

Citations map:

- 1. John C. Goldberg, et. al., Tort Law ("Goldberg");
- 2. Restatements 3rd ("Rest.");
- 3. Class Notes & Discussions ("CND").
- 4. John C. Goldberg, Twentieth-Century Tort Theory ("TCTT").

10/15

EXAM ANSWERS

more than 1 type of med (mal) reform

1. <sup>may</sup> The medical malpractice tort reform is concerned with minimizing the costs of frivolous malpractice suits that burden the courts and medical profession. Under the <sup>st</sup> reforms, the parties of a malpractice claims will be required to enter non-binding arbitration. If any or both parties refuse and want to proceed with their claims to the court instead, they can. However, the losing party will be required to absorb all litigation costs for itself and for the other party as well. Because such costs can be considerable, the issue is how to balance the benefits associated with the cost reduction resulting from elimination of frivolous suits with potential danger of unjustly deterring the public from the access to courts. ✓

The reform proponents argue that the new approach should deter the public from initiating frivolous law suits by addressing their issues via arbitration. That should reduce the cost to the courts for administering the law, relieve the physicians from paying increased malpractice insurance premiums, and spare insurance companies from covering the costs associated with unfavorable judgments. Eliminating these additional costs will potentially reduce the overall cost of administering health care to everyone.

The opponents of the reform object by saying that the statistics show that overall number of malpractice suits is insignificant in order to have a desirable reduction effect on the overall cost of medical care. Also, in terms of justice, <sup>V. good</sup> the danger of eliminating such law suits may outweigh the cost reduction benefit. The reform may considerably limit the access to the courts for those patients who have valid negligence claims and suffered serious injuries. The risk of the significant cost absorption that may result from the law suit can become a formidable barrier for the individuals who incurred injuries from negligently conducted medical procedures, which cannot be efficiently addressed through arbitration.

so - answer? would tort reform affect cost?

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2. According to the theory of "law and economics," an objective of tort law is to minimize the sum of the: "costs of accident prevention, costs resulting from accidents, and costs of administering the tort system." TCTT, p.545. When individuals get involved in economic activities, they conduct the cost-benefit analysis of those activities. The "tort law force[s] actors to internalize costs" associated with the harms resulting from the activities, which are not incorporated in such analysis. *Id.* Because at some point the cost of preventing the harms can exceed the losses associated with them, the society should set up sanctions so as "to achieve [an] optimal mix of precautions and accidents." *Id.*

In contrast, the concern of the corrective justice theory is not how to establish, but how to "to restore the pre-existing equilibrium" by correcting injustices that have already occurred via allocating the costs to responsible parties. *Id.*, at 570.

too many quotes

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3. Anna Cardall ("Anna") can sue Officer Ken Thompson ("officer") for the (1) intentional infliction of emotional distress ("IIED") and for (2) the negligence resulting in wrongful death of her husband Brian Cardall ("Brian"). Anna can sue the officer's employer Hurricane Police Department ("HPD") under the (3) vicarious liability doctrine for the tortious conduct of its employee. Also, she should sue Scottsdale, the manufacturer, and Taser International, the parent company, under the (4) product liability theory. Also, Anna can possibly bring a suit to the federal court for the false advertising against Taser International, as, according to the article, "it has publicly stated its products do not cause cardiac arrest." (The Salt Lake Tribune).

didnt cover - FTE claims

(1). Anna can try to claim an IIED by the officer when he electrocuted her husband twice..

The prima facie case elements of IIED are (Goldberg, p. 650 and CND):

- Extreme and outrageous conduct on the part of the defendant ("D");
  - Intent or recklessness on the part of the D to cause a severe emotional distress;
- Also because plaintiff ("P") is not the object of the officer's actions, she needs to show that:
- she was present when the injury occurred to Brian
  - she is his close relative
  - the D knew that she was present and a close relative.
- The D's conduct caused a severe emotional distress.
  - Actual damages – severe emotional distress

normal range?

Before filing a charge for IIED, Anna will need to clarify how she felt when the officer tased her husband, whether she showed to the officer that she was distressed, did he ignore, was Brian visibly suffering or his behavior was in the norms of the behavior when he was sick.

Assuming that Anna saw Brian's intense suffering that caused her severe emotional distress, her claim has to be analyzed in terms of likelihood of prevailing.

Under the first element of prima facie case, the officer's conduct should have been extreme and outrageous. In our case, the officer was performing his duty to apprehend a suspect. While using a taser may seem outrageous to a civilian, the D can successfully argue that it is not as extreme as using a gun and according to his training was a safe procedure. Anna can try to argue that the officer misused his authority when he used taser twice on the naked and unarmed man.

