Gerla
Torts I
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Question I. (60 points)

Mort Sordo suffered from a severe urinary tract infection. He went to his doctor, Ed Mata, for treatment. Mata prescribed the antibiotic oleomycin for Sordo's condition. Oleomycin is extremely effective in treating he type of infection which plagued Sordo. However, in two out of every 1000 cases in which oleomycin is prescribed, it causes severe damage to the patient's hearing. Mata did not inform Sordo of this risk and unfortunately Sordo suffered a severe hearing loss as a result of the oleolmycin. Sordo has brought suit against Mata. Sordo claims that Mata was negligent in not informing Sordo of the risk of deafness from taking oleomycin.

At the trial Sordo produced two witnesses. Both were physicians associated with highly respected out-of-state medical centers. Both physicians testified that they agreed that oleomycin was the best treatment for Sordo's ailment. They also stated that they routinely told their patients of the risk to hearing posed by oleomycin, and that most physicians in leading hospitals across the nation were informing their patients for whom they prescribed the drug of the hearing risks associated with oleomycin. They opined that conveying the information was "sound medical practice" because it was something "patients probably would want to know."

The two physician witnesses further testified that they did not know whether doctors in Mata's practice area informed their patients of those risks.
Finally, the two doctors said that of the 2,500 patients for whom they prescribed oleomycin, only three had had changed

their minds and insisted upon alternative treatments upon being told of the risks to hearing. The doctors stated that the reason so few changed their minds was that they were also informed that oleomycin was far more effective in checking uninary tract infections than any other treatment, and that if the infection was not checked it could lead to all sorts of unpleasant consequences including risks of sterility, impotence (in males) and even death.

Sordo also testified on his own behalf. He stated that he was particularly senssitive to any threat to his hearing because he was a passionate classical music aficionado and that he would have insisted on alternate treatment if he had been told of the risks of oleomycin. When Sordo was cross-examined, he admitted that he did not particularly relish any of the consequences of continued infection.

Three local physicians testified on Mata's behalf. All agreed that oleomycin was the treatment of choice for urinary tract infections. They also testified that no physician in the area where Mata practiced told patients of the risks to hearing posed by oleomycin. The physicians said that there was no particular medical reason why doctors did not inform their patients. Rather, doctors did not believe their patients would be interested in learning of the risk.

An interesting development has complicated matters. It turns out that "Dr." Mata was not a licensed physician at all. His credentials were complete fabrications. He has pled guilty to a state statute which makes it a felony to "practice medicine without a license." Licenses are issued by the State Board of Medical Examiners, an organization designed to establish competency qualifications for would-be physicians.

Discuss Mata's potential liability to Sordo for negligence in not informing him of the risks of oleomycin.

Question II. (60 points)

Radio station WHEE decided it needed a new publicity gimmick. The station manager Adam Smith decided to begin a "find the real Frank Neil contest." Neil would drive around town and make five minute stops at various locations. The disc jockey on the afternoon shift would give clues on the air to Neil's location. The first person to find Neil, walk up to him and say, "I have more fun with WHEE" would win $500.

The contest seemed to run smoothly for the first week. The contest proved extremely popular and the station's ratings soared. On Monday of the second week, however, disaster struck. One of the radio station's listeners was Tommy Incorrigible. Tommy lived with his legal guardian, his Aunt Em. Tommy had a habit of stealing Aunt Em's car keys from her purse and taking her car for "joy rides" at breakneck speeds. In spite of the speeds at which Tommy drove, Tommy had so far managed to avoid injuring anyone on his joy rides. Tommy, nonetheless, had been apprehended by the police on several occasions. Aunt Em, at the suggestion of the police, began locking away her car keys in a safe to which Tommy did not have the combination.

That Monday afternoon Aunt Em was supposed to be picked up by one of her friends and driven to their weekly canasta game. Aunt Em had gone out shopping in the morning and for various reasons did not return home until after her friend had arrived to pick her up. In her eagerness not to delay her friend, Aunt Em left her purse home and forgot to lock the car keys away in her safe.

