior for several months when he started threatening his parents with stealing their car so that he could drive to "freedom" some place far away – perhaps, he suggested, Alaska. His parents, Fred and Alice Rent ("the Rents"), who also suspected that he was often highly intoxicated, decided to force him to see Dr. Harry Shrink, a psychiatrist specializing in treating adolescents, to see if their relationship with their son and his behavior could be improved by therapy. Although initially Kid was not willing to talk very openly with Dr. Shrink, he soon opened up – the first time he had ever done so with an adult – and he admitted to his increasingly heavy drug use. He also told Dr. Shrink that his father regularly beat him, often leaving serious bruises. When Dr. Shrink told Kid that he would be obliged to report his case to the state authorities as one of suspected child abuse, Kid protested and said that any such report would effectively end his relationship with his parents, and also his relationship with the psychiatrist. He begged Dr. Shrink not to report it.

↑ Statute  
← duty

Although New Mexico law requires that "every person . . . who . . . has a reasonable suspicion that a child is an abused or neglected child shall report the matter immediately" to a state or tribal social services agency or a law enforcement agency, Dr. Shrink decided that he would be able to help Kid and his parents only if he could gain their trust, and he decided that he could not gain their trust if he reported them. Ultimately, he decided that the best thing he could do for the family was not to report his suspicion, but, rather, to try to work with Kid and the Rents. In his expert judgment, he believed that Kid had been physically abused by his parents, but that his mental and physical well being would be undermined by instituting a state investigation, which would be the result of his report to the state.

R.P.  
to violate  
Statute  
must protect  
it

Kid met with Dr. Shrink every week for a month before his anger with his parents again became piqued. One evening, shortly after his meeting with Dr. Shrink, Kid started screaming at his parents and told them he was leaving. He grabbed the keys to the family car, which was parked in front of the house, ran out to the car, turned on the ignition, and placed his foot on the accelerator. When he reached the stop sign at the first corner he realized that he had no idea how to stop the car, and he sped into the intersection at a speed far in excess of the posted speed limit. Unfortunately, his car collided with a motorcycle driven by Roxy Rider, a forty year old experienced motorcycle driver who was, in fact, driving very carefully despite the fact that she had consumed four mixed drinks during the previous hour.

Comp. Fault

Kid's car spinned to a stop without any damage to car or driver, but Rider, who was not wearing a helmet, was thrown twenty feet into a retaining wall. While New Mexico once required adult motorcyclists to wear helmets, the statute doing so was repealed several years ago. A passing motorist who witnessed the accident called for an ambulance, which arrived promptly and transported Rider to the emergency department at Albuquerque General Hospital. Rider was bleeding profusely from a head injury and her left leg was crushed. A neurosurgeon determined that Rider would require immediate brain surgery to remove a part of the skull that was crushed into brain tissue. She was rushed by hospital personnel to the wrong operating room where an orthopedic surgeon, Dr. Messup, misidentified the patient as the victim of a different automobile accident and cut off her otherwise healthy right leg. When the mistake was discovered an hour after the first surgery, Rider was returned to the operating room, where the brain surgery was carefully and successfully performed. Unfortunately, the delay in obtaining this surgery resulted in continuous bleeding into her brain, and this contributed to the loss of a great deal of brain tissue and functional ability.

loss of Chance

Sec.  
T.F.

Although Rider never fully recovered, her guardian and conservator brought an action on her behalf against Kid, the Rents, and Dr. Shrink to recover damages for the results of her brain injury and her

unnecessarily amputated leg. She would have sued Dr. Messup and the Albuquerque General Hospital, too, but by the time the action was filed Dr. Messup had died, dissolute and penniless, and the Albuquerque General Hospital had declared bankruptcy and the building had been purchased as a distribution center by a large toy manufacturer.

You have just been hired as a law clerk by the lawyer representing Roxy Rider in this litigation. Your employer has asked you for a memorandum to discuss several issues that are likely to come up in the course of this litigation. Please write a memorandum briefly discussing each of the following issues:

- (1) What is Rider's best argument in response to the Rents' likely motion to dismiss based on their claim that they owed no duty to Rider? (10 pts.)
- (2) What is Rider's best argument in response to the Shrink's likely motion to dismiss based on their claim that he owed no duty to Rider? (6 pts.)
- (3) Assume for purposes of this subpart only that the court finds that Shrink owes a duty to Rider. What is the best argument available to Rider to show that Shrink breached his duty by failing to exercise reasonable care? (8 pts.)
- (4) What will be Rider's best argument in response to Kid's expected request for a jury instruction that he should be held only to the standard of a seriously emotionally disturbed child who does not know how to drive, not the standard of a competent adult? (8 pts.)
- (5) What arguments can we expect the defendants (Kid, the Rents and Dr. Shrink) to make that they are not the actual or proximate causes of any injury, and what are the best responses that Rider can make to these arguments? (12 pts.)
- (6) What arguments, if any, are available to Rider to get the damages that resulted from the amputation of the wrong leg, and from the delay in the brain surgery, from Kid, the Rents and Dr. Shrink? (5 pts.)
- (7) Will Rider be liable for any part of her own damages because she is comparatively negligent? (6 pts.)
- (8) If Rider's action is successful, what allocation of liability among all of the tortfeasors ultimately would be best for Rider? (5 pts.)

### QUESTION 2 (15 points; 20-25 minutes)

Read the following statement and explain why it is right OR wrong (your choice). You will not be graded on your choice of answer, but only on how you defend that choice.

The purpose of tort law should be to assure the society that improper conduct will not be tolerated in law. Thus, any wrongful conduct that is not otherwise actionable under contract law, criminal law, or some other area of law, must be actionable in tort. Tort law is the most flexible of any branch of the legal tree. In deciding whether a complaint states a claim in tort, the judge must ask only whether this would be a better, more respectful, more civilized society if such an action were recognized. If the answer is "yes," the complaint states a claim.