The second element requires that the officer either had intent to cause a severe emotional distress or was negligent as he disregarded a high probability of causing it to the relative of the victim who was present and the officer knew that she was present. The officer was performing a routine arrest and had no particular intention to cause an emotional distress that is out of boundaries of the distress caused by the situation. However, Anna can argue that the officer was negligent as Brian seemingly suffered as he screamed after he was tased the first time, so the second application of the taser was reckless as the officer could have predicted Brian's suffering and he also knew that the wife (Anna) was close by and witnessed the entire scene.

Third, Anna will have to show both that the officer's conduct caused her a severe emotional distress and claim the distress as actual damages. It would be hard to show both because the D can argue that Anna was aware of her husband's heart condition and was in a certain degree prepared to his death, therefore it on one side mitigate the emotional effect of the officer's actions on her, and on the other side the emotional damages would be no more severe as he would have died of his heart condition in front of her.

Because the courts have a high standard of proof in IIED cases, Anna's claim is not likely to succeed.

why?

(2). Anna can charge the officer with the negligence resulting in wrongful death of her husband. The state of Utah has a statute that allows recovering for the wrongful death. The further research is required to determine if Anna's claim can be allowed by the statute or the claims are restricted to the cases when the victims were killed in the certain ways only and under what circumstances, if any, the governmental agents/agencies can claim immunity for their actions and/or actions of their employees. Also, Anna should be asked if she gave to the officer a warning of her husband's illness at the time of the incident.

Assuming that the Utah statute allows recovering for the wrongful death of the spouse and the police officer is not immune from the negligent conduct, the prima facie elements of negligence should be analyzed. They are as follows (Goldberg, p.48):

- P has suffered an injury
- D owed a duty to a class of persons including P not to cause the kind of injury that is suffered by P
- D breached that duty of care
- D's breach was an actual and a proximate cause of P's injury

The injury that Anna can claim would be a loss of the companionship of her spouse, loss of his income, his pain and suffering before his death.

Because Anna represents a decedent, the analysis of the elements should be applied to him and transcend on her. Under *Rowland v. Christian*, Goldberg, p.110, the courts use the following factors to analyze if the D owed a duty to the P:

1. "Foreseeability of the harm"; ~~to do what?~~
2. "Degree of certainty that the P suffered injury";
3. "Closeness of the connection between the D's conduct and the injury suffered";
4. "Moral blame attached to the D's conduct";
5. "Policy of preventing future harm";
6. "The burden to the D ... to exercise care";
7. "Availability...of insurance".

Applying the factors to the case shows that the officer could have reasonably foreseen a harm done to the D when he applied the taser gun to his naked body directly against his chest. On the other hand, his training did not suggest that such application could be lethal, so the degree of certainty of causing death was not very high. There was a direct connection between the electrocuting and the death of the P. There some degree of moral blame that can be attached to the action of the armed police officer continually applying the taser gun to the unarmed, naked, and visibly disoriented P. Although the officer may argue that he did not violate the given instructions, there is a significant burden on him as a public worker to exercise due care. Insurance may alleviate the duty of care, but not likely if it results in death of the insured. Most likely, the officer owed a duty to exercise not to use excessive force in the course of his dealings with the suspect without an immediate danger to himself.

P can argue that the officer breached the duty not to use an excessive force when he applied taser gun for the second time to an unarmed, not aggressively behaving suspect. The officer may argue that per his training, if the suspect does not succumb immediately, then the officer should tased him again. That is not unreasonable in the police practice and does not constitute the breach.

If the breach is established, then the court would move on to determine if the breach was an actual and a proximate cause of P's death. Applying the taser gun was an actual cause of an immediate death of the P. If not for the second taser application, the P's pre-condition could have allowed him to live. There is a physician testimony that the P's disease did not per se cause his death. To determine if tasing was a

proximate cause of death the court should look if the death was foreseeable from the reasonable person's point of view. The police officer stated that he used the taser gun in order not to cause death; otherwise he would have used an actual gun. However, the victim was weak looking, thin, visibly disoriented, naked, and not in position to defend himself. Dealing with taser guns on the routine basis and being knowledgeable that some of those guns do cause death under certain circumstances, the officer could have perceived at least a high risk of causing a serious bodily harm to the victim. If Anna did in fact warn the officer that her husband was ill and weakly, that may show that the office could have reasonably foresee the harm or even a death.

