



The University of New Mexico

School of Law Library
MSC11 6080
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone (505) 277-0939
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other that private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

Exam Number 494

TORTS FIN. GRADING SHEET - 2004

QUESTION ONE

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

QUESTION TWO

Purpose of tort law (expansive v. narrow view)

15

(15 pts.) wow! secretariat will take

TOTAL ----- 61 (75 pts.)

Subject Torts - Schwartz

Date 12-17-04

Number 494

Write your number, title of course and date above
and in each blue book.
Do not put your name on the blue book.

**DO NOT OPEN THIS EXAMINATION UNTIL THE
PROCTOR TELLS YOU TO START!**

When the proctor tells you to start, break the seal on your examination, turn the page and begin to work.

A five-minute warning will be given by the proctor. When time is called, stop writing. Fill out your receipt, including the name of the exam, the date, the name of the professor, and your exam number. Take your exam, any relevant material, and receipt to the Forum where the proctors will collect your exam.

Blue Book #1

HONOR CODE

I have neither given nor received help on this examination
I have not seen anyone give or receive help.

SCHOOL OF LAW
THE UNIVERSITY OF NEW MEXICO



1) Rider's argument should hinge on the basic

definition of duty as prescribed by NM law:

A duty is generated by foreseeability and policy.

The Pents either acted (or omitted to act - should

not matter due to the parent/minor child special

relationship) by creating a situation ~~that~~ that

gave rise to kid's ability to cause the injury by

stealing the car. Even though he threatened to do

so on prior occasions, no precautions were

taken to keep the keys or the car secure. Thus,

any driver on the road is obviously a foreseeable

plaintiff in the event that the unlicensed kid

causes an accident. From a policy point of

view, the Pents are indeed held at least somewhat

liable for the actions of a minor child and thus as a matter of policy is dictated that any duty of care that kid has in assuming control of a car is linked back to the Rents.

This argument would fly under either an Andrews or Cardozo approach as the zone of danger is

so large that even a restrictive (Cardozo) view of duty would certainly be able to arrive at such a conclusion.

2) Rider should argue, using Tarasoff reasoning, that Shrink knew of a potential risk that kid posed due to his repeated threats of stealing a

a car and that he took no steps to diminish this

risk. In fact, Shrink went so far as to violate

a law demanding that suspected child abuse

must be reported. Had he performed his duty,

kid would not have stolen the car to run

away and would not have caused the subsequent

injury. A foreseeability analysis would yield the

same type of argument - that Shrink's knowledge

of kid's threats ~~was~~ and his act/omission (doctor/

patient, special relationship) of not removing kid

from the situation created a large zone of danger

to other motorists or pedestrians.

3) Rider must argue that no reasonable psychiatrist would have failed to report the suspected abuse and that, furthermore, violation of a statute yields breach as a matter of law. The last portion of this argument will be fought by Shrink (assuming his attorney is not negligent) because the statute must pertain to the plaintiff in order for its violation to constitute breach as a matter of law. However, Rider can (and must) provide expert testimony by other psychiatrists to demonstrate that Shrink's failure to report constituted a breach of duty as to how a reasonable psychiatrist, professional, or ~~other~~ would have acted under the circumstances. Presumably, a reasonable psychiatrist

under the circumstances would not have violated the law, but would also have taken into consideration the possible risks that a troubled adolescent might have posed - in this case, that would include the risk of making good on threats to steal a car, thus resulting in risk to other motorists.

4) Rider will argue that kid should not get his instruction because by assuming the responsibility of driving a car, an adult activity, he also assumes, whether consciously or not, the legal responsibility to act as a reasonable person (adult). New Mexico

law is clear on this issue which would rid Kid of the possibility of getting the "child" portion of the instruction as well as the "didn't know how to

drive" instruction. Moreover, a reasonable person (not

child) who did not know how to drive would probably not drive at all. However, Kid will want to

keep the "seriously emotionally disturbed" portion of the instruction as part of the circumstances, and he may be able to. Rider's argument here is that

mental disability in NM law does not lower the standard of care - those with mental illness are held to the same standard as everyone else

for their torts.

5) Kid has no room to argue that he is not the actual

cause of the injury - but for his bad driving

he would not have hit Rider. He also has very little

wiggle room on the proximate cause issue. As to

the original injury he would want to bring up a

few major issues: 1) That Rider was engaging

in a criminal act by driving while intoxicated

2) She was not wearing a helmet. The basis for

these arguments would be an attempt to divert

proximate cause onto Rider. ~~As to the proximate~~

~~As to the proximate cause issue, even Rider's~~

responses are simple, as Kid's arguments as to causal

are very weak. First, his potential arguments may

go to her comparative fault, but they do not amount

to a negation of proximate cause - her injury from the accident stemmed from a natural and continuous sequence of events set in motion by kid (USI 13-303) and even a claim that her inebriation or

lack of helmet would at best provide a question of IC which could only result in a foreseeability analysis. Neither of her actions render the possibility of his injuring someone unforeseeable and would ~~not~~ probably not cut off his liability. As to

the amputation/malpractice aggravation injuries,

kid also has no wiggle room. NM has made a

point of declaring that in successive tortfeasor

cases malpractice is always foreseeable after

causing an initial injury and to original tortfeasor

Subject Torts- Schwartz

Date 12-13-09

Number 494

Write your number, title of course and date above
and in each blue book.
Do not put your name on the blue book.

**DO NOT OPEN THIS EXAMINATION UNTIL THE
PROCTOR TELLS YOU TO START!**

When the proctor tells you to start, break the seal on your examination, turn the page and begin to work.

