Klick
Torts
The Armageddon
December 16, 2016

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. You work in the General Counsel's Office for a firm that is developing software that controls the operation of driverless cars. One year before your firm's software is to be deployed in mass market models by the nation's top automobile manufacturers, the head of engineering raises the following issue with the GC's Office: "Although our testing is going great – in fact, our simulations are suggesting with very high confidence that cars operated with our software exhibit a reduction in all crashes, including fatal ones, by about 90 percent compared with cars driven by humans in comparable settings – we must make some coding choices concerning what to do when a crash is imminent. For example, in some simulations, where a crash is about to occur, say when a car from the other lane comes over and creates the potential for a head-on crash – and these are cases where it's not possible to simply brake and avoid the whole issue perhaps because of wet road conditions – we need to code some decision rule that governs whether the car turns to the left (leading to a collision between the other car and "our" car's passenger side), to the right (leading to a collision between the other car and "our" car's driver side), doesn't turn at all (which perhaps concentrates the collision less on any particular side of the car but also has the unfortunate consequence of not dissipating the impact force in the way a turn would), or something else. One joker in our department even suggested we should have the program randomize what the car does. Anyway, to make this even more of a pisser, in some of the simulations, turning in either direction will likely lead to a crash with other cars or pedestrians."

   After some discussions with the engineers, it becomes clear that the same systems that control the car's movement relative to the environment can be used to ascertain whether pedestrians or cars are present in any direction (including how many) and can also observe the size of the other cars (which can be used for proxies of how many people may be in the other cars and how much damage the other car will cause and receive in any crash, though these proxies are not perfect. For example, a van might either carry 7 people or may only have the driver present, and although large cars can often withstand greater force, older cars tend to be larger but may have less in the way of safety attributes, etc). The software's decision algorithm can make use of this information when deciding what to do.

   After listening to all of this, your boss directs you to write a memo discussing how liability concerns should impact the coding decisions and whether there are any legal strategies the firm can use to mitigate any liability problems. Further, your boss reminds you, the cars using the firm's software will be driven across jurisdictional lines but it is not feasible to have the code make different decisions based upon what jurisdiction the car is in when the actual decision is made. How should this affect your analysis and/or recommendations? For the purposes of this question, use general torts principles as opposed to products liability law to guide your analysis.

This is a real-life trolley problem that is being seriously considered in many contexts right now. From a big picture perspective, based on the claim that the driverless cars will significantly reduce accidents, it would be good socially to support the adoption of this technology. Further, the accident reduction rate potential likely grows as more cars use the technology (e.g., the defensive reactions by a given driverless car contemplated above will be less necessary as there are fewer human-driven cars). To the extent that uncertainty regarding the applicable liability rules or the expected costs of liability rules slow/reduce adoption of this technology, there would be large social costs. Given these concerns, there may be an opportunity to push for federal legislation preempting state tort law. Putting aside constitutional issues regarding such preemption (or, short of preemption, there could be an attempt to harmonize state liability rules by tying new federal highway funds or something like that to state adoption of common driverless car liability rules), the argument would leverage the large safety improvements promised by driverless cars and the difficulty in coordinating state level tort rules (and the attendant uncertainty and delay involved with such coordination). Any reduction in average liability could be seen as a subsidy to this technology which could be justified by the positive externalities generated by improved safety and the network externality from inducing more driverless cars (since the safety benefits would likely grow more than proportionately as there were more driverless cars on the road).

As can be seen below, even within a given state's liability rules (not to mention the problems that arise when many different/conflicting rules arise across states), there is no clear path to minimizing liability exposure. Thus, exerting effort/resources on lobbying efforts to bring about a federal regime (which eliminates the state to state differences problem) that is predicated on lower liability levels (damage caps, liability shields, etc) may be the best legal strategy.

As for the coding decisions themselves, the basic principle to be followed is one of minimizing the expected liability costs. Such costs would be those arising from harm to the driver of the vehicle in which the software is being used, harm to any passengers in the vehicle, harm to the vehicle itself, and harm to third parties, including other drivers, passengers, and pedestrians, as well as harm to property involved in any crash. In practice, there is a lot of uncertainty regarding estimating these expected costs. In the scenario raised in the question, turning to the left might be prudent since it will dissipate some of the force and, while there will presumably be a driver in the car in such a circumstance (though perhaps not if driverless cars do not require anyone to be in the driver's seat), there will not always be occupants on the passenger side. However, such swerving might increase the likelihood of involving additional vehicles/pedestrians in the accident. The sensors to determine whether there are cars/pedestrians should probably be exploited in cases where the car can swerve without hitting additional cars/pedestrians if doing so is likely to reduce harm to the driverless car's occupant(s). In cases where swerving would likely lead to additional victims, perhaps pedestrian avoidance should take precedence over avoiding collisions with other cars given that pedestrians may be susceptible to more severe injuries. On the whole, it is difficult to imagine generalized rules that will minimize harms. In a negligence regime, given the presumptive safety value of driverless cars, this may actually be helpful from a liability perspective. Any particular choice will involve risk/risk tradeoffs where the cost of the precaution (such as swerving left and potentially causing an accident in the other lane) will be of a similar magnitude in expectation as the benefit (dissipating force in the head on collision). If the precaution suggested by a potential plaintiff is not using the driverless technology, the

simulation evidence (or subsequent field evidence) could be used to demonstrate that such a precaution would be very high cost (because of the increase in accidents in cars controlled by drivers) which would help to defeat the negligence claim and could likely be useful in any causality inquiry.

