

**October 2004 Baby Bar  
Question 3 – Torts**

**How would a court be likely to rule on each ground of the motions filed by Prof and ULS to dismiss Gina's suit? Discuss.**

**Gina v. Prof**

**Prof moves to dismiss Gina's suit on the grounds that (i) he owed no duty of care to Gina to disclose what he knew about Dave.**

**Negligent Misrepresentation**

Negligent misrepresentation is a misrepresentation by defendant upon which plaintiff actually and justifiably relies, and which actually and proximately causes plaintiff's damages.

**Duty**

In a negligent misrepresentation cause of action, a defendant owes a duty of care only to those persons to whom the representation was made or to those the defendant knew would rely upon it. In essence, the defendant must have contemplated the reliance of a particular plaintiff or group of persons to which the plaintiff belongs.

In this case, Prof's misrepresentation was made to the Office of Youth Assistance ("OYA"), and presumably someone in the personnel department at OYA. Thus, the misrepresentation was made to someone who performed the hiring at OYA, not any of the youths who receive OYA's services and not any counselors at the facility who were co-workers. Even so, the foreseeable harm was to children counseled by Dave, not Gina, who was a youth counselor at the office and who was not the subject of Dave's molestation.

Prof will argue that the Cardozo view applies in that he only owes a duty of care to foreseeable plaintiffs. Paul wrote his letter of recommendation recommending Dave highly and in unqualified terms although knowing that Dave admitted molesting his girlfriend's daughter. Further, Prof knew the summer job that Dave applied for required the incumbents to be in frequent close and unsupervised contact with young children. Thus, Prof's conduct in writing the letter without disclosing Dave's past created a reasonably foreseeable risk of harm to others. However, the only foreseeable harm was to children counseled by Dave, not Gina, who was a youth counselor at the OYA and who was not the subject of Dave's molestation.

On the other hand, Gina will argue that the Andrews' view of duty applies. Under the Andrews view, Prof's conduct would create a foreseeable risk of harm that Gina would be injured upon learning of Dave's molestation of a young child and could sustain a debilitating heart attack from the stress as a result.

The most likely result is that the court will limit the scope of Prof's duty, as a matter of law, to the children potentially harmed by Dave and not extend the duty to include youth counselors such as Gina.

Therefore, the court will find that Prof did not owe a duty to Gina.

**Prof moves to dismiss Gina's suit on the grounds that (ii) even if did have such a duty, his breach of the duty was not the proximate cause of Gina's injuries.**

### **Proximate Cause**

Proximate cause involves who should bear the risk of loss with a defendant who has been negligent and who has actually caused damage to the plaintiff, and whether there are policy reasons why the defendant should be relieved of liability for the damage.

Prof's conduct must be the proximate cause of Gina's injuries. The facts indicate that Gina was injured upon hearing the screams of the six-year-old girl that was being molested by Dave. Since Dave was hired as a result of Prof's glowing letter of recommendation, Prof's conduct was the actual cause of Gina's injuries.

### **Intervening, Superseding Cause**

An intervening cause is one that occurs after the negligent conduct of defendant but before the harm. An independent, intervening act is an abnormal response to stimulus created by defendant's negligence. The fact that the intervening force was not reasonably foreseeable does not excuse D from liability as long as result was foreseeable, such as a third person's negligent conduct.

Prof will argue that Dave's conduct, i.e., conduct of a third person, was not foreseeable because Dave's conduct was a criminal act. Criminal acts are generally viewed as not foreseeable and will sever the chain of proximate causation. Thus, criminal acts are generally viewed as a superseding cause of injury.

However, in this matter, Prof was aware of Dave's past history of molesting young girls. Therefore, even though Dave committed a criminal act, Prof's knowledge of Dave's past actions means that Dave's present act of molestation was foreseeable.

Therefore, Dave's act will not be sufficient to sever the chain of proximate causation.

### **Thin-Skull Plaintiff**

The thin-skull plaintiff rule holds the defendant liable for all results, foreseeable and unforeseeable, if the result stems from an inherent frailty in the plaintiff.

Prof will also argue that Gina's susceptibility to heart attack was not foreseeable and that he is therefore not liable for her injuries. However, under the thin-skull plaintiff rule, Prof is liable for Gina's inherent frailty, i.e., her susceptibility to a debilitating heart attack even though her condition might have been unforeseeable.

Therefore, Prof's conduct was the proximate cause of Gina's injuries.

## **Gina v. ULS**

**ULS moves to dismiss Gina's suit on the ground that ULS cannot be held vicariously liable because writing letters of recommendations for his students was outside the scope of Prof's employment duties as a professor.**

### **Respondeat Superior – Vicarious Liability**

Under the respondeat superior doctrine, an employer is liable for the torts of its employee that occurs within the course and scope of the employment.

ULS is the employer of Prof. Therefore, an employer-employee relationship exists.

However, ULS will argue that Prof is employed as a professor of torts and commercial law at ULS. Further, ULS will argue that Prof's employment contract requires him to teach, conduct research, publish scholarly works, be available for consultation with students and engage in community service. Hence, none of the employment duties of Prof involve writing letters of recommendation for his students.

Gina will argue that Dave is actually one of Prof's students and research assistants and, as such, Prof's writing of the letter of recommendation is closely related to Prof's employment duties of counseling students and engaging in community service, albeit here indirectly, in that Dave was the person who was working at the State Office of Youth Assistance, not Prof. Thus, there is a colorable argument that Prof's conduct was within the course and scope of his employment with ULS. Therefore, it is likely that Prof's conduct will be determined by the court to be within the course and scope of his employment with ULS.

Thus, the court will deny ULS's motion because ULS is vicariously liable for Prof's conduct.