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Answer-to-Question-_____

Answer-to-Question-_1_

This memo will analyze the tort claims of Paredes vs. three entities, TBS, Warner, and Endemol Shine.

Potential Plaintiff: Paredes v. TBS

I would not be willing to bring a lawsuit against TBS. This is because there was an express assumption of the risk involved in this action, relieving the parties of liability. However, I will analyze the case to see if any other claims may hold despite the express assumption and also analyze the jurisdictional law and how express assumption of the risk works.

Paredes will allege that TBS was negligent in hosting a show that can put its participants at serious risks of injury.

Duty

A general duty in this case may exist because it was foreseeable that if TBS did not make sure certain precautionary measures and safety concerns existed, it could cause harm to its participants through its show, Wipeout. There are also accidents similar to this one that have occurred before. However, it is highly likely that no duty existed at all because there was a signed waiver which removed TBS and its partners from liability. This will be covered more in the defenses section. However, the duty in this context will also require more information. I would need to know whether this jurisdiction is a pure comparative fault jurisdiction or a contributory negligence jurisdiction. If it is

contributory negligence, then assumption of the risk, may be a defense to TBS by the lawsuit. However, in a comparative fault jurisdiction, this may be different. It is likely that in a pure comparative fault jurisdiction, express assumption of risk may remain a defense, however, Implied assumption of the risk, which may apply if the express waiver is not valid, may show that there was no duty to TBS, since under pure comparative fault. Even if there is a duty, it is likely that this duty will be a limited duty requiring TBS and wipeout to to assume a duty of care not to intentionally injure another or engage in reckless conduct totally outside the range of ordinary activity.

Breach

For purposes of analysis I will analyze a general duty and a limited duty standard of care.

For general duty the standard of care will be that of a reasonably prudent television entity hosting a show of similar nature under like circumstances. TBS will be able to meet this standard of care by showing custom of other shows. Their will likely be expert testimony from America Gladiators and NBC showing evidence of custom. They will also likely bring in testimony which suggests that they only used athletes that were in tip top condition, where as Wipeout uses athletes that are normal average people. If there is any other lack of custom, it could be argue that lack of custom does not excuse important precautions. However, Wipeout and TBS will easily be able to rebutt this evidence by showing that it was reasonable for them to use out of shape people becuase this was a hallmark of their show and one of the reasons the show will likely bring profits to advertisers, sponsors, and the network. They can use the learned hand test to show that the untaken precaution, using in shape athletes, while seemingly low, would be a substantial cost to them because it would get rid of the entire allure of the show which is watching average normal people get hurt. The burden of the untaken precaution will be MORE than the extent of the resulting injury multiplied times the probability of injury occurring, which should be low, since the show has contractual obligations for participants to only participate if they don't have any conditions that could harm them. Additionally there is also evidence of the producers spending tons of money on padding, which constitutes a significant

portion of their budget. Wipeout and TBS also had medically trained staff on sight to help. However, to fully evaluate how reasonable the staff were, we will likely need to know the results of the autopsy and see who caused the injury and what precautions could have added to or prevented further injury.

If the limited duty rule applies then a breach of duty would be conduct where Wipeout and TBS intentionally injure another, engage in reckless conduct totally outside the range of ordinary activity within the sport. There is not sufficient evidence to show that there was any intention to injure, even though one of the goals of the show is to watch people bounce around and get injured, this would not be the type of injury that this limited duty principle covers. The limited duty rule covers injuries like skiers intentionally running into each other not activities where participants are agreeing to potentially being injured. Additionally although this conduct would be reckless in just about any context, it would not be reckless within the sport. Every one who does wipeout knows what they are signing up for, and knows that the recklessness within the show is a normal occurrence within the show. Additionally, Wipeout and TBs will use some of the evidence from the above paragraph, like learned hand test, padding money, and trained medical presence to show they were not reckless and did not show serious injury.

