

Klick
Torts
The Armageddon
December 10, 2018

This exam is open book, open notes, open commercial outlines, etc. Each of the 2 questions is potentially worth the same fraction of the total score, subject to your decision for item #3. You have 4 hours to complete this exam using the law school's test taking software. Remember, you are all above average on some distribution . . . unfortunately, that can't be true on this particular one. Good luck.

1. Since 1964, Americans age 65 and over (as well as some other individuals such as those covered by Social Security Disability and individuals with end stage renal disease) are eligible to have their hospital costs (Medicare Part A), costs associated with services provided by doctors and physical therapists (Medicare Part B), and prescription drug costs (Medicare Part D as of 2006) covered under the federal Medicare program. Under the Medicare Secondary Payer Act of 1980, Medicare was designated as a secondary insurance for costs arising from a tort or workers' compensation covered injury. In effect, this meant that while Medicare would cover eligible medical expenses arising from torts or accidents on the job, any payments made by Medicare would be deemed "conditional" with the expectation that the Medicare beneficiary would reimburse Medicare for these payments in the event that the beneficiary received damages for the medical expenses in a lawsuit (either through a settlement or a judgment) or through a no-fault payment arrangement (such as in workers' compensation). The 1980 act had no enforcement provision, however, so virtually no one voluntarily reimbursed Medicare in such circumstances. The only way Medicare collected on any of its conditional payments was by subrogation (i.e., asserting itself as a party in litigation/settlement negotiations – something it only did when conditional payments were very large).

This changed with the passage of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) which required third-party insurers such as liability insurers, no-fault insurers, or workers' compensation plans to notify Medicare regarding any judgments, payments, or settlements involving Medicare beneficiaries. The requirements were specifically designed to facilitate HHS's ability to collect funds used to treat beneficiaries. The Act specifies that CMS can recover from an insurer, even if it has already paid the plaintiff, from settlement funds, or from plaintiffs' attorneys. The Act also specifies substantial fines for a failure to report. Essentially, it is now the case that before settlements are agreed to entities involved in any relevant litigation (insurers, lawyers, or plaintiffs themselves) must obtain an estimate from Medicare regarding how much it has spent on the plaintiff's medical care related to the underlying tort/accident/injury and, upon payment, must compensate Medicare for that amount. Of potential interest, Medicare does not offer a so-called settlement "discount" (i.e., litigating parties will often be willing to settle based on an expected value of an ultimate judgment which includes the possibility that the plaintiff will lose at trial) and Medicare reserves the right to decide that some future healthcare expenditures are actually related to the original tort/injury/accident even if those expenditures occur well after the settlement/payment/judgment.

Discuss the various (positive and normative) effects this Medicare Secondary Payer issue might have on the tort system and the various goals we hope to achieve through the tort system.

On the positive side, MSP represents an attempt to avoid the windfall that exists if someone is able to sue for money he did not lose (since Medicare covered medical expenses). However, this might lead to some problems to the extent that individuals may no longer have an incentive to sue if they cannot recover for these expenses (this might be a particular concern since the older people covered by Medicare might be less likely to have lost income). If that is the case, we might worry about under-deterrence. Another positive, at least in principle, might be that MSP helps fund Medicare (an expensive program that otherwise requires tax revenue; raising that revenue through higher taxes could have bad economic effects (e.g., raising payroll taxes could discourage people from working, etc), so substituting MSP revenues for required taxes could be a good thing).

On the negative side, in addition to possibly reducing people's incentive to sue (and therefore reducing deterrence), the MSP reimbursements might discourage settlement for those cases that are brought. If there is uncertainty about how much Medicare is owed (especially in the case where future expenses might be attributed to the underlying tort injury) risk averse plaintiffs will be hesitant to settle. To make matters worse, because individuals on both sides are often interested in settlement to avoid the risk (variance) of a trial as well as court costs, with parties willing to settle at the expected value of the claim (probability of plaintiff win X judgment amount), Medicare's failure to take a settlement "discount" will diminish the plaintiff's willingness to do the same. This too will reduce settlement, leading to more resources (both public and private) being spent on litigation.

