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Course / Session **F15 Torts- Pareja M**
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Section All Page 1 of 13

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Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	2876	13717	16735
Total	2876	13717	16735

Memorandum in re Maude's Claim for Wrongful Death

Maude v. Dominos

Maude has a very good case for wrongful death and loss of consortium against Dominos Pizza and its employees who could be held jointly and severally liable. The first issue is whether Dominos owed Harold a duty. In general, one owes a duty of reasonable care to protect against all foreseeable risks of harm arising from one's conduct. Although Dominos did not directly act in this scenario, the actor was one of its employees acting in the scope of employment, which would make the company vicariously liable for its employees actions. This is due to the policy that employers are in the best position to control their employees and may be better able to compensate for damages. It is unknown if Dominos is a franchise establishment, but if so, the underlying company might still be liable. For purposes of this analysis, it is assumed that Dominos is not a franchise. Therefore the company and its employee owed a duty to act reasonably in regard to preparing Harold's pizza order.

The next issue is whether dominos breached its duty owed to Harold. A duty is breach when one fails to conform his conduct to that of a reasonably prudent person in same or similar circumstances. In this case, Dominos breached its duty when the employee did not write down that the customer had a nut allergy nor inform the employees making the pizza of the allergy

grandes

reasonably prudent person would understand the severity of nut allergies, as they are some of the deadliest (and fairly common) food allergies. A person working in the food industry would also know that this is something that should be guarded against. It could also be said that Dominos directly breached its duty by not having instructions in place keeping nuts separate from the general food area, although it is unclear if there were instructions in place, they were not followed. The Hand formula would weigh the burden of protecting against the risk (i.e., keeping nuts separate or writing down the nut allergy or notifying the pizza makers) vs the probability of harm and the degree of harm that would occur. Using this method, the relatively small burden would be significantly outweighed by the probability that a customer with a known nut allergy would have an allergic reaction to nuts and the harm suffered such as anaphylactic shock and death. Therefore Dominos did not act as an RPP and can be found negligent.

The next issue is whether Dominos caused Harold to go into shock and eventually die since there was no evidence left of the pizza. The standard of proof in torts is a preponderance of the evidence. In order to win, Maude would have to prove that more likely than not, Dominos gave her husband a pizza with nuts in it. Maude can overcome this burden by submitting a Res Ipsa Loquitur prima facie case since it has already been proven that there was a duty and a breach. She would have to prove that more likely than not the harm was caused by negligence. Inferences of

used to
 show
 breach.
 Not
 causation

Can't circumvent rule

causation are permissible when the negligent act is deemed wrong because the act increases the likelihood of the particular harm suffered, and that the harm suffered followed the negligent conduct. In this case, the Dominos restaurant did indeed have pine nuts that were present in the establishment. Furthermore, there was no evidence to prove that Dominos kept the nuts separate, nor was there any evidence that the employees made any effort to keep the pizza nut free. In addition to this, Harold went into anaphylactic shock shortly after eating the pizza as a result of his nut allergy. Dominos could argue that Harold had contacts with nuts by some other product like the Diet Coke or soap he used, but this would only be successful if there were nuts in those products. Therefore Maude will most likely be successful in proving that the harm would not have occurred without Dominos negligence and that the pizza did have nuts. In addition to this, Maude would have to prove that the object that caused the negligence was under the exclusive control of the defendant. The standard of exclusive control has been relaxed over the years and will most likely be successful, as the pizza was made and delivered by the same company directly to the victim. A third requirement that the plaintiff not be contributory negligent has since been phased out. Therefore Maude will most likely prove via res ipsa locator the specific grounds of negligence and factual/legal causation, and it would be up to the defendant to rebut this presumption.

The next issue is whether Harold was comparatively

Not fully, but it's large obj ignored

- But for cause
- Prox cause

negligent in eating the second slice of pizza. Most jurisdictions now follow the rule of comparative fault, which bars the plaintiffs recovery for some or all of the damages depending on the amount of fault attributed to his negligence. Assuming that this is a pure comparative fault jurisdiction, Harold would not be barred recovery even if he were more negligent than Dominoes (i.e., under a modified comparative fault state). However, his damages would be reduced by the amount of fault attributed to his own actions. In the case, Dominos would argue that Harold was negligent by eating the second slice of pizza. While it was not unreasonable to eat the first slice, Harold should have stopped once he started exhibiting symptoms. This could be rebutted that Harold was not negligent because a reasonable person might attribute the symptoms of itchy eyes to the cheap soap found in many hotels, and he just took a shower. However this argument would most likely fail, as Harold's allergy would be considered as a sort of circumstance similar to a physical disability. Therefore Harold would be held to a standard of a reasonably prudent person with nut allergies eating Dominos pizza. A RPP would most likely be familiar with the early effects of an allergic reaction, especially one who had a prescription for an epi-pen and had the awareness to warn others of the allergy. A RPP would also be aware of the fact that it is common for fast food places to get orders wrong. Therefore Harold was most likely comparatively negligent in regard to eating the second slice and worsening the shock. He also might