Causation

If there was a breach for some reason by TBS and wipeout, then it will need to be asked first, what the autopsy results are, it would be hard to get a clear idea of causation until the autopsy results are more fully analyzed. However, in absence of the autopsy results, there is no evidence that but for running in the obstacle course by wipeout, plaintiff would not have suffered a heart attack and died. This is because we don't know whether or not plaintiff would have suffered the heart attack anyway. He could have been sitting at home and still suffered a heart attack.

We should also ask whether TBS, allowing Wipeout to allow this contestant to run the course was a substantial factor in his injury. Once again, without more evidence it is hard to say. But Plaintiff may

argue that since there was a medical examination which revealed nothing since he was allowed to participate. The running of the course may have been a substantial factor in the injury, because it was a material contribution.

Since there is no autopsy we will have no idea what the outcome could be, but it is likely that at trial medical experts will be brought in to show if the running of the obstacle course was enough to cause the injuries, as well as other care that may have been taken to prevent the injuries.

Scope of Liability - Injury not within scope (need more evidence though)

The test for determining whether the injuries fall within defendant's scope of liability is to first determine whether this is a case of an unforeseeable plaintiff. Since Plaintiff passed a medical exam, said he did not have any medical conditions, did not have Covid, and seemed to be in otherwise normal condition, it is likely not foreseeable that he was a potential plaintiff. In addition, there were safety precautions taken to reduce the likelihood of injury.

The second part is whether, the consequences were unforeseeable. Similar to the analysis above, it doesn't seem that it would be foreseeable under the circumstances for a cardiac injury to occur when plaintiff said he was in healthy condition, and safety precautions were taken.

However, there is also evidence that a relatively healthy patient died on the show previously and this may indicate that it was foreseeable, however, the plaintiff also had a pre-existing condition, and we would need more evidence to know if wipeout knew this information or not.

Since there is no evidence yet, we cannot say if there are intervening forces that could supersede TBS's negligence, or if the intervening forces were foreseeable. The only way intervening forces could relieve TBS of liability is if the intervening forces negligence was so egregious.

However, medical malpractice complications are usually never a superseding cause, and if the hospital did something to exacerbate the chances of death this will not likely relieve TBS from liability.

In addition, it is hard to say whether the eggshell plaintiff rule will apply since the plaintiff signed a form acknowledging that he was in healthy condition, but it seems likely that it will still apply given the circumstances since plaintiff takes defendant as he finds him.

To summarize, plaintiff would need to argue: It is foreseeable that a man running on an obstacle where injuries are likely to occur will experience injuries that could cause him to have a cardiac episode and result in fatal injuries.

Defense will argue: It is not foreseeable that an otherwise healthy patient, who passes a covid test, a health examination, and is willing to sign a waiver which asks that the plaintiff be in good condition would still run on a dangerous obstacle course, sustain severe injuries, require defibrillation, and then sustain fatal injuries.

Damages- plaintiff will recover no damages

We will need to know whether there is a survival statute in the state and what the conditions are of the statute. Most states do recognize recovery for wrongful death, however since Roseanne LaRosa is only a girlfriend she may be barred from recovery.

Assuming she is not barred from recovery, she will likely be able to collect damages based on economic damages and loss of consortium. She will likely not be able to recover for grief loss since most jurisdictions do not allow for grief loss recovery in wrongful death actions.

As a result she may recover money for funeral expenses, earnings losses of plaintiff in the future which will be based on work life expectancy and the career trajectory of plaintiff's current career. It is not likely that race based statistics will be used, and any other health conditions may be used to determine this. In addition there may

be, loss of household services, loss of consortium which includes sexual pleasure, love and other emotional ties related to consortium. All of these damages will be reduced to Net Present Value and will include inflation. There will be no money for attorney's fees since the claim will not be brought in bad faith.

It is likely that TBS if the trial makes it this far will be held liable along with Warner and Endemol Shine based on vicarious liability. Since each entity was doing a function of their job duty and as a result are responsible for the actions of the show they all jointly created and profited from. As a result, they will be held liable jointly and severally if this is possible.

