3)

Primary Legal Topic: Torts

1. Is State Hospital liable for Cook's negligence?

Issue: Is State Hospital vicariously liable for Cook's negligence?

Rule: Vicarious Liability (Respondeat Superior)

Under the doctrine of vicarious liability (a subset of strict liability), an employer may be held liable for the torts of an employee if the employee acted within the scope of employment. Vicarious liability does not typically include the intentional torts of employees, but does apply to employee negligence. Vicarious liability applies to employer-employee relationships, but does not usually apply to relationships with an independent contractor, unless the activity performed is inherently dangerous or the independent contractor's behavior is controlled to the level of a typical employee (i.e., clear told what to do, how to do it, and given the tools to do so).

(i) Employer-Employee v. Employer-Independent Contractor

Here, State Hospital employs Cook's Catering to make meals for the hospital staff, patients, and visitors. State Hospital is vicariously liable for its employees, but may not be liable for independent contractors. Cook's Catering is owned and operated by Kimberly Cook. Because Kimberly Cook is said to own and operate her own business, it can reasonably be assumed that she is an independent contractor. There is no indication that State Hospital tells Kimberly Cook what food to make, how to make, whom to hire, or how to run her kitchen. Further, the facts state "neither Kimberly Cook nor any of her employees" were present in the kitchen when Frank entered. This indicates that Kimberly hired her own employees and did not merely assume management responsibilities of employees hired by State Hospital. Viewed in the light of the totality of the circumstances, Kimberly is most likely an independent contractor. If Kimberly Cook is an independent contractor, then State Hospital is **not** vicariously liable for the negligence of Kimberly or Cook's Catering unless the activities performed are inherently dangerous.

(ii) Inherently Dangerous

Here, making food would almost certainly **not** be considered an inherently dangerous

activity. Inherently dangerous activities are those for which (1) no amount of reasonable care can render them safe and (2) they are not typical activities of the community. While there are ways in which commercial cooking *can* be dangerous--such as through food contamination, allergies, etc.--the nature of the activity can be made safe and should be considered typical of a hospital community.

a. Cooking is an activity that **can** be made safe. One way to make commercial cooking safe is to hire a security guard--which State Hospital had done--to keep watch of the kitchen, so as to ensure that it is always supervised and inaccessible to those without clearance. Another way to make a commercial kitchen safe is through the State health code which provides that "food served in a hospital must never be left unattended before, during, or after meal service to prevent contamination or tampering."

b. Cooking is an activity that is **widely performed in the community**, both at the hospital and surely in the surrounding area at restaurants and other commercial eateries.

The nature of the activities performed by Kimberly and Cook's Catering should not be considered inherently dangerous.

In this case, the State Hospital is most likely not vicariously liable for Cook's negligence because Cook is an independent contractor and the nature of the activities she was hired to perform do not meet any of the exceptions to vicarious liability for employer-independent contractor relationships.

(iii) Contributory Negligence (majority view)

Rule: Contributory negligence is the majority view defense to negligence. There are two versions of contributory negligence: (1) Partial Contributory Negligence: Fault is allocated across all responsible parties, both plaintiff(s) and defendant(s), such that the plaintiff can collect a percentage of the damages from defendant(s) based on percentage fault; and (2) Pure Contributory Negligence: If the plaintiff is more than 50% at fault, then he/she collects nothing.

Here, State Hospital may be **contributorily negligent** (although not vicariously liable) for removing the security guard from his usual post supervising the kitchen without first telling

Kimberly Cook about the change. It is possible the Kimberly could assert a defense against State Hospital that *because* a security guard is always patrolling the kitchen area, she didn't have any reason to ensure an employee remained in the kitchen at all times to oversee food production and protect against contamination/tampering. While Kimberly Cook may be able to claim a limited degree of fault from the State Hospital under pure or partial contributory negligence, as an independent contractor, Kimberly is still responsible for the full oversight of her onsite catering production. So, even in the absence of proper communication from the hospital about the removal of the kitchen security guard, Kimberly would still be primarily responsible for ensuring her onsite catering business adhered to the state health code. Furthermore, it might be argued by the State Hospital that the security guard's absence should have been noticeable to Kimberly, even without proper communication from the hospital CEO. And, because of the state health code, there was a reasonable expectation for Kimberly to have noticed the security guard's absence and taken measure to ensure someone from her kitchen staff supervised at all times.

