

TORTS ANALYSIS

(Torts II.A., B., D., E.1. & 2., F.)

ANALYSIS

Legal Problems

- (1)(a) Could a jury find that University had a duty of care to Susan and that its breach of that duty was the cause in fact and proximate cause of Susan's injuries?
- (1)(b) Could a jury find that Jim owed a duty of care to Susan and that his breach of that duty was the cause in fact and proximate cause of Susan's injuries?
- (1)(c) Could a jury find that Ann's Psychiatrist owed a duty of care to Susan and that Psychiatrist's breach of that duty was the cause in fact and proximate cause of Susan's injuries?
- (2) If any party is liable for Susan's injuries, may Susan also obtain damages for PTSD symptoms?

DISCUSSION

Summary

A jury could find that University is liable to Susan for failing to take reasonable precautions to protect Susan from foreseeable criminal activity resulting from unauthorized entrance into the dorm. University owed a duty of care to Susan, a resident of a dormitory controlled and maintained by University. University's failure to fix the broken lock or take other steps to prevent entry by an intruder violated that duty; it was also the cause in fact and proximate cause of Susan's physical injuries.

A jury could not find that Jim is liable to Susan unless Susan relied to her detriment on Jim's promise to obtain assistance or unless Jim increased the risk that Susan would suffer harm. Here, there is no evidence of reliance or increased risk as a result of Jim's failure to obtain assistance.

A jury could not find that Ann's Psychiatrist is liable to Susan. Although a therapist may be liable for failing to warn a patient's intended victim of credible threats of violence when that victim is reasonably identifiable, in virtually all jurisdictions, a therapist may not be found liable for failing to warn a victim who is a member of an indeterminate group.

If University is found liable to Susan, it will be responsible for damages related to Susan's PTSD injuries because a tort defendant takes his victim as he finds him.

Point One(a) (30%)

University owed a duty of care to Susan, a resident of a dormitory controlled and maintained by University, to take reasonable precautions to protect Susan from foreseeable criminal activity.

University's failure to fix the broken lock or take other precautions against unauthorized entry into Susan's dorm violated that duty. It was also the cause in fact and proximate cause of Susan's physical injuries.

A college does not stand in a *parens patriae* relationship with its students. See *Hegel v. Langsam*, Ohio Misc. 2d (Comp. Pl. 1971). However, although the common law imposed almost no duties on landlords to provide safe premises to tenants, modern courts have found that landlords, including landlords like University, have a duty to take reasonable precautions to protect tenants against foreseeable attacks. See *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970). See also RESTATEMENT (SECOND) OF TORTS §§ 360, 361.

[NOTE: An examinee might also conclude that University owed a duty of care to Susan because she was an invitee. See DAN B. DOBBS, THE LAW OF TORTS § 235, at 605 (2000) (describing tenant in common areas of building as an example of an invitee encountering obvious dangers).]

Criminal activity of the sort that occurred here was foreseeable. Apartment buildings and college dormitories almost invariably have locked entrances to protect against intrusion by criminals. Indeed, recognizing this risk, University had taken steps to ensure that nonresidents could not enter the dormitory.

A jury could find that University's failure to repair the broken lock or to take other steps to secure the door through which Ann entered the dormitory represented a breach of its duty of care. The lock had broken four days before Ann's entry. Therefore, University employees had ample time to discover the break. Even if repairs were impossible within the relevant time period, University could have taken other steps to prevent the door from being opened from the outside. Such precautions were warranted given the foreseeability that unauthorized persons could enter the dormitory to engage in criminal acts. It is this risk that prompted University to issue key cards to the dormitory residents. See *Brauer v. New York Central & H.R.R. Co.*, 103 A. 166 (N.J. 1918) (finding railroad liable for theft resulting from failure to guard plaintiff's goods when theft foreseeable).

Because Ann's entrance into Susan's dorm was made possible by University's failure to secure the damaged door, a jury could find that University's failure to repair the lock was the cause in fact and proximate cause of Susan's physical injuries.

Point One(b) (25%)

There is no general duty to come to the aid of another. Jim assumed a duty to Susan only if Susan relied to her detriment on Jim's promise to obtain assistance or if Jim left Susan in a worse position. Here, the evidence does not show that Susan relied to her detriment or that Susan was in a worse position after Jim took charge.

Susan and Jim did not have a special relationship that created a duty to come to the aid of another. See DAN B. DOBBS, THE LAW OF TORTS §§ 314–319. However, when an actor “takes charge of another who is helpless adequately to aid or protect himself,” he is subject to liability to the other for bodily harm caused by

a) “the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor’s charge, or

b) the actor’s discontinuing aid or protection, if by doing so he leaves the other in a worse position than when the actor took charge of him.”

RESTATEMENT (SECOND) OF TORTS § 324. *See also* RESTATEMENT OF TORTS § 323 (“One who undertakes, gratuitously or for consideration, to render services to another . . . [is liable] for physical harm resulting from his failure to exercise reasonable care . . . if (a) his failure to exercise such care increases the risk of such harm; or (b) the harm is suffered because of the other’s reliance upon the undertaking.”).

