

## October 2021 Baby Bar

### Question 4 – Torts

**What claims may Paul reasonably assert against, and for what injuries could he recover damages from:**

#### 1. Aspen Hospital Discuss.

##### **Vicarious Liability**

An employer is liable for his employee's torts that occur within the course and scope of the employment.

Aspen Hospital is a hospital that has contracted with Dr. Johnson to perform surgeries. Since Dr. Johnson is contracted to perform surgeries and he performed a surgery on Paul, he was acting within the course and scope of their agreement with Aspen Hospital.

Aspen Hospital will argue that Dr. Johnson was an independent contractor, thus, no employer/employee relationship existed.

##### **Independent Contractor**

Generally, no liability can be assessed against an employer for the negligent conduct of the independent contractor because an employer has no right to control the manner in which an independent contractor performs the contract.

Although Aspen Hospital did hire Dr. Johnson to perform surgeries at the hospital, it was Dr. Johnson that allowed a surgical clamp to be left inside Paul's abdomen which resulted in Paul experiencing severe abdominal pain and having to go into emergency surgery. Since Dr. Johnson allowed the clamp to remain in Paul's abdomen, Aspen Hospital had no right to control the manner in which Dr. Johnson performed Paul's surgery. Thus, Dr. Johnson was an independent contractor for Aspen Hospital who acted negligently.

Therefore, Aspen Hospital may not be held vicariously liable for Dr. Johnson's negligent conduct.

##### **Negligence**

Negligence requires that a duty is owed, that the duty is breached, and the breach is the actual and proximate cause of the damage.

##### **Duty**

A duty to act as a reasonable prudent person under the same or similar circumstances.

Dr. Johnson, as a licensed doctor owes a duty to properly perform surgeries on his patients and to act reasonable in a situation when he is performing surgery and to act as a reasonable prudent person would do under the same or similar circumstances.

Therefore, Dr. Johnson owes a duty of due care to his patient, Paul.

### **Breach**

Since Dr. Johnson knew after he performed the surgery on Paul, that a surgical clamp had been left inside Paul's abdomen and he did not warn Paul of the dangerous condition, nor rectify the problem, Dr. Johnson breached his duty. Dr. Johnson will counter that he did not leave the surgical clamp in Paul, thus, he did not breach his duty.

### **Res Ipsa Loquitur**

Res ipsa loquitur is established when you show that an accident does not normally occur in the absence of negligence, the instrumentality is in the exclusive control of the defendant, and the plaintiff did not contribute to her own injury.

Paul underwent surgery. After Dr. Johnson performed the surgery a surgical clamp was left in Paul's abdomen. The clamp left in Paul's abdomen caused him sever pain and having to get emergency surgery. The clamp left in his abdomen during a surgery does not occur absence negligence.

Dr. Johnson will argue that while he performed the surgery, he did not leave the surgical clamp in Paul's abdomen. However, since Dr. Johnson is the one performing the surgery, the procedure was in his exclusive control.

Because Paul was undergoing surgery he did not contribute to his own injury. Thus, res ipsa loquitur will establish a breach.

### **Actual Cause**

"But for" leaving a surgical clamp in Paul's abdomen, Paul would not have severe abdominal pain, causing him to undergo emergency surgery.

### **Proximate Cause**

Absent a warning, it is foreseeable that when a surgical clamp is left inside one's abdomen that sever pain, massive infection would result and cause injury.

Dr. Johnson will argue that he is only liable for the minor injuries suffered by Paul, and not his permanent lung damage since it was not foreseeable Paul would have a blood clot that caused the harm.

However, the negligence of a third party is always foreseeable.

Therefore, Dr. Johnson is the proximate cause of Paul's injury.

### **General Damages**

General damages are damages that reasonably or naturally flow from the tort. General damages allow recovery for injuries that include past, present and future pain and suffering.

Dr. Johnson will be liable for the pain and suffering of Paul's injuries and permanent disabilities.

### **Special Damages**

There may be recovery for those damages that are unique to Plaintiff and they must be specifically pleaded and proved. Further, special damages must be foreseeable, reasonable in amount and not too remote resulting from the injury.