After Aunt Em left, Tommy noticed that Aunt Em had left her car keys in her purse, but decided that he just was not in the mood for joy riding that day. He then turned on the afternoon radio program on WHEE. The disc jockey gave the

clues to Neil's first location for the day. Tommy thought he knew the location. He grabbed Aunt Em's car keys out of her purse and took her car. In his eagerness to get to Neil's location before anyone else did, Tommy ran a red light and broadsided another vehicle. The driver of the other vehicle, Ray Haley, was severely injured and the car totally wrecked.

Haley has now sued the radio station, claiming that it was negligent in staging the "find the real Frank Neil contest," and Aunt Em, claiming she was negligent in leaving her keys where Tommy could reach them.

Discuss the possibility of (a) Radio Station WHEE and (b) Aunt Em to Haley.

Question III. (60 Points)

Reporter Stewart James was working on the story that had obsessed him for the last two years. Approximately seven years ago the Northside Diamond Exchange had been robbed of $777,000 in gems and cash. An unemployed drifter, Ed Dantes, was arrested and convicted for the crime and sentenced to twenty-five years in prison. James was convinced that Dantes was not the robber. James believed that the robbery was committed by G.E. Marshall. At last, the proof of James' theory was within his grasp. James learned of the existence of a box containing documents which would prove Marshall's guilt and exculpate Dantes. James also learned that the box was located on top of a small shack on land belonging to Marshall's brother-in-law, Jay Cobb.

James and his assistant, Jimmy Olson, hurried to the shack. The shack, which was located on an extremely isolated part of Cobb's land, was surrounded by fences and signs reading "Keep Off - Private Property." The box was supposed to be on the roof of the shack and the only way to the roof was a rickety rotting hand ladder permanently attached to

the shack. James and Olson both realized that anyone who tried to get to the roof using the ladder might well not make it because of the ladder's condition. They were about to go back to town for a ladder when they saw an unusual looking car coming up the trail. The car looked exactly like one which belonged to two of Marshall's henchmen. James and Olson guessed that the "henchmen" were there for the same purpose they were - retrieving the box. If the henchmen got the box first, Marshall might never be brought to justice and Dantes might languish in prison for years. James decided to ascend to the roof via the ladder. He made it to the roof safely, found the box and tossed it down to Olson. However, when he was coming back down via the ladder, it gave way and James suffered a broken leg.

Ironically, the unusual-looking car turned out to be driven by two hunters who had no relationship to Marshall or his henchmen.

When the box was opened, it indeed, turned out to contain exactly the documents James had hoped. On the basis of the documents, Marshall was charged with and convicted of the robbery, while Dantes was freed.

James is now suing Cobb claiming that he was negligent in not properly maintaining the ladder. At trial, in addition to the above discussed facts, the following facts were established:

(1) a new ladder would have cost $25 and taken one hour to install.

(2) the reason the fence and signs around the property were erected was that every couple of months one or two hunters would come on Cobb's land without permission and utilize the shack, although as far as anyone knew, none of them had ever gone on the roof.

Discuss the possible liability of Cobb to James for his broken leg.

NOTE: The jurisdiction by statute has adopted pure comparative negligence (i.e. the type adopted by California in Li v. Yellow Cab). Neither the statute nor any court decision in the jurisdiction has discussed the impact of the adoption of pure comparative negligence on any other defense or doctrine.

POSSIBLE ANSWERS

Question I:

Sordo has alleged that Mata was negligent in not informing Sordo of the risk to hearing posed by oleomycin. The first thing Sordo must prove is that Mata fell below the standard of care. In a medical malpractice/informed consent case there are three competing and alternative standards used to determine the risks of treatment a physician must reveal to her patient. The first standard or approach is to treat an informed consent case in the same manner as an ordinary medical malpractice case. Under this standard a physician need only reveal those risks which are customarily revealed by members of the medical profession. There are two approaches to exactly whose custom is examined. The traditional approach looks to the custom of physicians practicing in the same locality. If this approach is used Sordo will lose. Mata brought forth three local physicians who testified that local doctors did not inform their patients of the risks of oleomycin. Sordo's expert witnesses testified that they were unfamiliar with whether physicians in Mata's practice area informed their patients of the risks of olemycin. Under these circumstances, reasonable minds cannot differ that Sordo has failed to carry his burden of proving that Mata fell below the standard of care because Sordo did not prove that Mata departed from local custom.