Here, Jim’s failure to follow up his unsuccessful attempt to report Susan’s injuries to the University security office with any other action was arguably negligent. Moreover, Jim’s closing the library door made it less likely that anyone else would come to Susan’s aid. However, there is no evidence that Susan actually suffered any harm as a result of Jim’s conduct. Susan obtained medical assistance herself only half an hour after Jim left her, and there is no evidence that her minor physical injuries or PTSD symptoms were aggravated by delayed treatment.

Thus, because there is no evidence that Jim caused or exacerbated Susan’s injuries, Susan cannot recover damages from Jim.

Point One(c) (30%)

A psychotherapist has a duty to warn a reasonably identifiable individual against whom her patient has made credible threats but has no duty to warn any individual who is a member of an indeterminate class against whom the patient has made threats.

In *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), the California Supreme Court held that the special relationship between a psychotherapist and patient justified the imposition of a duty to warn “persons threatened by the patient.” Both the holding and reasoning of the *Tarasoff* court have been widely adopted. Today, in most states, a psychotherapist who fails to warn an intended victim against whom her patient has made credible threats of physical violence may be found liable for that victim’s injuries. Many courts have also followed *Tarasoff* in permitting recovery either (1) when the therapist believed that the patient posed a real risk to the specified victim or (2) when the therapist negligently failed to take the threat seriously.

However, California courts have restricted the duty imposed on psychotherapists in *Tarasoff* to “potential victims . . . specifically known and designated” by the dangerous patient. *Thompson v. County of Alameda*, 614 P.2d 728, 736 (Cal. 1980). For example, in *Thompson*, the court refused to extend *Tarasoff* to a defendant that had released a youth who had a long history of violence and who had “indicated that he would, if released, take the life of a young child residing in the neighborhood.” *Id.* at 730. The court held that, in contrast to *Tarasoff*, “the warnings sought by plaintiffs would of necessity have to be made to a broad segment of the population and would be only general in nature [S]uch generalized warnings . . . would do little as a practical matter to stimulate increased safety measures . . . [and] would be difficult to give.” *Id.* at 736.

Courts and legislatures in other states have also generally confined the *Tarasoff* duty to intended victims who are readily ascertainable and subject to a serious threat of physical violence. *See, e.g.*, KY. REV. STATS. ANN. § 202A.400(1) (requiring “actual threat of physical violence against a clearly identifiable victim”); NEB. REV. STAT. § 38-2137(1) (requiring “serious threat of physical violence” against a “reasonably identifiable victim”); N.H. REV. STAT. § 329:31 (requiring “serious threat of physical violence against a clearly identified or reasonably identifiable victim” or “serious threat of substantial damage to real property”); N.J. STAT. ANN. § 2A:62A-16 (requiring “threat of imminent, serious physical violence against a readily identifiable individual”). Cases in which courts have imposed a broader duty have typically involved defendants who directly facilitated the patient’s attack. *See, e.g.*, *Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984) (imposing duty to victims where psychiatrist helped patient to obtain guns confiscated by police).

Under *Tarasoff* and the case law of most states, the fact that Ann’s Psychiatrist did not find Ann’s threats credible would not be a defense if the evidence showed that a reasonable therapist would have taken Ann’s threats seriously. Here, Ann’s Psychiatrist had a therapeutic relationship with Ann because Ann saw Psychiatrist weekly for several months. That relationship imposed on Psychiatrist a duty to warn Ann’s ascertainable intended victims if Ann made serious threats of physical violence against them. Psychiatrist’s decision not to warn anyone was likely reasonable based on Ann’s lack of any history of violent behavior and the ambiguity of her vague threat to ensure that cheaters “get what is coming to them,” which is not a clear threat of serious injury. More importantly, Ann’s threats were general; she did not specify any ascertainable victims. Thus, in the vast majority of states, a jury could not find that Psychiatrist is liable to Susan.

Point Two (15%)

University is responsible for damages related to Susan’s injuries because a tort defendant takes his victim as he finds him.

A tort defendant takes his victim as he finds him. The victim with an “eggshell skull” who suffers injuries greatly in excess of those that a normal victim would suffer is entitled to recover for the full extent of his injuries. *See* RICHARD A. EPSTEIN AND CATHERINE M. SHAKEY, *CASES AND MATERIALS ON TORTS* 471–74 (10th ed. 2012).

Here, although Susan sustained only minor physical injuries from Ann’s attack, Susan suffered a preexisting condition, PTSD. Susan’s PTSD symptoms that emerged after Ann’s attack were attributable to her preexisting PTSD. Most of the “eggshell skull” cases involve unusual physical consequences of an underlying precondition. However, there is no reason why, with proper proof, the plaintiff should not also recover damages for mental symptoms such as anxiety or insomnia. *See Steinhauser v. Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970) (permitting recovery for plaintiff’s post-accident schizophrenia when evidence showed that prior concussion created predisposition that was exacerbated by accident for which defendant was liable). Courts have sometimes been reluctant to award tort plaintiffs damages for mental distress unaccompanied by any physical injuries (*see Williamson v. Bennett*, 112 S.E.2d 48 (N.C. 1960) (disallowing mental-disorder damages when plaintiff suffered no physical harm in accident caused by defendant)).

Torts Analysis

However, here Susan did suffer physical injuries during the attack, and the attack also triggered physical symptoms such as nausea, muscle tension, and sweating.

Thus, if Susan recovers damages from University for her physical injuries, she should also be able to recover damages for her PTSD symptoms.