be comparatively negligent for keeping his epi-pen in the bathroom where he could not reach it in time. The doctor ordered him to keep it with him at all times, and this might be arguably unreasonable, although this is a weak argument. Despite this, Maude's recovery would most likely be reduced by the amount of fault that the jury assigns to Harold. Overall, though, Maude has a very strong case against Dominos.

Maude v. Oscar/Clark

Maude has a good case against the owner of the Hotel 6 Franchise, Oscar and his employee, Clark, who could be held jointly and severally liable under vicarious liability, which would be preferable as Oscar would most likely have more resources than Clark. Like the previous suit, Clark was acting in the scope of employment for Oscar and his actions would be attributable to Oscar as well. The first issue is whether Clark owed Harold a duty. Normally individuals do not have a duty to act in any way due to the high value we place on individual freedom in America. However, when one has a special relationship of dependence to the plaintiff, he must assist in a reasonable manner, and will be held liable for the worsened condition as a result of the lack of action. Since Clark was acting in the scope of employment as an innkeeper and Harold was a guest, then he owed him a duty to rescue or assist.

The next issue is whether Clark breached his duty by not

following Maude's instructions to check on her husband. Having an affirmative duty, Clark would have breached his duty if he did not assist in a reasonable manner. This is a very tough question, as reasonably prudent person in Clark's situation might be torn in between satisfying a customer and addressing the worries of his wife. Harold told Clark he was "really tired and looking forward to a good night's rest." This would lead Clark to believe that it was unreasonable to bother the man after his wife called. He also showed Harold how to turn off his cell phone, which might lead a reasonable person to believe he did not want to be contacted by anyone, including his wife. He also put her through to his room, showing that he did not totally bar her ability to contact her husband. Maude might rebut this by pointing to the fact that Harold did not answer the hotel phone either and that he never missed a nightly phone call with her. However, this seems to be enough evidence that a reasonable person would hesitate at checking in after the first attempt was unsuccessful at 9:30.

Good

However, Clark most likely breached his duty to assist at 10:30 when he again refused to check in on Harold despite Maude's unsuccessful attempts to contact him. While it could be argued that a reasonable person would assume she was just an overprotective wife, the Hand formula would look unfavorably on this. The burden of disturbing a sleeping customer is not so great as to ignore the likelihood that Harold was in need of rescue and the degree of harm that could occur if he were left

Good.
There's a continuum here. When should Clark be on notice that a need for rescue exists

Burdens can be non-econ. Like invasion of privacy

unattended. Therefore Clark/the Hotel breached their duty to Harold.

While Clark/Oscar would not be liable for the initial injuries caused ingesting the pizza, they would be liable for Harold's worsened condition from 10:30 to approx. 1:15am, the amount of time that lapsed in between when the duty was breached and when the medics arrived. One defense that Clark/Oscar could put forth is that their negligence did not cause Harold's death. They could have an expert witness testify that even delays of 30 minutes of restoring the blood flow have lead to an increase in mortality. In this case, even if Clark called the authorities at 10:30, it would have been over an hour delay, in which case *excellent* Harold might have eventually died anyway. However, this would have to be proven by a preponderance of the evidence. Maude could rebut this by having experts testify that while the risk of death is increased, it is still very likely that her husband would have survived if Clark would have checked in on him. Most likely, Maude could prove that Oscar/Clark were a substantial factor as the hour plus delay was most likely a material contribution to Harold's death, if not a but for cause, in Harold's death, which would leave them with the burden to apportion the injuries.

Overall, Maude has a good case against Oscar/Clark, but may run into some issues when proving causation and damages.