The second approach to custom is to look to the customary practices of physicians across the country (national standard). If this standard is adopted Sordo has an excellent chance of proving that Mata fell below the standard of care becuase Mata's expert witnesses testified that doctors in leading hospitals across the country routinely told their patients of the risks to hearing posed by oleomycin. Whether Mata fell below the standard of care using a national standard may still, however, present a fact question for the jury. Sordo's expert witnesses testified that doctors in "leading hospitals" nationwide warned their patients of the risks. There may be a difference between physicians practicing in hospitals nationwide and physicians in general. The practice of physicians in Mata's area may be evidence of such a divergence.

The next standard used by courts in medical informed consent cases is that doctors must inform their patients of the material risks of treatment. Under this approach material risks are defined as those risks which might affect the decision of the reasonable patient, i.e., those which (s) he would wish to know in order to make an intelligent decision. [The Scott case in your casebook implied that the standard was whether the risk would cause the reasonable person to change her mind. I believe this is incorrect. However, on the grounds of reasonable reliance, I gave full credit for that statement of the approach.] Using the "objective" standard of materiality it is probably a question of fact whether the risks to hearing engendered by oleomycin were material. On the one hand a risk to hearing, even one of only .2%, would seem to be important to a reasonable person's decision on whether to go ahead with the procedure.

Question II

Haley alleges that WHEE was negligent in staging the "Find the Real Frank Neil" contest. The first issue is whether the radio station fell below the standard of care in staging the contest. This would seem to be a question of fact for the jury. The contest did entail certain risks. It is probably foreseeable that encouraging listeners to win $500 by giving them 5 minutes to find a moving target would also encourage them to drive hurriedly toward the location where they believed Neil was. This in turn could lead to the type of serious injury to person and property that occurred in this case, though the probability of such injuries might vary depending on facts not given. Freedom from bodily injury is highly valued in our society. On the other hand, there were benefits from the contest. The main one seemed to be that people enjoyed participating in the contest, as evidenced by the stations soaring ratings. The jury will have to balance these considerations in determining whether the radio station acted reasonably in staging the contest.

There is no doubt that the radio station's actions were the cause in fact of Haley's injuries. Tommy testified that he was not in the mood for a joy ride and had not availed himself of the known opportunity to take Aunt Em's car until after he heard the WHEE contest broadcast. Thus, but for the contest Haley would not have been injured.

There is some question whether the station's broadcast was the so-called "proximate cause" of Haley's injuries. If the issue is sent to the jury, it will probably review the question in terms of whether the injuries were too remote to justly hold the radio station liable. In deciding whether there is or was sufficient evidence to send the issue to the jury, the trial judge or reviewing appellate judges will use one of two "models."

The first model is the "forseeability model." This model focuses on whether the resulting injury is foreseeable from

the commission of the negligent act, at the time of the act. It is at least arguably forseeable that given the size of the prize and the 5 minute time limit, drivers might drive like madmen to reach Neil's location causing auto accident and injuries such as those Haley suffered.

