TORTS II PROFESSOR DEWOLF
SPRING 1995 May 12, 1995

SAMLE ANSWER

QUESTION 1

[*This case is based upon* Wagner v. Roche Laboratories, 77 Ohio St.3d 116, 671 N.E. 2d 252 (1996). *In that case the supreme court reinstated a jury verdict for the plaintiff, based upon a finding that the warning accompanying Accutane was inadequate*.]

I would consider a number of potential claims; first, I would consider suing the doctors who prescribed the drugs to her; second, I would consider suing the manufacturers of the drugs; and third, I would consider whether or not the FDA had any responsibility for her injury.

Claims Against the Doctors

A physician is liable to a patient for injuries suffered by the patient as a result of medical treatment if (a) the doctor failed to use reasonable care in treating the patient; or (b) the doctor failed to obtain informed consent from the patient prior to treatment.

a. *Negligence*. Dr. Burkhardt prescribed Acutane, which eventually required the use of steroids, which caused her injury. However, there is no evidence that Dr. Burkhart was negligent. To determine negligence, we would ask whether a reasonable physician practicing in the same specialty and under the same conditions as Dr. Burkhart would have followed a different standard of care. Nothing in the fact pattern suggests that such would be the case. In any event, we would have to find an expert witness who would testify that Dr. Burkhart did not meet the standard of care.

A similar analysis would apply to the ophthalmologist and the neurologist. Perhaps more information was known by either the ophthalmologist or the neurologist regarding the risks of PTC.

b. *Informed consent*. In addition to performing medical procedures with reasonable care, a doctor has a duty to inform the patient about material risks associated with diagnostic or therapeutic options, and to explore alternative forms of treatment. Most jurisdictions follow a standard based upon what information a reasonable patient would want before consenting to a procedure. In this case, we would need expert testimony to show that there was enough information available about potential risks, either from the Accutane or steroid treatment, that would have led to a presentation of this information to Mrs. Wagner. Since Mrs. Wagner's original problem was acne, and her ultimate treatment cost her a shoulder and two hips. One alternative treatment would be a less aggressive treatment of her acne; and/or to put up with the headaches rather than begin steroid treatment.

Claims v. Smith / Roche

The drug manufacturers are liable for injuries caused by the use of their product(s) if the product has a defect. In this case the injury was caused by the interaction of Minocin and Accutane, which in turn led to her need for steroids. It doesn't appear that there was anything wrong with either drug in isolation; it was only in combination that the risk was significant. Thus, the question is whether or not the failure to warn about the interaction between the drugs rendered either or both drugs defective.

Jurisdictions differ on whether or not to apply a strict liability standard or a negligence standard in deciding whether products are defective. Some jurisdictions (like California in the *Brown* case) have applied a special rule to pharmaceutical drugs that imposes liability only when the manufacturer was negligent. (The difference is that in a strict liability claim the plaintiff could utilize the information we now have about risks associated with the product; that would make a big difference in this case: we now know about the "synergistic effect" between Accutane and Minocin, and thus the the product would be unreasonably dangerous if it did not warn of this effect. On the other hand, it might be very difficult to show that the manufacturer was negligent in failing to warn about a danger which at the time was unknown.) Thus, I would examine the law in my jurisdiction to find out whether the courts would apply a strict liability rule or a negligence rule in a case like this.

FDA

The FDA was involved in the approval of this drug, and thus it might be thought tha a claim could be brought against them for negligently allowing a dangerous drug to be used. However, the FDA enjoys sovereign immunity to the extent that its decisions are based on the exercise of a discretionary (policymaking) function. In this case the decision about whether to approve a drug is likely to be considered that sort of decision.

Comparative Fault

If it should turn out that more than one defendant was found to be negligent (or liable for selling a defective product) then we would have to consult the statutes on how the joint liability would be allocated. This jurisdiction turns out to have a "reallocation" formula for the imposition of liability among joint tortfeasors. That is, if one of the defendants turned out to be insolvent, then the liability is "reallocated" between the plaintiff and the defendant. If this were a case in which the plaintiff acted negligently or assumed a risk (I don't see any basis for that in the facts) then the share of any insolvent defendants would be reallocated according to the respective shares of fault between the plaintiff and any remaining solvent defendants.

