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Course / Session F15 Torts- Pareja M
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Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	2507	12398	14985
Total	2507	12398	14985

Maude, as Harold's personal representative, may have several claims of negligence assuming her state has survival action and wrongful death statutes. She has strong negligence causes of action against Dominos, Oscar (the owner of the Motel 6) and Derek. If Dominos is a franchised company, she may have a claim against the national company, as well as the franchise from which Harold ordered the pizza. She may also sue the Motel 6 and Derek's workplace, asserting they are vicariously liable for the actions of their franchisee and employee, respectively. Likely, those vicarious liability claims will fail.

Call of them?

Maude's strongest cause of action is against the Dominos from which Harold ordered the pizza. To establish a prima facie case of negligence, Maude must prove duty, breach, actual cause, scope and damages.

(The analysis below concerns the actual store from which Harold ordered. It if it can be shown that Dominos corporate has sufficient control of the daily operations concerning nut products (as the McDonald's in the hot coffee case had control of the daily temperature of the coffee at its franchises), then Dominos corporate may also be held liable for Harold's death.)

Except was a direct liability theory.

Duty analysis establishes there is a legally recognized relationship between the defendant and the plaintiff that obligates the defendant to act in a reasonable manner toward the

plaintiff. Dominos had a presumptive duty of reasonable care for foreseeable risks arising from its conduct. Though Harold was a customer of the business, which would make him an invitee for limited duty analysis, he never set foot on the actual premises of the Dominos. Dominos owed Harold a general duty of reasonable care for foreseeable risks.

The next question is whether Dominos breached its duty to Harold. A breach occurs when a defendant acted unreasonably in light of foreseeable risks of harm. The reasonableness of the defendant's actions is judged against the standard of care of a reasonably prudent person under the same or similar circumstances.

It must be determined whether the harm that befell Harold was foreseeable to Dominos. Harold explicitly told the order taker that he had a nut allergy and sought to ensure there would be no nuts on his pepperoni pizza. The order taker did not write this information down, ~~nor~~ did she tell the chefs of Harold's allergy. Nut allergy concerns are ubiquitous in modern American society. The dangers of nut allergies are often discussed in the media and within the food industry. That a customer may react to the presence of nuts in his food is a foreseeable risk of harm. The order taker's inaction to prevent that harm was unreasonable under these circumstances. Maude should claim the following grounds of negligence:

Good analysis

(1) Dominos should have had a spot on the order ticket for order takers to make note of nut allergies;

Good
(2) Dominos should have a policy that all order takers alert chefs when they receive an order from a person with a nut allergy.

(3) Dominos should have a policy to ensure that chefs do not include nuts or nut residue in products where the recipe does not call for them.

The court may employ the Hand analysis to assess whether the burden of adequate precautions (implementing the practices suggested in the grounds of negligence) would outweigh the probability of harm and the gravity of that harm. If the burden of adequate precautions is less than the probability of the harm multiplied by the gravity of the harm, then Dominos breached its duty. Here, the probability that someone may be harmed due to improper handling of nut products is relatively high. As mentioned above, nut allergies are very present in our society. In assessing the gravity of the harm, courts may use the actual harm in this instance (Harold's reaction, heart attack and subsequent death), the worst case scenario, or the likely, average harm that could ensue. Harold's case is close to the worst case scenario, so the court will likely combine those two methods of analysis to determine that the harm was very severe. A high probability of serious bodily harm or death far outweighs the costs of reprinting new order tickets and retraining staff to

alert each other of allergies and practice safe nut-handling. According to the Hand formula, Dominos breached its duty to Harold.

To further assess Dominos's breach, it would be helpful to introduce custom evidence as to the practices of other pizza restaurants. If it is found that other pizza chains have stricter nut allergy policies, the fact that Dominos does not have those policies is an indication of breach. If, however, Dominos's policies and practices align with other restaurants in the industry, custom evidence could show Dominos did not breach its duty of reasonable care.