The second "model" is the direct cause "model." Under this model the defendant is liable for all injuries flowing from his negligent act unless relieved of liability by a superseding intervening cause. A superseding cause is one that is both unforeseeable and produces unforeseeable results. It must also be an intervening cause, i.e., be a cause in fact of the injury and occur between the time of alleged neglient act and the injury. There are three candidates for superseding causes. The first is Aunt Em's failure to lock away her car keys. This will not work because the facts indicate it occurred before the broadcast which triggered Tommy's actions. Two other candidates are Tommy's takinbg of Aunt Em's car and his subsequent negligent driving. The former will probably not relieve WHEE from liability. First, the end result may be foreseeable (see discussion in preceding paragraph). Second Tommy's driving may itself be foreseeable (id). Tommy's intentional taking of Aunt Em's car may relieve the station of liability. Traditionally, intentional criminal acts were viewed as superseding causes, even if they produced foreseeable results or were themselves foreseeable. Under this view Tommy's theft of Aunt Em's car may relieve WHEE of liability. However, the modern trend is to treat criminal acts the same as any other alleged superseding cause. Thus, if the cause is either foreseeable (somewhat doubtful in this case) or produces foreseeable results (which may apply in this case, see discussion supra) it may not be viewed as a superseding cause. If this view is adopted there may still be proximate cause under the direct cause model.

Haley alleges that Aunt Em was negligent in leaving the

car keys where Tommy could reach them. There is little doubt that Aunt Em fell below the standard of care in failing to lock up the car keys. The risks of her conduct were that Tommy would take the keys and her car and injure either himself or an innocent bystander. The burden of locking away the keys seems minute, delaying her friend for a few minutes.

Reasonable minds cannot differ that Aunt Em's failure to put away the keys was the cause in fact of Haley's injuries. Unless Tommy could have "hot-wired" Aunt Em's car, he could not have driven it and caused the injuries to Haley. Whether Aunt Em's negligence was the so-called proximate cause of Haley's injuries is a much closer question. Once again, the Jury will consider if the injuries were too remote from Aunt Em's negligence to justly hold her liable. Judges in reviewing whether there is or was enough evidence to send the issue to the jury will use one of the same models described in the discussion of WHEE's liability. Under the foreseeability model, Aunt Em's negligence may well be found to be the "proximate" or "legal" cause of Haley's injuries. According to the facts, Tommy, in the past had frequently stolen Aunt Em's car keys and driven at breakneck speeds. Under these circumstances it well may be foreseeable that an injury to some innocent person might result from Aunt Em's failure to lock away the car keys.

The situation under the direct cause model is more complex. There are three potential superseding causes, the radio broadcast, Tommy's pilfering of the keys and the car, and Tommy's negligent driving. The radio broadcast is probably not a superseding cause because whether or not it was foreseeable, the end result was probably foreseeable (see preceding par.). Tommy's negligent driving not only produced a foreseeble result (id.), but was probably itself foreseeable in light of his previously having driven at breakneck speeds. Aunt Em's best argument will be that

Tommy's taking of the keys and car was an intentional criminal act which cuts off her liability. Under the modern trend of treating intentional intervening criminal acts like other intervening causes, Aunt Em will not succeed in her argument. On the basis of past performance it was foreseeable that Tommy would take both the keys and the car if Aunt Em left them out. Even under the traditional view of intentional criminal acts as automatic superseding causes, Aunt Em might not escape liability. Even courts adhering to the traditional view said an intentional criminal act was not a superseding cause where the defendant's negligent act clearly created a specific opportunity for criminal behavior, or, to put it a bit differently, where creating the opportunity for crime is what makes the act negligent. In this case the very reason Aunt Em was required to lock away the keys was Tommy's habit of stealing the keys and the car. After all, if Tommy had no pattern of stealing the car, Aunt Em could hardly be considered to be negligent.

The only other even vaguely plausible argument Aunt Em would have is that her not putting away the keys was an ommission, and that she is shielded by the no liability for ommissions no duty rule. This will not work for two reasons. First, her actions can equally be characterized as acts, i. e. leaving the keys out, and courts today tend to characterize alleged tortious conduct as an act whenever possible. Second, Aunt Fm was Tommy's legal guardian and had knowledge of his proclivites (which is why she started locking the keys away). Under these circumstances the attempt to seek shelter through the no duty rule will fail because of the relationship between the defendant and Tommy.

