

## **Sample Answer: Hypothetical No. Two<sup>1</sup>**

### **Dana v. Baker -Negligence**

#### **Duty**

Everyone has a duty to avoid exposing others to an unreasonable risk of harm. By undertaking to install electrical equipment, Baker had a duty to do so in a way that would not expose others to an unreasonable risk of electric shock. Therefore, Baker had a duty to Dana and Echo to install the equipment in a non-negligent manner.

#### **Breach**

To determine if there has been a breach, the appropriate standard of care must be [determined]. The standard, by default, is that of a reasonable person. Because Baker has special skills, and belongs to an industry which has its own standards of safety, the standards of the industry are useful (but not determinative) in deciding if his duty has been breached. The standard is still that of a reasonable person, but community standards, in cases such as this one, are relevant in determining what a reasonable person would do in Baker's situation. Experts [may be] be called in to testify [if necessary] as to what such a person would do and how they would act in the same or similar circumstances.

[Here, expert testimony is probably unnecessary.] The instruction manual for the dryer specifically stated that the modification which Baker performed should not have been performed, presumably for safety reasons. Therefore, Baker breached the relevant standard of care when he went against this industry standard, and performed an improper modification on the electrical outlet. Further, Baker failed even to perform this modification properly, and failed to install the dryer properly. All of this is more than sufficient to establish that he fell below the relevant standard of care in his community.

Furthermore, creating a risk of fatal electric shock to any person standing in water who comes into contact with the dryer is clearly unreasonable, given that he knew the dryer was in the bathroom close to the tub and had said it wouldn't be a problem. Thus, there was an obvious breach.

#### **Factual Causation**

The facts indicate that, but for Baker's improper installation of the dryer, the worst that could have happened would be a blown fuse, causing no damage. Because Baker's conduct was the ONLY conduct which caused the injury, there is factual causation.

#### **Proximate Causation**

Here, the harm and the type of harm were clearly foreseeable because the dryer was in the bathroom and close to the tub. Although he did not know that he was creating a risk of fatal electrocution, he knew or should have known that some harm was likely to result, whether it be a blown fuse or death. Thus, the element of proximate cause is likely met, and there were no intervening causes that could be said to be superseding.

Therefore, Baker's conduct is both the factual and legal cause of Echo's and Dana's injuries.

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<sup>1</sup> Composite of two student essays with minor edits by Professor.

## **Damages**

[The extent of damages recoverable by Dana depends on the theory or theories of liability asserted.] The damages [arise out of] the death of [Dana's] child and possibly property damage to the house and dryer.

D would likely be able to recover for non-economic damages such as [emotional distress] caused by the death of Echo, as well as any economic damages [pursuant to two distinct causes of action based on Baker's negligence, discussed below. Also, Dana might have a direct action for her emotional distress as she was in the "zone of danger" of the electric discharge and [may have] actually feared for her own safety.]

### **[Negligent Infliction of Emotional Distress]**

[Dana may] recover for negligent infliction of emotional distress [under the "bystander rule".]

In this case, the "bystander rule" applies. To recover for NIED in a case such as this, the negligence of the defendant must cause a severe injury to a person closely related to the plaintiff, the plaintiff must witness the injury, and the plaintiff must suffer [serious] emotional distress beyond what would be expected in a disinterested witness, and which would not be abnormal for the particular plaintiff in question.

The negligence of Baker caused Echo's death (see above), Echo is closely related to Dana (parent-child, see *Thing v. La Chusa*), Dana witnessed the accident which killed Echo, and she suffered severe emotional distress (overwhelming grief, inability to eat or leave the house, difficulty sleeping), which is obviously beyond what would be expected in a disinterested bystander who might have witnessed Echo's death, but not beyond what one could reasonably expect a parent to experience at the death of a child.

Therefore, Dana may recover for negligent infliction of emotional distress, entitling her to damages for any pain and suffering incurred due to the loss of Echo.

### **[Wrongful Death]**

Dana may sue for the wrongful death of Echo. [Pursuant to this theory] she may recover for loss of consortium, society, love, and companionship, as the finder of fact determines her to be entitled, [but not for grief associated with the death of her son.]

[In a wrongful death action, Dana might also recover loss of economic benefits expected from Echo. Although this element of damages might have been more relevant in an earlier era when children contributed to the family income, today this [element] of recovery [has] been found to be problematic [in like cases], as some courts have referred to the "negative net worth" of [very young] children when a wrongful death suit is brought by surviving parents.)]

## **Defenses of B**

[Baker] may argue that Dana's negligence, by [requesting that the dryer be installed in the bathroom, and by] washing clothes and creating a wet floor next to an electric dryer, contributed to Echo's death. This may be true, but contributory negligence will not completely bar recovery. Rather, the finder of fact will likely rely on comparative fault. Dana may be barred recovery to the extent (if any) that the finder of fact finds her to be culpable for the death of Echo.

However, such a finding is unlikely, since Baker, a professional, assured Dana that the placement of the dryer posed no safety risk, on which Dana relied. Since it is reasonable to rely on what one believes to be sound, professional advice, a finder of fact is unlikely to find that Dana failed to exercise due care, contributing to her own injuries.

[Baker may also claim that Dana failed to supervise Echo, and allowed Echo to run into the bathroom and touch the dryer. This sort of defense, which might implicate the negligence of both Dana and Echo on the wrongful death claim, is unlikely to succeed, as Echo was a child (and thus, held to the standard of a reasonably prudent toddler) and Dana would not appear to have done what a reasonably prudent mother would not have done simply by allowing her child in the bathroom.]