Dr. Johnson will be liable for any medical expenses and lost income.

## **2. Dr. Johnson? Discuss.**

### **Battery**

Battery is the intentional, harmful or offensive touching of another.

Dr. Johnson knew that a surgical clamp was left inside Paul's abdomen. He further assured Paul that he would not have any issues with his abdomen in the future. Based on his conduct of knowing and not telling Paul, or trying to rectify the problem shows he was substantially certain to cause Paul harm. Thus, Dr. Johnson's actions were intentional.

Dr. Johnson knew that a surgical clamp was left inside Paul and that it would cause injury. Thus, Dr. Johnson's act of allowing the clamp to remain in Paul was harmful and offensive to Barry.

Since Dr. Johnson knew and allowed the clamp to remain in Paul there was a touching of another.

Thus, it appears Paul does have a claim for battery against Dr. Johnson.

### **General Damages**

Defined supra.

Paul should recover for any damages which reasonable and naturally flow from Dr. Johnson's tortious conduct which would include pain and suffering.

Therefore, Paul will be entitled to general damages.

## **Special Damages**

Defined supra.

Paul should receive damages for any medical expenses and/or lost wages resulting from Dr. Johnson's act.

Therefore, Paul is entitled to special damages.

## **Punitive Damages**

Punitive damages may be awarded where there was intent to injure or harm plaintiff.

As discussed, since Dr. Johnson knew the surgical clamp was left inside Paul he committed a battery against Paul, he acted with the intent to cause injury to Paul.

Therefore, Paul will be entitled to punitive damages from Dr. Johnson.

3. Valley View Hospital? Discuss.

## **Vicarious liability**

An employer is liable for the acts of its employees while in the course and scope of employment.

The facts indicate that Valley View Hospital hired nurses to aid in patient care in the hospital. Thus, establishing an employer-employee relationship between Valley View Hospital and the nurses

After Dr. Norman performed the emergency surgery to take the clamp out of Paul, Valley View nurses failed to discover an embolism which cause Paul permanent lung damage.

When the nurses failed to have discovered the embolism they were acting within the course and scope of their employment.

Thus, Valley View Hospital as the employer, will be vicariously liable for the nurse's actions.

## **Negligence**

Defined supra.

## **Duty**

Defined supra.

The nurses, as a trained professional owe a duty to properly monitor their patients and to act reasonable in a situation where the patient after surgery to watch for a pulmonary embolism and to act as a reasonable prudent person would do under the same or similar circumstances.

Therefore, the nurses owe a duty of due care to their patient, Paul.

### **Breach**

A breach is a failure to act as a reasonable prudent person under the same or similar circumstances.

After Paul's surgery the nurses failed to monitor Paul, and he got a pulmonary embolism. Thus, the nurses conduct of not monitoring Paul, and a blood clot developed causing him permanent lung damage establishes they fell below the reasonable person standard of care.

Therefore, the nurses breached his duty owed to Paul.

### **Actual Cause**

"But for" not monitoring Paul after his surgery, he would not have gotten a blood clot that caused him permanent lung damages.

Thus, the nurses are the actual cause of Paul's injuries.

Therefore, the nurses are the actual cause of Paul's injuries.

### **Proximate Cause**

The nurses will argue it is not foreseeable that Paul would have developed a blood clot that would cause permanent lung damages.

However, it is foreseeable while monitor a patient who just had surgery, a blood clot could develop. If not caught in time the blood clot can cause severe damages. In addition, it is foreseeable that a nurse could be negligent in her duties.

Therefore, the nurses conduct was the proximate cause of Paul injuries.

### **General Damages**

Defined supra.

Paul should recover for any damages which reasonable and naturally flow from the nurse's tortious conduct, which would include the pain and suffering damages he sustained.

Therefore, Paul will be entitled to general damages.

### **Special Damages**

Special damages are those damages unique to Plaintiff and they must be specifically pleaded and proved. Further, special damages must be foreseeable, reasonable in amount and not too remote.

Paul should receive damages for any medical expenses and lost wages resulting from the nurse's act.