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Exam Number 625

TORTS FINAL GRADING SHEET – 2004

QUESTION ONE

- (1) Does Rent have a duty? 9 (10 pts.)
- (2) Does Shrink have a duty? 4 (6 pts.)
- (3) Did Shrink breach the duty? 6 (8 pts.)
- (4) To what standard should Kid be held? 8 (8 pts.)
- (5) Were Kid, Rent, Shrink the prox cause of any injury? 10 (12 pts.)
- (6) Are Kid, Rents, Shrink liable for subsequent injury? 4 (5 pts.)
- (7) Is Rider comparatively negligent? 5 (6 pts.)
- (8) What allocation of damages is best for Rider? 5 (5 pts.)

no callout!

QUESTION TWO

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

TOTAL ----- 62 (75 pts.)

A

Question 1-

Memo Rider v. Rents, Kid, and Shrink

1) Is a duty owed to Rider by the Rents?

Rider's best argument that a duty was owed to rider is that she was a reasonably foreseeable class of plaintiff within the zone of danger, and that there was a common law duty that extends to the parents. The Rents have a duty to operate with ordinary care. They committed the act of beating their child that led to the disturbance and created conflict between them. They have a duty to third parties because they have a status relationship as parents to their child, if it is a nonfeasance. The child had threatened to take the care in the past, they should have known to hide the keys from him. There could even be an argument that there is a statutory duty because of the child abuse, neglect, and responsibility for their children. Without the criminal acts of beating Kid, this action would not have occurred. They had a duty to not beat Kid. They had a statutory duty under NM law, and if seen as an omission they had the status relationship and were caretakers. Since they were negligent in their actions and they had a duty to watch their kid and they are responsible for his actions.

Rider is a foreseeable plaintiff. If there child who had no experience or training driving, goes driving, it is foreseeable that he would get into an accident near the house and he did so at the first intersection. There are policy reasons why they are responsible too, under New Mexico law there parents are responsible for the actions of their children,

albeit there is a cap to the amount of damages but they are still held liable. This is similar to *Calkins* in that he was in an accident not far from where they lived, which is foreseeably in the zone of danger and there are policy reasons, on top of foreseeability that warrants that the parents had a duty to operate with ordinary care, creating liability for them. It was also foreseeable if they beat their child that he would be emotionally damaged, and might run away, especially since it was in a manner that he had described. Rider was a foreseeable in the zone of danger created by a child driving.

2) Is there a duty owed to Rider from Shrink?

Again Shrink failed to operate with ordinary care, and therefore there was a duty. Under a *Tarasoff* interpretation where it was ruled that a doctor/psychiatrist has a duty to warn if they think that their client is a danger to third parties. Shrink was aware that his client was being abused and abusing substances. Shrink was aware of the danger that his client was to society and did not take reasonable action. This duty made Rider a reasonably foreseeable plaintiff. Shrink had a duty to act and is responsible by there omission to not do anything.

Shrink also had a statutory duty that they did not perform. Whether they agreed with the principles behind they duty to report if a child is potentially being abused or not, the statute is there to prevent instances like this. By failing to do so Shrink was criminal in there actions, by failing to act in a statutorily imposed duty. By not acting, it created a duty to the third party that was placed in danger, Rider.

3) If 2, then how did Shrink Breach the duty?

Shrink did not operate as a reasonable person under the circumstances. A reasonable person under the circumstances should have seen the statutory duty and reported the abuse. That would have taken Kid out of that situation and eliminated the danger. They violated the statute which was a breach of the duty.

Furthermore, as a Shrink they are a professional and held to the standard of a reasonable person under the circumstances. Is it customary within in psychiatry to violate statute? Even if it is a reasonable person, not a psychiatrist would see that this not how reasonable people act in society. The statute itself is written for all people not limited to any sort of professional. A reasonable psychiatrist though, should see that when their client is a danger to society, or is in a dangerous situation from the beating received at home that they should be taken out of that situation. Shrink did not act then the way a reasonable psychiatrist would act under the circumstances.

This can be seen in the formula that is given to us by Justice Learned Hand:

Burden \gg Probability multiplied by the loss

What was the burden here? That the child would lose trust in Shrink, Shrink would lose a client and the money therein, and that maybe the child would not be able to get help elsewhere if that trust severed they relationship. While important to Shrink in part to his professional ego to keeping clients, the money and the damage to relationship are quite negligible when compared to the other half of the equation.