Administrability concerns also arise because individuals involved in the litigation (lawyers, insurers, etc) must now collect more information (e.g., Medicare ID's which are social security numbers) so they can query Medicare to determine whether any conditional payments have been made, and Medicare itself now bears non-trivial information collection/reporting costs (including determining whether spending is related to the underlying tort and providing estimates to the litigating parties).

2. Bean Simmons (a star non-shooting guard for the Philadelphia 76ers) and Kendall Jenner (a decidedly non-Philadelphia person who is famous for some indeterminate reason) are a romantic couple. Everywhere the couple goes, swarms of admirers follow. The couple is invited to a super private wrap party for the movie *Clubber III: A Madea Halloween*, starring Rocky Stallone, Michael J. Jordan, Mr. T, and the one of a kind robot, Sico (owned by Stallone), who won an Oscar for its starring role in *Rocky IV* and now makes millions of dollars per year giving motivational speeches. *Clubber III* is set to be released shortly, one year after the blockbuster (gross revenues of \$800 million) success of *Clubber II: Rocky vs Madea*. The party organizers tell Simmons and Jenner to keep the location secret and to make sure nobody follows them to the secret location. They promise that they will keep the location secret. To avoid attention, Simmons wears a Markelle Fultz disguise (since nobody would recognize Fultz) and Jenner wears a tag bearing the name of one of her less interesting sisters, Joslin Bieber. When the couple gets to the party, Jenner's facebook app sends out a location signal to all of her 6 million facebook "friends" letting them know where she is. Jenner did not know that the facebook app provides this location signal and nowhere on the facebook website or on the app's documentation is this feature disclosed. That said, most users notice that the app does this because they see other people's locations specified on the app. Jenner has never noticed this. The location function cannot be turned off, though the phone can be turned off which effectively disables the location function. Shortly after arriving though, Jenner does send out

an Instagram picture on her “story” (which is followed by 3 million people) of her and Simmons (in disguise) on the world-famous Philadelphia Art Museum steps with the cast of Clubber III. Within minutes, thousands of people converge at the Art Museum. The crowd is angered because the people don’t see Jenneric. Many individuals demand to know where she is. Simmons (dressed as Fultz) tells the crowd to go home, but the crowd just gets louder and rowdier. Eventually, Mr. T yells, “I pity the fool who doesn’t get the hell out of here.” One crowd member, Barls Charkley, replies, “You the fool, you fool,” which leads Mr. T to tackle Charkley. A melee breaks out. In the course of the rumble, Sico is demolished and cannot be repaired. Also, the bad publicity arising from the ruckus causes (at least in the estimation of movie industry experts) Clubber III to fail at the theaters, generating revenue of only \$5 million against a budget of \$100 million. Outline any torts cases (and associated defenses) that might arise from this episode.

Many different things going on here. It might be easiest to organize an answer around who has legal claims. Charkley (and maybe Mr. T) as well as other unnamed brawlers might have been harmed in the ruckus. Stallone lost an income-producing robot. The producers of the movie might have a claim regarding lost revenues. There is no indication that Jenneric or Simmons suffered damages, so they are unlikely to have a claim.

Some thought Jenneric might have a claim despite there being no stated damages, however, so let’s briefly address what people might have thought. Perhaps (given what will be stated below) Jenneric will face liability for “causing” the ruckus and, therefore, she might be able to sue Facebook for revealing her location. First, this is problematic in that it would resemble contribution which courts are unlikely to recognize. Beyond that, any claim against FB would face cause in fact problems (she independently revealed her location through her Instagram post) and proximate cause issues (the crowd members, Mr. T., Charkley, etc would all be intervening actors). Also, it’s not clear that FB owes her a duty to not reveal her location. Many people wanted to invoke products liability principles (design defect regarding the inability to turn off the location services; duty to warn of location services, etc) but there would be some dispute regarding whether FB is a product or a service (for which products liability principles won’t generally apply). Further, reasonableness inquiries would likely go against Jenneric since most people would have been aware of the location issue and would have turned the phone off, though those might be jury questions. For these reasons, Jenneric will have a hard time bringing any case.