Defenses- will be able to show defense

TBS will argue and probably convince the court that they are relieved of liability because the waiver agreement constitutes an assumption of the risk, no matter what jurisdiction, comparative or contributory negligence. However, if this is not allowed for whatever reason, and they are in a contributory negligence jurisdiction, they will argue that plaintiff voluntarily assumed the duty because he knew what Wipouet was all about, 2) he appreciated the risks that could arise, 3) he voluntarily exposed himself to it. The waiver may be used as evidence to show this if it doesn't make it as express. Implied secondary risk also applies to this situation. Def will also argue that plaintiff was contributorily negligent for participating in the show if there are any underlying conditions that he did not reveal.

If it is a comparative fault jurisdiction. Only the express analysis in the paragraph above will apply. The other portions have already been covered in duty, or there may be a no breach determination. Finally, it is likely that plaintiff will be found comparatively negligent, for participating if it is revealed that he lied about a condition, and damages will be reduced to his proportion of fault unless it is a modified comparative fault jurisdiction and he will only be allowed to recover up to 49% or 50%

Paredes v. Endemol Shine- liable

It is highly likely that Endemol will be subject to the same analysis as above because they will likely be held to be vicariously liable. The only way they will get out of this is by suggesting that these injuries were not foreseeable given how far removed they are from the actual making of the show, and thus they owed no duty.

Paredes v. Warner

Warner will very likely make the same argument as Endemol above, but the same analysis will apply.

Policy Implications

This decision will fall in to the economic consideration of tort goals. There should be ability by businesses and others to be able to provide dangerous and entertaining services to others. Therefore, the waiver protects them from lawsuits that would otherwise result, because their conduct is inherently dangerous.

Conclusion

It is not likely that any of the companies will be liable since there was a waiver signed, and regardless they acted reasonably.

Question 2

Kelly will have a claim against the city of Freedoniaville.

Kelly will allege that Freedoniaville failed to clean up the bubbles in a sufficient amount of time, and failed to include any warning which resulted in her stubbing her toe, getting necrosis, and resulting in the loss of her big toe.

Duty- there is a duty.

Kelly will establish her duty that it was foreseeable that a large

water fountain if shrouded in bubbles in a tourist area could potentially cause injuries to those walking around the area. There may also be a limited duty consideration of whether or not the fountain was sufficient to constitute a trap. Since there is an exception as to the water fountain being a trap, there is no need for any consideration as to whether K was a invitee, licensee, or trespasser. However, for the sole purpose of consideration we will say that K was an invitee since she was a tax payer and her dollars were pecuniary benefit to the park, and as a result she benefitted. Either way she is owed a duty of reasonable care whether it results from a general duty or from a limited land owner duty.

Breach- municipality breached standard of care

Standard of care: that of a reasonably prudent municipality under similar circumstances.

It was foreseeable based on past previous incidents that bubbles could conceal the fountain. However, instead of cleaning up the bubbles promptly, the city took forever to do so resulting in Kelly's injuries. They also did not have signs or warnings. These expenses would have been relatively affordable and were less than the probability of injury times the extent of that injury.

Defendant may argue that the probability and extent was much higher than the burdens which are getting a crew out in time, and placing down signs that do not disturb the ambiance of the park. These would be expensive.

There will also need to be evidence provided of custom of what other municipalities would have done under similar circumstances, however, lack of custom cannot always excuse very important precautions.

There was no warning, and there is usually a duty to warn if a trap exists.

Causation- municipality caused

P will argue that but for Freedonia's negligence in failing to make

a warning and failing to clean the bubbles in a timely manner, she would not have stubbed her toe and suffered severe injuries.

She will also argue that stubbing the toe was a substantial factor in causing her eventual necrosis and amputation, because it was a material contribution to her injuries.

There will need to be medical testimony established regarding the cause to ensure that the stubbing of the toe will meet causation.

Defendant will argue that they did not cause the injury, because plaintiff should have known that you should not walk into an area where there are bubbles randomly present. They will also argue that a plumber was needed and as a result, even if they had signs or a cleaning crew right away, they would not have prevented plaintiff's injuries because the plumbers would have takne two hours anyway.