The Probability that this action would have occurred was actually quite high. It was foreseeable that Kid was angry with his parents had threatened to leave by taking the car and he did not know how to drive because he was so young. (This outcome leaving home is the same outcome that would have occurred if reporting to social services without the danger of putting others in danger). Kid was angry, the anger was piquing, and he had threatened to do so, therefore the probability that some injury would occur from an accident is quite high.

The loss is very severe. In this case was severe brain damage and loss of a limb. Even without the malpractice, the injury was severe head trauma and limited use of a crushed limb. Still a very serious and severe injury.

The severity of the injury multiplied by the high probability that an accident would occur by an untrained driver who was mentally unstable and threatening to leave outweighs the limited burden of the loss of client, money from client and potential damage the ego since these damages are also not guaranteed by the action they could have taken to prevent the accident.

4) Should be Kid held to a lower standard than that of a reasonable (adult) person under the circumstances?

Rider's best argument that Kid should not be held to a lower standard is that Kid was participating in adult activities. The first is that in the state of New Mexico when a child participates in adult activities they are responsible in the same way an adult would be. There is precedent from the case with the kid on the motor scooter who was held to

be participating in an adult activity – driving – and therefore should be held to an adult standard. This is for policy reasons that we want all individuals that are doing adult activities such as driving to be held to the same standard.

However, Kid may argue that under *LaBarge*, children are not liable for dangerous non-adult activities. This would be a creative argument but unlikely to turn over the precedent case.

Kid is not without options though. He may still get part of the jury instruction that he desires. While Mental conditions have not been admitted in NM, the argument may still have merit and they are not barred. He could argue he should be treated as an emotional unstable person due to physical abuse. The mental and physical he endured may allow for an instruction. Rider can still argue though that mental disabilities or conditions are not allowed and that he should still be tried as an adult, a reasonable person under the circumstances in this case driving a car.

Kid could still argue that he should be held to an adult who does not know how to drive. Since he was fleeing a dangerous situation he could argue he had no other recourse but to drive away, even if he did not know how. This immediacy and lack of knowledge in how to operate a vehicle may be allowed. However, courts tend to rule for a higher standard for professionals and those with special knowledge, and they do not usually grant a lower standard unless in the case of physical disabilities. Since Kid was attempting to drive a car, the court would likely rule that he would be held to the standard of an individual that knows how to drive a car

5) Rider's arguments that the defendant were the causal reason for the injuries?

The defendants were the but for causal elements that led to the accident. The accident would not have occurred but for Kid driving down the street, which occurred but for the abuse from the parents causing Kid to leave. That situation was allowed but for Shrink not acting to report or medicate, or take Kid out of the situation. They were the Actual Cause of the injuries sustained by Rider. Those initial injuries – head trauma and crushed leg – were the but for cause of Rider being taken to the hospital where the malpractice was committed. If not for their actions then the accident would never have occurred and Rider would never have gone to the hospital.

Rider will have to argue that this is then a successive tort. Under a proximate cause analysis it can be seen that the unbroken chain and natural cause of events that the lack of action, the abuse, and the driving all led up to the accident. Rider will argue that there was not independent intervening cause (IIC). When looking back it is evident that the actions that the defendants took were the cause of the injuries.

Shrink will argue that the driving of Kid was illegal (his age, running of the stop sign, and speed were all criminal) and therefore an IIC or the physical abuse from the parents were an IIC (also criminal), on his liability, except that Rider will argue that he had knowledge of this and still failed to act. The parents could also argue that Kid driving illegally was an IIC. All of the defendants could argue that the drinking of Rider was IIC because it illegal and slowed the reaction time down.

If the court rules that there was an IIC, then Rider will still argue that actions were foreseeable. Those likely events would still have occurred. An abused kid running away and driving a car at an illegal rate of speed running stop signs would lead to an accident

and it did. The shrink should have foreseen that this scenario was likely to happen and the parents could have as well. The illegal actions of Kid or Rider notwithstanding. These causal elements all led to the accident causing the head trauma and leg injury.

6) Can Rider collect damages from Kid, Shrink and Rents for the malpractice?

Presently under the law in New Mexico Rider can collect damages from Kid Shrink and Rents under the Ct. of Appeals ruling in *Payne*. In this case the actions of the initial tortfeasor could be held liable for all of the injuries, if there is a recognizable injury sustained in the first incident. Here we can see that there were recognizable injuries that Rider sustained the head trauma and the leg injury. That injury is the reason (the but for) that Rider went to the hospital and the malpractice was committed. They are the causal reasons and Rider can make a claim since there was a recognizable injury that was sustained. They are liable under New Mexico law for the entire injuries sustained since they are the cause the injuries of the initial injuries that led to the further injuries.

7) Is Rider comparatively negligent?