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Anna may or may not succeed in her negligence resulting in the wrongful death of her spouse claim. It will depend on how much the governmental agents are protected from such claims; if the officer had an advanced knowledge of the lethal effects of taser guns and could reasonably foresee the harm; if it is more likely than not that the death was caused by the electrocution, not by the victim's pre-condition; and if Anna warned the officer of her husband's fragile condition and the officer applied the taser nevertheless. The officer can implore a contributory negligence defense and/or an assumption of risk as the victim kept on moving despite being tased and firmly ordered to remain motionless.

INVOKE

(3) Anna can charge the HPD with being vicariously liable for the officer's tortious conduct. Under the *respondeat superior* doctrine, (Goldberg, p.502), an employer is subject to liability for the tortious conduct committed by its employee in the scope of the employment. Also, under *Wagner v. State* (Goldberg, p. 568) and Utah Statute, (Utah Code Ann. §63-30-10), "[i]mmunity from the suit of all governmental entities is waived for injury proximately caused by a negligent act ... of an employee committed within the scope of employment," unless there is an exception or recent amendment(s) to this statute.

The injury occurred while the officer was acting in the scope of his employment. If the court determines that he officer was negligent in applying a taser gun to the victim, which proximately caused the victim's death, then Anna may succeed in holding HPD vicariously liable for the officer's action as well.

(4) Anna should sue both Scottsdale and Taser International under the product liability theory. The prima facie case elements for the claim in product liability are (Goldberg, p. 868):

- P has suffered an *injury*;
- D *sold* a product;
- A is a *commercial seller* of the product;
- At the time it was sold, the product was in a *defective* condition;
- The defect functioned as an *actual and proximate cause* of the P's injury.

Under the Rest. 3d (Prod. Liab.) §2, the defect can be (a) manufacturing, (b) in design, (c) or because of inadequate warning:

- a) a manufacturing defect occurs where the product "departs from its intended design;"
- b) a design defect occurs where "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of the reasonable alternative design by the seller or other distributor ... and the omission of the alternative design renders the product not reasonably safe;"
- c) a product can also be defective because of inadequate instructions or warnings.

In our case, the P suffered an injury in a form of pain and suffering before his death; and the spouse representing the decedent suffered a loss of his companionship and income as well.

It is the assumption that Scottsdale or Taser International directly sold X-26 Taser to HPD.

Scottsdale and Taser International are both in the business of manufacturing and selling the tasers. Thus they qualify as being commercial sellers of the product.

At the time the taser was sold it was defective. It does not appear from the account of the events that the officer who applied the taser found it to be malfunctioning and thus departing "from its intended design." *Id.* Unless other evidence is presented, it can be concluded that X-26 Taser did not have a manufacturing defect.

A defect in the product's design can be reasonably inferred from the evidence presented that there were other occurrences of death resulted from the same product application. If so, then the "risks of harm posed by the product" becomes foreseeable to Taser International and its subdivisions. It calls for the company to consider an alternative design, the omission of which "renders the product not reasonably safe." *Id.* the company could have considered a modified product with lesser electrical charge or a shorter time period of the discharge of electricity during the taser's application.

More facts are required to determine whether Taser International failed to provide sufficient instructions to warn about a possibility of death during the application of its product. The police officer seemed to be under an impression that using taser was far from being lethal, even though in this particular case the victim was weakly and exposed. ~~The~~ Taser International does not openly claim that the taser use is completely safe, but at the same time it sues the medical examiners nationwide who cite Tasers as a cause of death. Such inconsistency may suggest that Taser International fails to recognize that the product's application can cause death and, thus, the company fails to warn its customers as well.

The medical testimonies from the article suggest that the victim did not die from his disorder. It was tasing that caused arrhythmia and cardiac arrest. Although both the victim's illness and the application of a taser were actual causes of his death, only the application of taser was a proximate cause of death. There were no other intervening causes between the application of the product and the victim's death. Therefore, it can be concluded that more likely than not the application of the taser was the proximate cause of the P's death.

Consequently, Anna can sue for IIED, negligence resulted in the wrongful death of her spouse, vicarious liability, and the product liability. She is not likely to recover under IIED claim due to the high standard of proof. She can possibly recover under the negligence claim if the jury finds that the officer applied excessive force and could reasonably foresee the injury. The officer and his employer HPD as a governmental agent/agency may or may not be able to claim immunity under the statute of the state or the exceptions to them. Anna is most to recover the damages under the product liability claim based on defect in design and failure to warn if sufficient evidence can be presented to support the claim. Anna can possibly bring a suit for the false advertising against Taser International, which is subject to the federal laws and is not within the scope of this discussion.

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