

A philanthropist operates a residential rehabilitation center for emotionally disturbed and ungovernable children who have been committed to his custody by their parents or by juvenile authorities. The center's purpose is to modify the behavior of the children through a teaching program carried out in a family-like environment. Though the children are not permitted to leave the center without his permission, there are no bars or guards to prevent them from doing so. It has been held in the state where the center is located that persons having custody of children have the same duties and responsibilities that they would have if they were the parents of the children.

An orphan, aged 12, who had been in the philanthropist's custody for six months while exhibiting no signs of violence, left the center without permission. The philanthropist became aware of the orphan's absence almost immediately, but made no attempt to locate him or secure his return, though reports reached him that the orphan had been seen in the vicinity. Thirty-six hours after the orphan left the center, he committed a brutal assault upon a five-year-old girl, causing her to suffer extensive permanent injury.

If an action is brought against the philanthropist on behalf of the girl to recover damages for her injuries, is the girl likely to prevail?

- A. No, because custodians are not personally liable for the intentional torts of those in custody.
- B. No, because the philanthropist did not know or have reason to know that the orphan had a propensity to attack younger children.
- C. Yes, because the orphan was in the philanthropist's custody.
- D. Yes, because the orphan was old enough to be liable for battery.

Explanation:

Defendants generally have no duty to control the conduct of others absent some **special relationship**. Custodians have a special relationship with persons in their custody, so custodians owe a **duty to use reasonable care** to mitigate any **foreseeable risks of harm** that those persons pose to others (eg, where a custodian knows of a prisoner's threat or propensity for violence). If a custodian breaches that duty and causes the plaintiff physical harm, the custodian will be liable for **negligence**.

Here, the orphan was in the philanthropist's custody (special relationship). But since the orphan exhibited no signs of violence, the philanthropist neither knew nor had reason to know of the orphan's propensity for attacking younger children (no foreseeable risk of harm). Therefore, the philanthropist did not breach a duty of care owed to the girl, and the girl is unlikely to prevail.

(Choice A) A custodian is personally liable (ie, directly liable) for the intentional tort of a person in his/her custody if the custodian encouraged the person to commit that tort.

(Choice C) Although the philanthropist's custody of the orphan imposed a duty of reasonable care, that duty only required the philanthropist to mitigate *foreseeable* risks of harm. Since any risk of harm by the orphan was *unforeseeable*, the philanthropist did not breach that duty.

(Choice D) The fact that the orphan was old enough to be liable for **battery** is insufficient to establish the philanthropist's liability. The philanthropist would be liable only if the orphan posed a foreseeable risk of harm (liability for negligent failure to control) *or* acted on the philanthropist's behalf (direct liability for battery).

Educational objective:

Because of their special relationship with persons in their custody, custodians have a duty to use reasonable care to mitigate any foreseeable risks of harm that those persons pose to others. Therefore, a custodian may be liable for negligence if he/she breaches that duty and a person in his/her custody harms the plaintiff.

References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 41 (Am. Law Inst. 2012) (duty to control another's foreseeable risk of harm).

Copyright © 1995 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Special relationships creating a duty to control others



Parent and
child



Mental-health
professional and patient



Employer and
employee



Custodian and
prisoner

Mnemonic: **P**lease **M**ake **E**veryone **C**areful