Finally, Dominos may argue that there is a proof issue in determining that the restaurant was at fault. The doctrine of res ipsa loquitur is Maude's best tool in combatting proof issues as it can be used when the plaintiff lacks the facts to know what happened leading up to an injury. The court may use the *Eaton* test to assess the circumstantial evidence. The *Eaton* test requires that the type of the accident shows, more likely than not, there was negligence. Dominos duty and breach is analyzed above. Second, the test asks if the instrumentality that caused the injury (the pizza) was under the exclusive control of the defendant. There is no evidence in the facts that anyone outside of Dominos staff (the chefs and delivery person) touched or handled Harold's pizza. Finally, the test asked if there was any

could the
 nut come
 from another
 source?

contribution by the plaintiff. It is highly unlikely that Harold would have any nuts or nut residue to contribute to his meal. If he did, he likely would have had a reaction before his first slice of pizza (when the reaction started). Doctors determined that Harold's medical complications were the result of his nut allergies. Harold was hungry when he ordered, which shows he probably had not eaten in the hours preceding the incident. The "thing speaks for itself" that it was more likely than not that the pizza contained nuts or nut residue, which means Dominos breached.

The next issue is one of causation. Was Dominos an actual cause of Harold's injury? If the injury would not have occurred but for the defendant's negligence, the defendant is an actual cause of the injury. But for Dominos's poor nut management, Harold would not have had an allergic reaction, would not have suffered a heart attack, would not have remained unconscious for hours, and would not have died six months later. Using the *Zuchowicz* analysis, the alleged grounds of negligence (lack of proper policies and practices regarding nut allergies) increased the chances that the injury would occur, and the actual injury (Harold's reaction and medical complications following such a reaction) did occur. Therefore, Dominos is a but for cause of Harold's death.

Was Harold's death too attenuated, remote or freakish for the

court to hold Dominos liable? This is the question asked to assess proximate cause. It needs to be addressed whether Harold was a foreseeable plaintiff and whether his injury was a foreseeable consequence of Dominos's breach. Harold is certainly a foreseeable plaintiff, as he was a customer of the restaurant. It is known that nut allergies are extremely dangerous and reactions can lead to death. His injury was a foreseeable consequence. The last question in scope is whether there were any intervening superseding causes to the injury. The fact that Harold laid unconscious for hours and was hit on the way to the hospital certainly worsened his injury. Time was a huge factor in his likelihood of survival. It cannot be said that Dominos is the sole proximate cause of his injury, so it will be necessary to bring in other defendants and analyze joint and several liability. Joint and several liability is allowable when there are multiple actual causes of an injury.

why? seems obvious but still

were those subseq events foreseeable?

Using the analysis for the prima facie cause of negligence explained above, Maude should also sue Oscar, and possibly Motel 6, for the negligent failure to act. The general rule is that there is no affirmative duty to act or rescue, however, there is a duty when the plaintiff and defendant are in a special relationship. Oscar is the owner of the premises and Harold is his invitee (because Harold is staying at the Motel 6 with the owner's knowledge and for the mutual benefit of both). A special duty to act reasonably to rescue or assist is created between

owners/occupiers of land and their invitees. Clark, as an agent of Oscar (and possibly Motel 6) who is under Oscar's direct control, had a duty to act when Maude continued to call worried about her husband's safety.

(This is an important issue. When must hotel check on guest? When do they know of need for rescue?)

Clark breached that duty because it was foreseeable Harold Must they know? Suspect? had suffered harm (his wife's insistence is evidence of the likelihood) and Clark acted unreasonably by refusing, especially after the second or third call, to go check on Harold. As for the grounds of negligence, Oscar should have had policies in place regarding the appropriate occasions to check on guests. Such a policy carries a very low burden weighed against the probability a guest could be injured and the extent of that injury.

Clark's failure to act resulted in Harold's worsened condition as he laid unconscious for five hours before the EMTs arrived to assist. But for Clark's inaction, Harold's injury may not have been as severe. Clark, and therefore Oscar under the theory of vicarious liability, are liable for Harold's worsened condition.

Motel 6, if it can be shown that it had daily control over its franchisee's policies and practices surrounding checking in on guests could be held vicariously liable for the breach of Oscar's franchise. More information regarding such policies

would be needed in order to pursue this claim.