## **Echo v. Baker – Survival**

When a person dies, [almost any] cause of action survives ... death and is transferred to [that person's] personal representative. As [Echo's] mother, Dana would then likely be able to state a cause of action [on behalf of Echo's estate] for negligence.

[In most states, Echo's estate would be entitled to recover all economic damages incurred from the time of injury until the time of death. And, in some jurisdictions (not California), Echo's estate would be entitled to recover for pain and suffering of the deceased person, even if that pain and suffering lasted only an instant (such as, when a plane is crashing.)]

Because Echo died instantly [however], there would [appear to] be no [legally cognizable damages recoverable by Echo's estate upon a] cause of action for survival.

## **Dana v. Able – Vicarious Responsibility**

In determining if Able is liable for the injuries sustained by Dana and Echo, it must be determined if he is vicariously liable for the negligence of Baker.

Generally, employers are liable for the torts committed by employees operating within the scope of their employment. However, this rule does not apply to independent contractors. An independent contractor is one who does a specific job for another, but does it without being under the direct control or supervision of the hirer. There are a few tests for when a person is an independent contractor, such as whether they supply their own tools and materials, and whether they are told when and how to do a job.

Able does not supply the tools that the electricians he hires use, nor does he give them any specific instructions as to how to do their job. He just tells them what job needs to be done, where it needs to be done, and expects them to rely on their own skills to perform the job. Baker was one of these electricians, so he meets all of the requirements of being an independent contractor, rather than an employee.

Normally, hirers of independent contractors are not liable for torts committed by independent contractors in the scope of their work. There are some exceptions, however. One of them is "apparent authority." That is, when the contractor or the hirer holds the contractor out to be an employee to third parties, the law will treat their relationship accordingly.

Able referred to Baker as "one of the electricians on [his] staff." Such a reference would lead any reasonable person to believe that Baker, was, in fact, a member of Able's staff, and therefore, an employee. I therefore conclude that the exception to the independent contractor rule known as "apparent authority" applies to Able and Baker. Therefore, Able is vicariously liable for the torts committed by Baker in the scope of his work.

Moreover, D may also be able to claim [A's] vicarious liability under the theory of joint enterprise, which states that if there is a group of people acting for a common purpose, with a pecuniary interest and equal right of control, then each is vicariously liable [for the conduct of the] other [in connection with the enterprise.]

Because A and B were working together (group) to complete the job (purpose) for a sum (pecuniary interest), the only thing that would be left to determine would be equal control. Here, the argument for joint enterprise would possibly fail because ... B was at the job site controlling the situation, whereas A was not. However, it may be strong enough to still establish liability if fact finder thought there was equal right to control, and so under either apparent authority exception to independent contractors or joint enterprise, [D] would likely be able to claim [the] vicarious liability [of] A [for the wrongful conduct of B.]

### **Able v. Baker - Indemnity**

Because Baker is entirely at fault for the death of Echo, and Able, as established above, [would be at most] vicariously liable, Able may [seek and be] indemnif[ied] by Baker for the entire judgment, since he is not actually at fault. A person who is not at fault, but vicariously liable for the actions of another by operation of law, can [seek] indemni[ty from] the actor who is actually at fault for his share of the damages. Therefore, [if Able is held responsible] will be able to recover from [Baker] the full value of Dana's claim against him.

[Of course, Able would not be entitled to total indemnity were Able found at fault, by reason of, for example, negligent referral of Baker to Dana, or knowledge of Baker's practice of wiring dryers improperly.]

### **Able v. Dana- Assault and Battery**

#### **Assault**

Able must show that Dana intentionally put him in an imminent apprehension of a harmful or offensive contact.

Dana clearly acted with the purpose of putting Able in an imminent apprehension of a harmful or offensive contact when she came out of the bushes, brandishing a weapon, and yelled at Able. Baker almost certainly experienced such apprehension. Therefore, Dana committed assault against Able.

[This conduct could also meet the elements of intentional infliction of emotional distress: extreme and outrageous conduct (acquiring a TASER, hiding in the bushes, lunging out screaming “you monster”), intended to cause severe emotional distress, if not worse, and a heart attack which would certainly appear to have been a manifestation of severe emotional distress (although the heart attack certainly could have been caused by the TASER.)]

### **Battery**

Intentionally causing a harmful or offensive contact with the person of another.

### **Intent**

There is nothing in the facts indicating that Dana wanted anything other than to electrocute Able. Therefore, she had both the purpose of causing such a contact with Able, and a substantial certainty that it would occur. The element of intent for battery is met.

### **Harmful contact**

Dana electrocuted Able. This caused severe injury, therefore, it was a harmful contact.

Therefore, Dana committed battery against Able.

### **Damages**

Dana may argue that she was not aware of Able's heart condition, and that this should at least partially bar Dana's recover. Dana would be mistaken to make such an argument. Under the "eggshell skull" rule, if you commit a tort against a person, and it causes an injury beyond what would normally be expected, you are liable for whatever injury that you cause. It doesn't matter if the defendant intended to cause a specific injury, all that matters is that the defendant intended to commit the tort. As shown above, Dana intended to commit battery, making her liable for the full extent of Able's injuries which are caused by her commission of battery.

Therefore, Able can recover his full medical expenses from Dana, the pain and suffering associated with the heart attack, and his lost wages.

### **Able v. Dana - Trespass to Land**

A may try to state a cause of action for trespass to land. He must show that D [intentionally] entered ... his land .. and ... D had [no] consent [and no apparent privilege] to be there. [Therefore,] she would likely be found liable for trespass and would have to pay for any damages to the property because of her trespass [even if nominal damages only.]