Scope of Liability-it was foreseeable

Scope of liability will be the hardest thing for plaintiff to prove but she will be able to do so. Plaintiff will argue that with so many soap events happening it was readily foreseeable by the municipality.

The test for determining whether the injuries fall within defendant's scope of liability is to first determine whether this is a case of an unforeseeable plaintiff. However, K was a foreseeable plaintiff because there was evidence that this happens often and as a result, a plaintiff could walk into the fountain and sustain injuries.

The second part is whether, the consequences were unforeseeable. Plaintiff will argue that based on the same evidence above these consequences were foreseeable. She will argue that the egg-shell plaintiff rule applies, and as a result, the municipality will need to take her as they find her.

The last portion of the test asks whether there were any intervening causes. Even though there was an intervening cause of someone putting soap in the fountain, this is not a superseding cause because it was foreseeable since this was the fountain most commonly

soap bombed.

Defense will also argue that necrosis and amputation was not foreseeable but as stated above plaintiff will simply argue eggshell skull rule. If there is evidence of any negligence by the hospital this will not matter, because the medical malpractice rule prevents medical malpractice from superseding any original cause. The only way eggshell skull rule will not work is if defense can prove that there was some factor by the plaintiff that resulted in the exacerbation of the injury so much so that it relieved them of liability, and was at least a substantial factor.

Finally, plaintiff will argue that: It was foreseeable that by not having clean up crews or signs to prevent a mass of bubbles, injury could result from someone in a tourist area walking into the fountain and sustaining minor injuries which could lead to triggering more severe injury such as necrosis and eventual amputation.

Defendant will argue that: it was not foreseeable that a young interverner would put soap in a fountain causing a mass of bubbles, which plaintiff would perceive to be a art piece walk into it, stub her toe, develop necrosis from this minor condition, and need extesnsice treatment and amputation.

Damages-plaintiff will be awarded

If plaintiff prevails she will likely be entitled to personal injury damages. These will include earnings losses she sustained as a teacher while injured but not for the future. It will also include damages for medical treatment regardless of whether or not insurance or medicaid/medicare agrees to pay for her injuries including past and future medical expenses. Finally since, plaintiff was humiliated she will likely be able to collect damages not only for pain and suffering, but for depression, grief, humiliation, embarrassment, and other matters. She will need to bring in expert medical testimony to show her medical damages, and she can also use lay testimony for her embarrassment and pain and suffering. The standard for this type of injury is the Daubert trilogy. Depending on the jurisdiction there may be a cap on some of her damages, but I would need more information on that. There will likely be

no damages related to career stuff since she is still able to teach.

Defenses-no defense

Defendant will allege that plaintiff is also negligent for walking into the stream of bubbles, and that she should not recover or recover less. This depends on whether it is comparative jurisdiction or contributory. If contributory she will be barred, if comparative she will either be paid her fair share or only up to the amount of 49% of 50%.

Immunities-no immunity

Defense will most predominantly argue that they have governmental immunity and therefore they cannot be sued. However, they will likely not be able to meet the burden of this defense because while placement of the fountain is certainly a policy decision, not having time to send a repair crew and not posting signs when they knew that these types of incidents were foreseeable, is a non-policy non-planning decision. Even though it is discretionary it was not the planning that contributed to the injuries it was the lack of signage and cleaning crew availability. The only way def may be able to get out of this is by arguing that they needed to allocate funds to more important causes and as a result this was a policy decision.

Policy Implications

This decision is fair under tort goals, because it supports allocation of loss properly. Even though the amputation was a stretch, it is still fair for def to take plaintiff as he finds him. It is better for the plaintiff to be compensated than the defendant, especially in this instance because the municipality has vast resources (not related to damages though because that it unconstitutional) but should be able to prevent accidents like this more readily.

Conclusion

Plaintiff will be able to prevail in her case, her hardest part will be foreseeability, but it still seems that she will prevail.