Question III

James alleges that the negligent act was Cobb's failure to maintain the ladder in proper condition. There is a close question whether Cobb even fell below the standard of care.

On plaintiff's side there is the risk of serious bodily harm posed by the ladder, e.g., James' broken leg, and the triviality of the cost in time end money or repairing the ladder. On defendant's side is the small probability of injury to anyone. The ladder was located on an isolated portion of Cobb's land, and although hunters occasionally wandered by, there was no indication that any of them had ever used the ladder. This seems to be a close question and almost surely one for the jury.

There is no doubt that the condition of the ladder was the cause in fact of James' injuries and that under any test for so-called proximate or legal cause Cobb will not be able to escape liability. Cobb may assert that his failure to repair the ladder was an omission and therefore he is shielded by a no-duty rule. Again, this argument is likely to fail because his actions can equally be characterized as an act, putting out a dangerous ladder.

Cobb will also argue that he is shielded by the landowner no duty rule because James was a trespasser. If Cobb is in one of the dozen or so jurisdictions which have abolished landowner immunity (a.k.a. measuring landowner "duty" by the status of the plaintiff) Cobb will not be saved by his status as a landowner and James' status as a trespasser. If Cobb is in a jurisdiction which continues the traditional rules, he will have a strong argument that he is shielded from liability by the landowner no-duty role. A landowner is not liable to trespassers for almost all forms of negligence. James is a trespasser because he is on Cobb's land without Cobb's permission. James may attempt to argue that the frequent trespasses on a limited area exception strips Cobb's no-duty protection. James will have difficulty proving any element of this doctrine. First, are a couple of hunters trespassing every couple of months really frequent trespassers? Second, while the hunters did utilize the shack they never seemed to utilize the ladder. Is the ladder

really a limited area upon which trespasses frequently occur? Third, the landowner need only warn of dangerous artificial conditions. While the redder is clearly artificial, is its obvious rickity condition warning in and of itself? [N.B. the signs posted by Cobb are not warning. The warning must be about the dangerous condition not merely a warning to keep off the land.] Therefore, in a jurisdiction retaining traditional landowner immunities, Cobb is likely to escape liability.

Cobb will raise two defenses. First, he will raise the defense that James was also negligent, and that James' recovery should be diminished proportionately to his negligence. Cobb will have a hard time reducing James' recovery because James has a strong argument that he acted completely reasonably. James will point out that the benefits of his conduct, freeing innocent man from prison and bringing the real culprit to justice far outweigh any possible risk of injury to himself. As for why James did not simply return to town for a safe ladder, James will explain that he had a reasonable belief, given the appearance of an "unusual looking car" which looked exactly like that driven by the true criminal's henchmen, that it was now or never for retrieving the box. Under these circumstances, James may well convince a jury that he was completely reasonable in his behavior and that his recovery should not be diminished at all.

Cobb will also try to argue that James should be completely barred from recovery because James assumed the risk of injury from the ladder. Many jurisdictions adopting comparative negligence have completely abolished the assumption of risk defense. In such a jurisdiction Cobb will obviously not be able to raise the defense. Some jurisdictions retain traditional assumption of the risk with comparative negligence. In such a jurisdiction Cobb must prove that James appreciated and voluntarily assumed the

risk which injured him. In the present case Cobb will have little difficulty in establishing that James assumed the risk. The facts indicate that James knew of the ladder's dangerous condition. While James certainly had a strong motive for going up to the roof, that probably does not rise to the level of compulsion which would render the assumption involuntary. While courts have eased the voluntariness requirement, they still require some sort of direct threat to the plaintiff's (or a member of his family's) personal safety or perhaps job security to render an action involuntary. In a jurisdiction retaining traditional assumption of the risk James will likely be barred from recovery.

Some jurisdictions adopt a compromise position of barring recovery only in cases where the assumed risk was unreasonable. James will have a strong argument that the risk he assumed was reasonable for the same reasons that his recovery should not be diminished on the basis of his comparative negligence.