Torts Section 3
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The Armageddon
December 12, 2011
9:30-1:30

This final exam consists of four questions. Each question will be given equal weight in determining your final grade (subject to your decision for #4).

This is an open book and open note exam. You may use your casebook, class notes, casebook supplements, commercial outlines, commercial supplements, lucky charms, and any other printed or written materials you believe will be helpful in completing your answers.

You will be given four hours to complete this exam, and you may allocate your time among the questions as you see fit. There is no answer sheet for this exam. You may write as long or as short an answer as you believe is necessary to completely answer the test questions.

If you perceive an ambiguity or error in any test question, please proceed to answer it, noting the ambiguity/error and making any reasonable assumptions you believe are necessary to answer the question. Please state these assumptions in your answer and provide your justification for the assumption.

Sorry for not having a funny hypo, but there is no way to make PSU/Syracuse funny (except when the latter is being whipped by the Wildcats), and I started writing an epic Kris Humphries/Kim Kardashian/Charles Barkley hypo, but it was just wrong.

Good luck and have a nice break.

1. In 2004, Governor Schwarzenegger proposed that California levy a 75% tax on punitive damages awarded at trial to help make up the state's budget shortfall. He estimated this would raise about $450 million per year. Rough estimates suggest that California state courts had awarded an average of about $600 million in punitive damages each year over the period 1991-2000. These so-called split-award statutes have been tried in a handful of other states. Discuss the pros and cons of a punitive damages tax like this. Include in your analysis some discussion of whether Governor Schwarzenegger's estimate of the revenue effects of his proposal was likely to be accurate.

The benefits of this are that it could avoid much of the overcompensation problem with respect to the litigating plaintiff while still maintaining the deterrence benefits. The latter is important since we need to allow for damages exceeding compensatory damages in cases where there is under-detection (e.g., to get deterrence "right" in cases where the wrong-doing will only be detected 10% of the time, we need a damage multiplier of 10). Also, in principle, the state could use the money to compensate non-litigating victims or for other good social purposes.

The downside is that there may be a lot of costs/risk associated with detecting and litigating these hard to detect cases. The prospect of punitive damages may be necessary to induce a plaintiff and his lawyer to pursue these cases. With a 75% tax, some of these cases won't be brought, which could lead to insufficient deterrence. There could be some concern that the tax revenue would lead the state to increase the scope of liability beyond what is required for efficiency, though given that punitive damages are pretty rare and are limited to pretty egregious circumstances, this concern is likely not large.

The biggest problem involves the effect this will have on settlement dynamics. In virtually any case where punitive damages are likely, there will be a very strong incentive for the defendant and plaintiff to settle out of court to cut the government out of the tax revenue. When this happens, the positives that were mentioned with respect to the tax revenue disappear. Also, the plaintiff in this scenario will still be "overcompensated" though perhaps to a lesser extent. While we would generally think more settlement is a benefit, as it lowers the burden on the court, the particular dynamics here have the potential to undermine deterrence. Specifically, imagine a baseline where punitive damages are set at the right level for deterrence. With the introduction of the tax, the plaintiff will have an incentive to settle for anything above expected compensatory damages plus .25*expected punitive damages, and the defendant will have the incentive to settle for anything below expected total damages. Most likely, this settlement bargaining will lead to lower total damages which means less deterrence.

Note: some people suggested that the tax would lead to under-compensation. This generally would not be true since the punitive damages are not compensating anyone for anything. To make this argument, you would need to posit some story about how puntives actually do fill a compensatory role (e.g., the risk/litigation cost argument made above).

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2. In tort, we worry about both over and under deterrence of risky activities. In cases where tort overlaps with regulatory systems whereby the same behavior is incentivized both by expected tort judgments and expected fines, there is a potential for over-deterrence especially given that

the tort system and the regulatory system are rarely coordinated. This has led some tort reformers to suggest that the existence of a regulation should preempt tort liability or an absolute regulatory compliance defense should be available.

2.a Discuss the pros and cons of these suggested reforms.

There are lots and people generally got credit here as long as you flagged some of them.

