

A man and a woman were competing in an illegal drag race. Both of them were driving over the speed limit but were otherwise driving very carefully. However, when a tire on the woman's car suddenly blew out, she lost control of her car and crashed, injuring a pedestrian.

The pedestrian later sued the man, because the woman had no insurance or assets.

Will the pedestrian be likely to prevail in that action?

- A. No, because the man did not cause the injury.
- B. No, because the man was driving very carefully.
- C. Yes, because the man and the woman were acting in concert in a dangerous activity.
- D. Yes, because the man was exceeding the speed limit.

Explanation:

Liability of multiple negligent actors

	Indivisible injuries	Separable injuries
Acting independently	Joint & several liability*	Several liability only
Acting in concert	Joint & several liability	

*Default rule on MBE.

Tort claims for personal injury generally require proof that the defendant's tortious conduct **actually and proximately** caused the plaintiff's harm. However, when **two or more tortfeasors** act pursuant to a common plan or design (ie, **act in concert**) AND **one or more** of them **cause the plaintiff's harm**, *all* of the tortfeasors are jointly and severally liable for 100% of the harm.

Here, the man and woman were competing in an illegal drag race (acting in concert) when the woman crashed her car and injured the pedestrian. As a result, the man and woman are jointly and severally liable for the pedestrian's injury, and the pedestrian will prevail against the man—regardless of whether he also caused the injury **(Choice A)**.

(Choices B & D) Even if the man was driving carefully, he was likely **negligent per se** since he was speeding in an illegal drag race in violation of traffic laws designed to protect persons like the pedestrian from harm. But this alone does not subject the man to liability since it does not prove that his tortious conduct *caused* the pedestrian's injury. Instead, the man is liable because he was acting in concert with the woman who caused the injury.

Educational objective:

If multiple tortfeasors act pursuant to a common plan or design (ie, act in concert) and at least one of them causes the plaintiff's harm, then *all* of the tortfeasors are jointly and severally liable for the harm.

References

Restatement (Second) of Torts § 876 (Am. Law Inst. 1965) (explaining that a defendant is subject to liability if the defendant commits a tortious act in concert with others or pursuant to a common design).

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