Also, if there were a settlement with one or more defendants, the claim against the remaining defendants would be reduced by the dollar amount actually received in settlement (see the statute, § 2(c) and § 4).

QUESTION 2

[*This case is loosely based upon* Ohio v. Lefevre, 1995 WL 258959. *In that case the supreme court affirmed a conviction for assault, finding that there was no reasonable belief that his life was in jeopardy*.]

LeFevre is likely to be sued by Poling, Moles, and Shannon. Poling will sue on the basis of battery, since he was struck with the pellets that were fired by Lefevre. An actor is liable for battery if he intends to cause injury or the apprehension of such injury, and thereby causes harmful or offensive contact. The only real issue will be the question of intent. By firing a shotgun in the direction of the car, Lefevre's actions were substantially certain to cause harm or the apprehension of harm, and therefore the intent element is satisfied. At the same time, Lefevre is likely to claim that his actions were based upon his legitimate fear that the noises were coming from someone intent on harming him. However, to justify the use of deadly force, there must be some threat to his person

or to someone else. That is not the case here; moreover, his fear must a reasonable one, and it is doubtful that such a finding could be made here, given the high probability that the noises connected with the car were really coming from someone repossessing the car.

Similar claims would be filed by Moles and Shannon, except they would allege assault (apprehension) rather than battery. Their damages would be less significant, but the same general principles would apply as with the battery claim brought by Poling.

As an alternative approach, the plaintiffs might argue that they were injured by the negligence of Lefevre. This would allow them to seek insurance coverage, but the carrier would likely claim that the action was intentional and therefore not covered. If Lefevre tried to argue that premises liability would apply, and that the plaintiffs were mere trespassers, he would lose. First, even a trespasser is owed the duty to avoid willful and wanton injury, and this case would fall within that category (assuming he had no justification to shoot). Moreover, it isn't really a premises liability claim, since the plaintiffs were injured not by a condition of the premises, but rather by the actions of the owner.

Finally, Lefevre might argue that the plaintiffs assumed the risk or were negligent in conducting the repossession operation, but I don't think that argument would hold water. They had a lawful right to be there, and did not assume the risk of being shot.

SPRING '95 FINAL—CHECKLIST

QUESTION 1

- ☐ Overview
- ☐ Claim v. Dr. Burkhardt
- ☐ Claim v. Ophthalmologist
- ☐ Claim v. Neurologist
- ☐ Medical Negligence
- ☐ Standard of care for that specialty
- ☐ Need for expert testimony
- ☐ Informed Consent
- ☐ What would reasonable patient have wanted to know
- ☐ material risks
- ☐ alternative therapies?
- ☐ Claim v. Smith: failure to warn about Minocin
- ☐ Claim v. Roche
- ☐ Concept of a Defect
- ☐ Failure to Warn claim
- ☐ strict liability v. negligence
- ☐ imputed knowledge would make a big difference
- ☐ special status of pharmaceutical drugs
- ☐ Claim v. FDA
- ☐ Sovereign Immunity
- ☐ discretionary function
- ☐ Comparative fault
- ☐ contributory negligence / assumption of risk?
- ☐ "Reallocation" formula for uncollectability
- ☐ Dollar method for reduction of claim; see § 2(c) + § 4
- ☐

QUESTION 2

- ☐ Overview
- ☐ Battery
- ☐ Intent to harm or cause fear of harm
- ☐ Intent includes "substantially certain" events
- ☐ Defense of self or others - not applicable
- ☐ Defense of property: only reasonable; no deadly force
- ☐ Negligence - failure to use reasonable care
- ☐ insurance implications?
- ☐ Premises liability not relevant
- ☐ duty not to shoot
- ☐ comparative fault?
- ☐
- ☐

QUESTION 3

- ☐ Overview
- ☐ Major changes
- ☐ trades speedy clearing of name for right to damage remedy
- ☐ doesn't require proof of malice, but clear & convincing
- ☐ damages action requires malice for all
- ☐ (removes distinction between public & private)
- ☐ contains attorney fee provision that encourages settlement
- ☐
- ☐