The pros would include, as suggested, a reduced risk of over-deterrence. Also, you would avoid redundant investigations and adjudications, freeing up court resources. You would avoid the potential for inconsistent rules, etc.

The cons would include the fact that most regulatory systems do not compensate victims, so preemption would undercut one of the primary purposes of tort. Courts often have greater flexibility and can better incorporate local knowledge, standards, etc than can a central regulator. Regulators may be subject to lobbying/capture by special interests; having separate court rulings may serve to undo this. Using a dual system can also remedy problems arising from limited public regulatory resources, etc.

2.b Criminal law serves as a regulatory system that almost completely overlaps those activities falling under the category of intentional torts. Interestingly, virtually no one has called for preemption in this context. Why?

The basic reason is that the bulk of activities falling under the heading of intentional torts and criminal law are deemed to have no (or at least very low) social value, so the concerns regarding over-deterrence are not important. We are probably not so concerned that we may have a world with too few batteries, for example.

Note: Some people suggested that the main reason is that tort is about compensation while criminal law has no mechanism to compensate victims. This is correct, and it is a reasonable point for which people got some credit, though note that this issue is not different than one of the general reasons we may not want regulations to preempt tort (i.e., most regulatory systems do not provide a compensation mechanism either; fines are generally just used to fund the regulatory agency or are spent for some public purpose).

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3. The Milton Hershey School is a charitable boarding school for underprivileged children. In 2011, the school denied admission to a 13 year old boy on the grounds that he is HIV positive, claiming admitting the student would pose a direct health risk to other students due to his communicable disease. In support of this claim, the school noted that teenagers often engage in risky sex, and there is little the school can do to stop this from happening. Ignoring any discrimination claims, analyze the school's potential exposure to tort liability in the scenario where it chooses to admit the student. Include any potential defenses the school could offer in a hypothetical tort suit, evaluating their strengths and weaknesses.

Assuming away any discrimination claim (as directed in the question) and any liability stemming from special relationships (since we didn't cover those), it's best to look at this from a negligence standpoint. There are lots of issues here, and while nobody got all of them, most people did pretty well. I'll highlight some of the trickiest/most interesting ones but there are surely more.

From a negligence standpoint, this is a tricky issue. Someone could argue that admitting the student creates a risk to the other students, and the cost of declining the student is low (or zero) since there are presumably lots of other students available to take his slot. Further, this risk is foreseeable so there is potentially proximate causation. The tricky part, however, involves the fact that this student, if he is so inclined, will still pose risks to other people (non MHS students) and so there is (perhaps) no differential risk to society unless one could make a reasonable argument that the amount of risky sex is increased by putting this student in a boarding school. There is a lot of uncertainty surrounding this issue since some juries may decide that MHS owes a duty to its students only suggesting that admitting the student is negligent if that student then infects other students. The "easy" legal advice then might be to simply reject the student, but this has the potential to generate bad publicity which should be considered. In the event of admission and subsequent infection, the school could argue that the student in question's decision to have sex is an intervening cause breaking the causal chain. This defense is likely to fail given the student's age and expectations about a teenager's behavior (this is analogous to the case where the RR was responsible for the woman getting attacked as she walked back to her missed stop).

The school should probably consider intermediate precautions such as a general or a specific warning. A general warning that there is a student who is HIV+ is low cost but it also presumably provides low benefits too. A specific warning is high cost, since it likely will cause practical/social problems for the student as well as being a potential invasion of his privacy, but it would provide much higher benefits as well. Both warnings could possibly lay the groundwork for a contributory negligence defense, though it would be stronger in the specific warning case. The specific warning case could also generate an assumption of risk defense (the general warning would be too broad to put people on notice). Both of the defenses, however, are likely to be weakened by the fact that juries will hesitate to apply them to children. Pursuing these defenses against its own students will also be very bad from a public relations standpoint.

Etc.

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4. Choose one of the questions, 1,2, or 3, to count double in your total score (i.e., the raw points for the question you choose will be multiplied by 2) or choose to have each question count equally (i.e., the raw points for each question will be multiplied by 4/3). Indicate your choice clearly or you will automatically lose 25% of the total available points