Charkley presumably has a fairly easy battery claim against Mr. T, though injuries were not explicitly described (many people reasonably assumed he might have medical bills and pain and suffering). Mr. T might try to claim consent or self defense given Charkley’s comment, but such defenses will likely be ineffective. Even if Mr. T was apprehensive/fearful, his response was likely disproportionate. Consent would fare even worse since a nasty comment does not equal consent. Individual brawlers might have claims against each other, though self defense might be an effective legal defense.

Stallone might bring claims for the loss of Sico. Presumably a robot cannot recover for pain and suffering, loss of life, etc, but Stallone might be able to recover for the lost income and property. For the income, presumably the long track record of speaking fees can be used to establish damages that are not terribly speculative. It might be difficult to estimate a robot’s working life horizon. Beyond lost income, Stallone might try to claim more subjective

damages (since Sico is one of a kind, and can't be replaced), but the robot's uniqueness will also pose valuation problems (if there were a replacement available in the market, the damages would be easier to value).

As for whom to sue, assuming it is not possible to identify any individual who actually destroyed the robot, the obvious candidates are Jenneric and Mr. T., and maybe the individuals who hosted the wrap party.

Regarding Jenneric, Stallone would need to establish that she had a duty to keep the party location secret. Since people do not generally have affirmative duties, this might be hard. Perhaps her promise to do so established a duty (there is a notes case in the text where someone did not have a duty to have his pet tested for rabies or to monitor the animal during the incubation period for rabies, after it scratched someone, but once a promise was made to monitor, the court found that a jury could determine that established a duty. Even if the promise established a duty for some purposes (for example wrt those who invited her), it might not extend to others. If a duty to Stallone is established, he will face proximate cause concerns (are the brawlers intervening actors; is a brawl a foreseeable consequence of her failure to keep the promise). All of these (except for the duty question in most likelihood) will be jury questions.

Suing Mr. T or Charkley for "starting" the mayhem would likely falter on similar proximate cause grounds (but perhaps bedlam is a foreseeable effect of engaging in an altercation in a crowd). Assuming Stallone is not one of the people who organized the party, he may try to claim that the party organizers owed him a duty to provide security. Again, proximate cause concerns would arise with any such claim.

The movie producers might try similar claims against Jenneric and the brawlers (facing similar difficulties). Additionally, they would face some unique defenses. First, with respect to Jenneric, there would be cause in fact concerns since, arguably, having a party on the Art Museum steps would have led to crowds regardless of what Jenneric did to keep things secret. Further, having invited Jenneric (reasonably knowing that crowds follow her) the producers might reasonably be seen to have assumed the risk of craziness ensuing or might have been contributorily negligent for not taking steps to avoid the problems (e.g., having the party in a non public place). The producers damages will also create some difficulties. It would be difficult to prove that the ruckus is what caused the movie to do poorly. Perhaps experts can somehow plausibly make that claim (e.g., by examining the revenues from the previous films or similar films; looking at the effect of similar bad publicity, etc). Assuming experts can use reliable and relevant methods to make this determination, the correct measure of damages is not the accounting loss (\$100M budget - \$5M revenue) but the counterfactual measure of the difference between what the movie did make (\$5M) and what it would have made. A judge or jurors might find any counterfactual analysis highly speculative and either exclude the testimony or give it little weight.

Some people raised the possibility of suing the Art Museum for not providing better security. This claim, while not impossible, would fare better if the ruckus hadn't taken place in a completely public place (the Art Museum steps).

3. Choose one of the two questions to count double (i.e., the total points for the chosen question are multiplied by 2 and then added to the points for the other question to yield your total score) or indicate that you would like to diversify in which case I will multiply the points from each question by 1.5 and then sum those points for your point total. Clearly indicate your choice. Failure to do so will lead to an automatic loss of $\frac{1}{3}$ of the potential points for the exam.