

Klick
Torts
The Armageddon
December 14, 2012

This exam is open book, open notes, open commercial outlines, etc. Each of the 3 questions is potentially worth the same fraction of the total score, subject to your decision for item #4. 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. Kim Kardouchian and Kris Harumphries have been married for about a year, but things have not been going well with neither speaking to the other for the past few months. Kardouchian relies on Harumphries for financial support since she has no marketable skills and he makes millions as an NBA player. Kardouchian signed a prenuptial agreement stipulating that if Harumphries seeks a divorce, he must pay her \$10 million. However, if there is evidence of infidelity on the part of Kardouchian, she forfeits the payment.

Kardouchian secretly becomes involved with Charles Berkeley, leading to a pregnancy. Because she and Harumphries have never consummated their marriage, Kardouchian knows the pregnancy will provide evidence of her infidelity. She decides to get an abortion, and she then attempts to re-ignite her relationship with Harumphries. As things appear to be improving, Harumphries notices an unexplained co-pay on his insurance. Due to privacy rules, when he contacts the insurance company, he is given no information since his wife was the recipient of the medical care. He investigates the issue further, finding a nurse at the hospital where the abortion was performed who tells him his wife had an abortion. Harumphries promptly files for divorce. By the terms of the prenuptial agreement, his wife's infidelity precludes her from securing any financial compensation from Harumphries.

The privacy rules that precluded the insurer from releasing the information to Harumphries were prompted by Title II of the Health Insurance Portability and Accountability Act (HIPAA) which regulates the disclosure of medical information by covered entities which includes the employees of insurers, as well as health care providers. While HIPAA allows these entities to share information that is necessary for the provision of healthcare, it requires that entities take reasonable care to minimize how much information is provided for the purpose of facilitating health care provision, and it requires a patient's written consent when providing information to non-providers. If someone believes his privacy has been violated, HIPAA provides recourse wherein the individual can make a complaint to the Department of Health and Human Services which, in theory, has the ability to levy fines against the offending healthcare organization. In the first three years of HIPAA, HHS fielded almost 24,000 complaints regarding violations of medical privacy under HIPAA, but no fines were levied with the agency either finding that no violation had occurred or, instead, providing informal guidance to the healthcare organization regarding best practices.

Kardouchian asks you whether she has a legal claim regarding breach of privacy. Assume that normal negligence standards apply and also assume that privacy damages follow the same

general principles laid out for all damages in tort. Evaluate this case, making sure to also raise all the reasonable defenses that may apply to your arguments.

The best argument for Kardouchian is that the existence of the privacy provision in HIPAA implies that there is a duty for healthcare providers to protect patients' privacy and that the value of doing so is high. Since the statute does not include a private right of action, to make this claim, she needs to demonstrate that 1) she is in the class of people the statute was intended to protect, which is clearly true since she was a patient; 2) there is no indication that Congress intended to deny such a private right of action; and 3) the private right of action is consistent with the underlying purposes of the legislative scheme. Since the question is silent on #2, there is not much to be made there. #3 is trickier. Because Congress provided for fines, one might be tempted to infer that the scheme is fundamentally regulatory, relying on the agency's judgment and discretion. On the other hand, Kardouchian could argue that the purpose of the scheme was to protect privacy. Federal agencies will often be under-staffed and under-funded, requiring a reliance on private enforcement through litigation, perhaps as suggested by the fact that there have been 24,000 complaints but no fines.

As for whom to bring the action against, the only plausible possibilities are the nurse and the hospital. The insurer provided no information to Harumphries as required by the statute. Some people indicated there may be a claim against Harumphries which is far-fetched. He has no duty under HIPAA, not being a healthcare provider/insurer, and it is ridiculous to think there is a general duty for a spouse to not inquire into the behavior of the other spouse. The claim against the nurse is fairly straight forward in that s/he violated the statute by providing information to Harumphries without the consent of Kardouchian. However, since the nurse is unlikely to have substantial assets or insurance, a claim against the hospital under respondeat superior (i.e., the employer is strictly liable for the torts of its employees as long as the tort occurred within the scope of employment, which would seem to be the case here since hospital employees will often interact with patient family members, etc, unless there were extenuating circumstances not articulated in the question) or directly on the grounds that the hospital failed to have adequate training, etc for its employees regarding what HIPAA requires.

The counter on the part of the hospital (and the nurse) is that HHS has the authority to enforce HIPAA and so Kardouchian has no recourse under HIPAA through the courts. Further, the absence of fines may simply mean that the system is working well and, in any event, since Congress has not revisited HIPAA, it must think that HHS's approach of working with providers satisfies what Congress hoped to achieve. At the end of the day, given how many healthcare interactions there are, 24,000 complaints is not particularly indicative of a problem.

Avoiding the statutory basis for liability, the hospital is in a better position to make the claim that it had acted reasonably and that it was reasonable for a nurse to provide information to a patient's husband. The provision of such information is likely to improve many healthcare situations (e.g., families being able to help their sick members etc).