Maude might have a good case for Harold's worsened condition against the Motel 6 Company. This would be worth pursuing as they would have the greatest amount of assets (besides possibly Dominos). The issue is whether the franchise can be held liable under vicarious liability. Franchisors are generally not vicariously liable for franchisee negligence unless the franchisor had the right to control the aspect of the business that caused the harm. It is unknown what policies Hotel 6 had in place for disturbing customers in emergencies, but if the fact-finder decides that it had the right to control how such situations were handled, then it would be held jointly and severally liable for the worsened condition to Harold.

Good

Maude v. Ambulance

Unfortunately, Maude does not have a very good case for Harold's worsened condition against the the ambulance company. While the ambulance owed Harold a duty of care to take him to the hospital in a relatively safe manner, they most likely did not breach the duty. While the ambulance drove through the intersection on a red light, they did so with their lights on and in a cautious manner. The standard of care for medical professionals is based upon the minimum competent behavior in the industry and proven definitely by customs. It is universal that

Is driving ambulance medical treatment of just subject to general negligence

ambulances run red lights in order to expedite delivery of victims to the hospital. This is precisely why there are sirens and lights, and drivers are taught to pull over for such emergency vehicles. Therefore, the ambulance did not breach their duty and could not be held liable for Harold's worsened condition. There could also be an issue of governmental immunity, if the ambulance were ran by the municipal government. However it still might be worth trying to seek a quick settlement from the ambulance company.

Maude v. Derek

Maude has a very good case against Derek. Derek had a duty to act as a RPP driving his car and breached that duty by running a red light and crashing into the ambulance. Therefore he would be liable for the worsened condition as a result of the delay waiting for the second ambulance. However, this is somewhat of a moot point, as Derek is judgment proof as he has no assets, little income and no insurance. However, this is not a total wash, as Derek was driving home after working a double shift at a factory. The facts indicate that Derek was bone tired after work and had to listen to music to keep himself awake. This leads one to believe that his tiredness caused the accident, and this could have been proximately caused by working a double shift.

It would be worth investigating whether the factory

required the double shift or have any actual or constructive knowledge that its employees were driving home in such a state. While Derek was not acting in the scope of his employment in his commute, the accident could have been reasonably foreseeable by his employer. While the factory could argue that it did not owe a duty to Harold, as he was an unforeseeable victim, it could be argued that anyone on the road is a foreseeable victim if a company regularly allows workers to work double shifts and drive home in such a sleepless state. While this case would be harder to prove, it is worth pursuing as the factory could be held liable for its employee's conduct.

3 creative

Maude v. Harold's Employer

Maude has a possible, although most likely unsuccessful, case against Harold's employer. The only argument Maude could make is that it was foreseeable that requiring an employee with allergies to stay in such a small town without a variety of eating option would result in possible exposure to nuts. However, this would be a long shot, as it is most likely unforeseeable and it did not tell Harold where to eat or how to eat. Even if this were successful, Maude would only be able to collect worker's comp most likely, which is small in comparison to wrongful death damages.

Damages

The damages in this case would be under a wrongful death suit, assuming there is a survival statute in the jurisdiction that would allow for recovery. Since Harold died as a result of his anaphylactic shock, the defendants would all be liable for his death as they were all arguable a substantial factor, unless it could be proven that the injuries were apportion-able. This might prove difficult, as it is hard to say how much the injury was exacerbated by the delay in treatment or whether Harold would have died anyway. Nonetheless, Dominos at the very least would be responsible for Harold's medical expenses, pain and suffering, loss of income, loss of enjoyment of life, and Maude's loss of consortium. All damages must be proven with substantial evidence and future damages must be proven to a reasonable certainty. The pain and suffering might be limited as Harold was unconscious and not aware of his suffering until after he reached the hospital, which is required in most jurisdictions. Maude might not recover much under lost wages, as Harold was 68 and most likely did not have a high work life expectancy at that time. The medical expenses would be easy to prove, as no future expenses are required. Maude would most likely recover the most under loss of enjoyment of life (hedonic damages) and loss of consortium. Although these too might be limited due to the advanced age of Harold. If it were decided that any defendant were reckless, then punitive damages might be considered as well.

As Maude's attorney, I would personally suggest that she

invest any damages that she receives in an investment account, where it can grow with interest, dividends and capital gains. If the couple has significant assets totalling over 10 million (assuming spousal portability for Harold's 5 million dollar estate tax exemption, I would also suggest she consult a tax advisor to pursue options such as giving gifts to family under the \$14,000 limit each year per person or setting up a Charitable Remainder Unitrust in order to avoid paying death taxes when she dies.

Ha!
Good
advice