*Prox
cause*

Derek was negligent, but has a smaller role to play in Harold's injury. He owed a general duty of reasonable care that he breached by driving unreasonably (listening to music through ear buds that was so loud he could not hear the ambulance). It is not clear that Derek's conduct was a but for cause of Harold's injury. If Derek had not crashed into the ambulance, Harold would still have suffered heart tissue death and the affects of his heart attack. If it can be determined that the 30 minutes of wait time resulted in identified worsened conditions, it may be possible to collect some damages from Derek, but it is not advisable to pursue him. He is likely insolvent and a remote cause of the injury.

It is unlikely that Maude would be able to recover from Derek's employer, though Derek had pulled a double shift and drove home in a very tired state. The accident occurred outside Derek's scope of employment (commuting is never within the scope of employment), which makes his employer not liable for his negligence.

As there are multiple actual causes to Harold's injury, these defendants represent a situation of joint and several liability, as mentioned above. Maude should sue Dominos (and possibly their corporate office) and Oscar (and possibly Motel 6's corporate

office). It is difficult to apportion the harm each defendant caused, as the death of heart tissue does not come with a timestamp. Maude only has to sue one defendant to recover for damages, and that defendant can sue the others for contribution. The best defendant would be Dominos as they likely have insurance for this kind of injury.

The defendants will argue that Harold was comparatively negligent in his injury as he turned his flip phone off and silenced the ringer on his hotel phone. Comparative fault is a partial bar to recovery if the plaintiff is also found negligent. The defendants may argue that he should have had his epi pen closer since he was eating at the time of the reaction. The court may analyze Harold's conduct in light of the probability that he would have a reaction and his knowledge of the harm he may suffer if he had a reaction, among other factors found in the Uniform Comparative Fault Act, to assess Harold's fault in the injury. It is likely the jury will find Harold partially liable for his injury, but Harold is unquestionably less liable than ~~Dominos and Oscar~~.

Damages are awarded in an effort to make the plaintiff whole. As Harold's estate surely had to pay for medical treatment, and it is likely that Harold had to take a leave of absence from the job that brought him to Little Town in the first place, Maude should be able to recover economic damages for lost earnings and past medical expenses. Though Harold and Maude (just got it...!)

☺

may have had insurance that paid Harold's medical expenses, the collateral source rule explains they are not barred from recovering from the defendants the amount of medical expenses they incurred due to the injury. Maude will need to put on evidence to show Harold's lost earnings following the accident.

Maude also has a claim herself for loss of consortium, which is derivative substantively from the claim of Harold's estate. Maude must show that they had an affectionate relationship in order to recover for the loss of love, companionship, sexual activity, emotional support, protection, and household services that are addressed within loss of consortium damages. As the pair had a seemingly successful 45-year marriage wherein they never missed a single goodnight call, it is very likely that Maude would be able to recover for loss of consortium.

It is possible Harold may be able to recover for loss of enjoyment of life and pain and suffering, depending on the rules for such damages in Midwestern State. Loss of enjoyment of life is sometimes included in pain and suffering damages, and sometimes is considered a separate category of damages. It is rare but possible that Midwestern State does not allow for loss of enjoyment of life damages. To prove such damages, Maude would have to put on evidence that Harold's injury impaired his ability to do everyday things like spending time with family, sexual relations, work activities or physical hobbies while he was

living. The majority rule is that Harold did not have to be aware of this loss in order for Maude to recover, but some courts state Harold would have had to have been aware.

If Maude can also prove Harold's pain and suffering (the actual pain of the reaction and the mental suffering it may have caused him) while he lived, she may be able to recover such damages.

Assuming Midwestern State allows for pure comparative fault, damages will be awarded based on the percentage of fault attributed to each party (including Harold). Likely, Dominos will be found most at fault followed by Oscar. Harold will likely also get a percentage of fault for his injury. Maude may recover the cumulative percentage of the damages from any of the defendants (Dominos is the best bet). She can not recover for Harold's percentage of the fault.