Causation and damages are tricky for Kardouchian. She is best off if, under HIPAA, she can argue for punitive damages indicating that most privacy violations go unnoticed and therefore this kind of behavior is under-deterred. If she must rely on non-punitive damages, there are some problems. In the absence of the privacy breach, presumably, there is no divorce.

Therefore, her measure of damages are some kind of maintenance (i.e., whatever Harumphries was paying to support her). It is very unlikely that she could secure the \$10 million contractual payment given that she does not receive that payment in the counter-factual world where the nurse does not tell Harumphries about the abortion.

Further, the hospital could plausibly claim that there was a reasonable likelihood that Harumphries would have continued seeking information and might have gotten it from another source. While such a claim would be speculative, it could sway some juries.

2. Environmental advocacy groups argue that the price of fossil fuels (e.g., oil) needs to be raised in order to reduce their use, citing the effects of the emissions from fossil fuel use on global climate change (which includes higher temperatures, rising sea levels, etc). Frustrated with the lack of the political will necessary to raise gas taxes, some of these groups have argued for the use of tort law to achieve reductions in the use of fossil fuels. If you were hired by one of these groups, how would you construct a case against, for example, Exxon? What are the problems with such a case? Taking account of your case's strengths and weaknesses, as well as other issues, is tort law a promising avenue for addressing global climate change?

Some kind of negligence suit against Exxon would claim it is unreasonable to sell its products given the effects on climate change. This could involve some kind of class action on behalf of individuals harmed by climate change.

Negligence-based suits would be problematic given the high social value placed on fossil fuel use relative to uncertain costs (in terms of the timing of those costs and the exact form those costs will take, especially given the possibility that some individuals may benefit from climate change) in the absence of alternative fuels or viable precautions on the part of Exxon. Given that, it's not clear Exxon was negligent in any way or that it had a duty to not sell a product that generates these risks. Additionally, the oil itself does not generate the emissions that lead to global climate change; rather, the burning of it does. If there is a claim of negligence on the part of Exxon, there would presumably be a contributory negligence claim with respect to most of the plaintiffs who used the oil.

Further, there are large causation difficulties given that it would not be possible to isolate Exxon's contributions separately from other contributors to climate change. Perhaps some form of market share liability, but even that would be a long shot since there are many sources of greenhouse gases not included in the oil industry. Further, the relationship between emissions and climate change is likely non-linear further complicating the causal inquiry. Beyond that, the harms associated with emissions were unforeseeable before the last few decades precluding liability for any production before a date where some scientific consensus was reached.

Tort law also has generally been hesitant to award expected damages. Since arguably the damages from global climate change lie in the future, courts are unlikely to award damages for global climate change.

A strict liability approach might fare better. Such an approach would involve a public nuisance suit. To bring a public nuisance suit, one would need to identify plaintiffs who suffered categorically different harms due to the fossil fuel induced climate change, so perhaps class

actions on behalf of coastal land owners or something similar. Still though, the damages and causation issues will still loom large, though injunctive relief may fare better. However, given the uncertainty regarding the timing and exact form of damage resulting from global climate change, this too is an uphill battle.

An alternative may involve attempting to induce the state to bring a public nuisance suit securing an injunction prohibiting the continued sale of fossil fuels. Such a suit would sidestep some of the concerns raised above as defining specific forms of harm will not be as crucial as long as some aggregate harm can be demonstrated. As a practical matter, however, if the government is unwilling to address this issue politically, it is not clear why litigation on behalf of the government is more likely.

Given these issues, it does not seem likely that tort is a currently viable tool here.

3. One formulation of res ipsa loquitur holds that a jury can infer negligence in instances where the incident that caused the harm is improbable without some underlying negligence (and there is no contributory negligence and the defendant had exclusive control over the situation). Why is such a formulation (and therefore the inference) problematic under standard negligence principles? How would you reformulate the concept of res ipsa loquitur to make it more consistent with those principles?

The statement that the probability of the accident is low when there is no negligence is not equivalent to the probability of negligence is relatively high (or more likely than not) when the accident occurs. The second statement is the legally important one since the trier of fact needs to make a determination that negligence is more likely than not. Not required in the answer, but perhaps of interest to people, is that the probability of negligence given that an accident occurred is equal to $(\text{the probability of the accident given negligence} * \text{probability of negligence}) / \text{probability of the accident}$. So, one could get to the legally relevant probability from the original statement only if you knew the baseline rates of the accident and the likelihood of negligence.

Many people focused on the problems of res ipsa loquitur generally, rather than identifying the problem with the formulation, which is what the question asked.

To “fix” this problem, one would want a rule that highlights situations where the probability of negligence given the accident is higher than the likelihood there was no negligence given the accident.

4. Choose one of the questions above (1, 2, or 3) to count double or else choose to have each question count for 1/3 of your entire score. Make your choice clear, otherwise you will automatically lose 25% of the potential points.