Either way, even if State Hospital is deemed contributorily negligent for failing to communicate the relocating of the kitchen security guard, the State Hospital would most likely **not** be vicariously liable for Cook's negligence.

2. Does State Hospital owe Patrick a duty to protect him from Frank?

Issue: Does State Hospital have a duty to protect its patients, like Patrick, from intruders, like Frank?

Rule: Negligence: (1) Duty; (2) Breach; (3) Causation--both actual (but-for) and proximate (foreseeable); (4) damages

Sub-Rule: Duty: a duty of care is the standard of care owed by a reasonably prudent person in like circumstances to all foreseeable individuals. Parties of particular authority may owe a higher duty of care to foreseeable individuals because of the nature of the service offered and the relationship established. Such "higher" duties are required of medical professionals and innkeepers.

(i) Vicarious Liability:

See rule above. The State Hospital has an employer-employee relationship with the

hospital CEO, Davis. Therefore, State Hospital is vicariously liable for Davis' negligent behavior in the course of her regular employment. Here, dealing with email threats to the hospital is almost certainly within the clear scope of Davis' job. Therefore, if Davis owed a duty of care to the patients at State Hospital, which she did as reasonably foreseeable parties to her conduct, then State Hospital owes a vicarious duty of care to those patients through Davis.

(ii) Duty of Care

Here, State Hospital owes a vicarious duty of care to patients, including Patrick. It also owes a direct duty of care.

State Hospital--as a public hospital, funded by the state, and offering a particular set of unique services--has both a "medical professional" duty of care and an "innkeeper" duty of care to its patients (and probably to staff, visitors and other foreseeable invitees). The "medical professional" duty of care requires the same care and skill of others in like profession and position. The innkeeper duty of care requires the exercise of upmost care. In both cases, the duties of care are *more* than that of a reasonably prudent person in like circumstances. Under both the medical professional duty and innkeeper duty of utmost care, State Hospital must make all possible and reasonable efforts to ensure the safety and care of its patients. In this case, State Hospital is a provider of medical services and professionals *and* has an innkeeper duty of care to its in-patients who are required to live at the hospital, including eating and sleeping. State Hospital owed this utmost duty of care to Patrick to create a safe and secure place for him to receive healthcare, sleep, eat (at a minimum), and obtain any of the other services offered to him by the hospital.

State Hospital had security guards who patrolled the hospital, including lobby, entry, and kitchen. It is not known if the security guards patrolled the in-patient wings or other areas that might be at risk for intruders. When the CEO of State Hospital learned there might be "a massive attack," she had a duty on behalf of the hospital (vicarious liability under an employer-employee relationship) to act so as to keep its patients safe. While there was not express duty to notify patients or even staff, the CEO and hospital both have duty to protect its patients from reasonably foreseeable harm.

A threatened "massive attack" is foreseeable because both the CEO, and therefore the hospital, were put on notice and have a duty of care to all those who might be foreseeably injured by the attack--either to notify them and/or make them safe from the attack.

3. What defense(s), if any, may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard from the hospital kitchen?

Issue: Does Davis have one or more defenses to assert against Patrick's claim she was negligent?

Rule: Contributory Negligence (Majority view): See rule above.

Here, Davis could try to assert a contributory negligence defense that she was not solely responsible and only partially responsible. She could assert a defense against the hospital as partially responsible for not providing more security guards and she could certainly include a claim against Cook as largely responsible for not manning the kitchen, which was a statutory obligation of hers.

Rule: Comparative Fault (Minority view): Comparative fault bars the plaintiff from any recovery if the plaintiff was at all contributorily negligent. Here, Davis is not a plaintiff, but in a claim against the hospital or Cook could claim that either or both was also negligent and therefore they cannot recover against her.

Rule: Assumption of the risk: Assumption of the risk is a defense to negligence whereby the defendant assumes the risk of injury and therefore the plaintiff is partially or fully barred from liability. This defense does not work here, because there was no assumption of the risk.

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