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Fall 2004 / Final Exam: A Answer

Subject Torts - Schwartz

Date 12-17-04 Number 494

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1-BB-8
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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 Prnts either acted (or omitted to act - should not matter due to the parent/minor child special relationship) by creating a situation that gave rise to Kid's ability to cause the injury by stealing the car. Even though he threatened to do so on prior occassions, 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 unlicenced Kid causes an accident. From a policy point of view, the Prnts 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 Parents.

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 ~~and~~ 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, 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 wante 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. ~~[illegible]~~

~~[illegible]~~ 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 (UJI 13-305) 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 ~~no~~ 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 the original tortfeasor

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 Rents will probably not argue actual cause either - but for their lack of security 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

of their breach so as to generate proximate cause by their actions. Not to mention that as a policy consideration 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.

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

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

6) 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 Shrink or the Parents 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 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

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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.

8) She would want the most liability to fall on the doctor as he would be easiest to collect from, and then either the remaining liability on the parents exclusively, 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 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 intial 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."