A five-minute warning will be given by the proctor. When time is called, stop writing. Fill out your receipt, including the name of the exam, the date, the name of the professor, and your exam number. Take your exam, any relevant material, and receipt to the Forum where the proctors will collect your exam.

Blue Book #2

HONOR CODE

I have neither given nor received help on this examination
I have not seen anyone give or receive help.

SCHOOL OF LAW
THE UNIVERSITY OF NEW MEXICO



can be held liable for subsequent injuries of the sort
as the proximate cause thereof. There is no question that
Kid caused an initial injury and so much of the debate

on the application of this doctrine is rendered moot.

The Pents will ~~argue that~~ probably not argue

actual cause either - but for their lack of seaworthiness

Kid would not have gotten out in the car. However

their proximate cause argument is somewhat stronger

than Kid's. They will bring up the fact that Kid's

acts were criminal and/or extraordinarily negligent

to the point of creating an independent intervening

cause of the injury. Even if they win on this

point, though, Rider will argue that negligent

driving by Kid would have been a foreseeable result

it does not make sense to allow parents to successfully argue that their minor child's actions as a result of their negligence can cut off their liability for an injury.

of their breach so as to generate proximate cause

by their actions. Not to mention that as a policy consideration

Shrink has the strongest proximate cause argument

and his actual cause argument is strong as well.

Essentially, the but-for test is not entirely conclusive

in his case → but-for his failure to report

suspected abuse kid would not have stolen

his parents' car. Granted, he would probably not

have stolen it in the proper time frame to injure

Rider, but the point is clear that Shrink's

causal link is already a bit shaky. As to

proximate cause he has a whole host of

arguments with which to argue that his failure

to report does not naturally and continuously lead to

Ricker's injury since it is unclear how Kid would have reacted differently if he had reported, and also that the actions of the Parents in beating Kid in the first place and their negligence and Ricker's own criminal actions and negligence might all

constitute IC's. Moreover, Shrink may argue as a matter of policy that since his negligence was in failure to report abuse, and not in failing to treat Kid, that he had no suspicion that Kid might act in such a way as to endanger others

and so to hold him liable for that which he did not suspect (as a medical professional) would

constitute bad policy. Ricker could nip this in the bud by formulating the case against Shrink

as one of failure to predict such circumstances, but this would have to hinge on facts that are not contained here. Pinder's argument as to proximate

cause will essentially be that Shrink's failure to conform to professional standards of care resulted in the perpetuation of the environment that led kid to drive off and hit her. A good argument, in my opinion.

a) Any of the three possible tortfeasors who are held liable for the original injury can also be held liable for the injuries resulting from malpractice, as discussed above.

Additionally, until Payne v. Hall is decided by the S.C. the current law is ambiguous as to

whether a completed tort is necessary to bring about successive tortfeasor liability or simply negligence (as in a breached duty of care). Rider might have room to argue that if the jury gets only far enough to find that either Shunk or the Rents breached a duty of care that they could be held liable for all of the injuries following.

This would be a tough argument as the actual injury is predicated on the actions of a third party, but it might be an argument worth making ~~as~~ as a fallback to assign liability:

7) Rider will probably be found comparatively negligent due to her failure to wear a helmet.

Had she been wearing one the brain injury might not

have occurred at all - the jury would decide how far this liability would extend. Her inebriation

might be argued, but if she was driving safely then the causal relationship necessary to find negligence would be lacking. Again, this would ultimately be up to the jury and could

probably go either way.

g) she would want the most liability to fall on the doctor as he would be easiest to collect

from, ~~the~~ and then either the remaining liability on the parents exclusively, ~~the estate~~

~~the estate~~ or only as much on kid as would have to be covered by the parents as a matter

of law. Assuming that the Parents have money, she

could collect both their portion and much, if not all, of Kid's portion from them and then try to collect remaining money from Shrink. Of course, her ability to collect depends exclusively on the apportionment of liability that the jury decides upon.

Question 2

The claim made here strikes me as too broad in its terms to be of much use. While it is certainly true that tort law is flexible and exists to fill in the gaps left by other forms of action, it is not necessarily true that "wrongful conduct... must be actionable in tort." The question as to what might constitute a better society as the sole predicate to a claim is simply too general - who defines better, more civilized, more respectful? Granting such ~~the~~ tremendous discretionary power would serve only to politicize the judiciary to the point where no effort towards impartiality would be made at all. The law would become a proving ground for trends in societal ethics, bowing to any whim or dominant strain of rhetoric and then snapping back again.

if convenient. No, tort law bears the responsibility of upholding those ethics that are tried and true - to predicate an action on general rhetorical musings about civilization is not the answer. A claim based in existing tort law may then be viewed against a backdrop of right and wrong, but the initial action must be judged by a less nebulous standard lest the trivial become litigated and socially acceptable evils become tolerated. Security and freedom, values and law - these issues are debated within the context of tort law, but they do not haphazardly create tort law. Extreme conditions may warrant newer forms of action, but the safest route is often the slowest route and it is better to leave these developments up to the course of time than to blow the law open to any self-righteous claim regarding a "better" society. That kind of rhetoric can be very dangerous when used flippantly by those with power and agendas. The law is a glacial progression, buffered by time and history against the fast-and-ready agendas of more temporally limited power players - we must not surrender it entirely to the fancy of those people. Tort law does seek a safer society and a more responsible society and it ought to take its time to think out the meaning of these goals before charging off to "civilize and protect."

**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 Secureexam 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)

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

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.