This issue is one that is not clearly decided. Under comparative negligence Rider would likely take some percentage of fault. However, since it is under a successive tort action where there still are remnants of joint liability, there is a chance that Rider will not take any percentage of fault. Under joint liability the defendants of the initial injury can be held liable for the entire 100% of the injuries in a successive tortfeasor. The court

could rule and allow for some form of comparative fault though and then it will be up to the jury. The jury will get to apportion fault and decide if any fault should even be allocated, was she inebriated enough and did that inebriation impair her driving, which from the account it does not appear that it did. The jury could decide to hold her liable for some portion, and in some jurisdictions if that percentage is over 50% then the defendant would not be liable

8) What would be the best allocation for Rider?

The best allocation for Rider would have been if ABQ General Hospital had not gone under and Dr. Messup had not passed away penniless. Under the circumstances that we have for Rider minimal apportionment to Kid would be best. In NM Kid's parents (Rents) would be liable for his actions, but only up to some minimal amount of several thousand dollars. So a very minimal allocation is best for Kid, although his actions likely are most at fault and would get a high percentage. The Rents could take more than Kid but not a high percent, depending on their wealth and level of insurance (potentially auto since it was their car, and maybe a homeowners claim). It is also not mentioned if Rents are wealthy. If they are or have enough liability with their insurance they could take more of the brunt of fault percentage. The person that would be best for Rider to bear most of the burden is the one that may be least likely at fault, and that is Shrink. Shrink likely has a much higher malpractice liability and is likely better off than the other defendants. However, it appears as if Shrink is farther removed and may not actually get the higher fault percentage, but it would be best for Rider if he did. So the best outcome

for Rider (without ABQ Gen. Hosp. or Dr. Messup) is for Shrink to take the most (like 50-100%) then the Rents with some of the burden (between 10 – 30%) and Kid little if any percent of fault (0-5%). This would be best, but is also likely the reverse of the probable outcome. Therefore Rider will need some good argumentation as to percentage fault

Question 2-

The view of the statement seems to be overly broad, and in need of some modification. This goes back to the initial Salmond v. Pollack debate. Should ^{the} their be torts that are only recognized if they fit into the specific tort boxes or is it better for a much broader and general appeal to right the wrongs of improper conduct. If the statement is made only to allow the claim, allowing for the courts to check to see if the claim is reasonable, was the damage foreseeable to this plaintiff by this/these defendants, was the plaintiff in the zone of danger and are these causally connected to some breach of duty to the defendants than allowing for claims might not be so bad. The purpose of tort law is to right the wrongs. If we work within the above framework we can achieve the goals of tort law. These goals are to be a deterrent from negligent or improper action, to help distribute the loss of the wronged party, and to provide proper compensation. We can see within society that the present emphasis on distribution of loss has diminished to more of an allocation of fault and not to who can bear the brunt most effectively. The decision to allow a claim if it allows for a "better, more respectful, more civilized society" is a dangerous step. This seems to move away from fairness and justice, and try to create a perfect society. This desire would lead to misallocation of fault and appear to be too restrictive in its zeal for deterrence. It becomes dangerous to create a perfect society because you have to use some individual's version and then whose morality are you going to use. While justice is not without its biases in our society, it is still better than trying to some person's version of the perfect moral society.

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Professor Name: Schwartz
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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

QUESTION 1 (60 points; 95-100 minutes)

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.

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.

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.

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.

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

statute
2.7??

- Q. 1.1.1.1

- R. P. C. / Expert

- Lot of damages
malpractice
loachok
2

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.

~ 3:00 start #1 }
14 yr. old

on the 5's

- Rory Pido -
drunk but driving safe
Reaction time
Illegal
~~to drive~~

Not drive
- Res. for kids

1) state.
Cere - Omission
Duty - top left (kid drive)

2) Taresoff
3rd party
State

3) RPUC -
State
B PL

4) - Mental
- Age
- Custom
Allegation - def

College - Dangerous & unusual - 1/2

5) - Head wound
Accident

- Forecability 15-305
13-306
↳ warned that to
mentally unstable
state
illegals

- 1/2 -
Minimal set both party
Reaction

Sub for
Calverts

7) - yrs drinking

8) Breakdown -
Lisping

UNMH Shrink
Dr. Mervin Rents
Dr. Nervosuz Kid

4) Will
Mental
Professional Knowledge
Custom?

D
B
C

Question 2
- Samuel Pollock
Det.
Dint. Loss
Compensation

Duty: Reasonableness
Foreseeable
Zone of danger
Causal Connection

most pts - double check
① ⑤
①, ⑥, ⑦