Perversely, there is some evidence that jurors are more apt to award punitive damages when there is evidence that defendants explicitly/systematically valued physical harms to potential victims ex ante in making their decisions (See, Viscusi 52 Stanford Law Review 547 (2000)) in product design. Such concerns may make any attempt to pick among potential victims a liability, especially given the rough nature of data that would be available to the software in choosing among the victims (e.g., while it may be true that larger vehicles contain more passengers, they may provide more protection in a crash, but they may also be older and therefore might be less likely to have modern safety precautions, etc). Using the data to attempt to swerve into empty space might make a lot of sense in terms of reducing expected liability costs, but using the data to choose among expected costs might be more problematic. Oddly, randomizing may seem more fair to jurors or at least less calculated.

Although many people spent significant time contrasting strict liability and negligence, there is not much to be gained differentiating between strict liability and negligence regimes since, in expectation, the calculus will be the same regardless of the regime.

This is not a simple problem and it does have the potential to significantly limit or delay wide-spread use of driverless cars, leading to less safety overall.

2. Due to concerns about perceived biases in the criminal justice system, the president of Penn State – Philly Campus, Amy Goofman declares that the West Philadelphia university has been designated as a sanctuary campus. Practically speaking, this means that the university will not comply with a federal law that requires all colleges to check the social security numbers of their students against a database containing the social security numbers of felons who are fugitives from justice and other individuals who have been arrested for serious crimes but failed to report for their court proceedings. Under the normal operation of the law, once a college finds a match, it reports the presence of the individual to state and local authorities who then can make an arrest. Some schools instead check for matches in the application process and simply do not admit any presumptive criminals. Goofman, however, announces that PSU-Philly will do neither of these things. "These individuals have both the strong desire and the impressive capacity to make vital contributions to our campus. At PSU—Philly, we are a richer campus for our inclusion and diversity, and our community benefits greatly from the presence of its undergraduate, graduate, and professional students who have non-traditional backgrounds and experiences. We refuse to facilitate a process that is plagued by unfairness and which lacks understanding." Further, under the sanctuary policy, PSU—Philly refuses to allow law enforcement personnel into campus buildings without a warrant.

   Dirty McMeany, after graduating from a Philadelphia high school with top grades and test scores, received his acceptance to PSU—Philly and then proceeded to celebrate with a coke fueled bender that ended with him shooting NoA Click in his one good leg. During the processing of his arrest, McMeany had the following exchange with the booking clerk:

"Clerk: Name?
DM: Dirty McMeany
Clerk: Address?
DM: 1234 Urmomblows Lane, 2nd floor, Upper Darby, PA
Clerk: Social Security Number?
DM: 123-45-6789
Clerk: Date of birth?
DM: February 31, 1999"

The clerk enters McMeany's responses into the local database which is tied into state and federal law enforcement systems. Due to a system error, McMeany's obviously false information is not caught. After his arraignment, McMeany pays his bail and is released pending his court date which is slated for August 1, 2017. McMeany never shows up to court but does enroll at PSU—Philly for the fall 2017 semester.

A few weeks into the semester, Chakey Click, NoA's older brother (who is the spitting image of NoA) and PSU—Philly senior, catches a glimpse of McMeany and immediately reports him to the PSU—Philly campus police, saying "this guy is dangerous; he injured my brother in a football game and later shot him in the leg." The campus police take Chakey's report but do not act on it because of the sanctuary policy. After a few weeks go by, Chakey notices that McMeany is still on campus, follows him to his dorm, and then calls the Philadelphia police to report that McMeany is on the PSU—Philly campus. When the police arrive on the scene, PSU—Philly security officers bar them from entering the campus dorm to search for McMeany. While waiting for the police to leave, McMeany does a significant amount of coke. After the police leave to get a warrant, McMeany leaves the dorm and plans to hide out back in Upper Darby. Stumbling through campus in a coke-induced haze, McMeany sees Chakey walking with his father Dr. Prof. Click, Esq. and, mistaking Chakey for NoA, fears that NoA has come to seek his revenge. Chakey, upon seeing McMeany, decides to take matters into his own hands and starts charging menacingly toward McMeany. Fearing for his life, McMeany takes out his gun and shoots toward Chakey. However, Dr. Prof. Click, Esq., Bruce-Lee style jumps in front of the bullet, saving his son but suffers permanent brain damage from the shooting. He is unable to fulfill his professional duties and must retire from his job which he enjoyed immensely and for which he was well compensated. Although PSU—Philly's benefits package does not include any defined contribution pension plan, it does include a 403(b) tax deferred savings benefit, to which Dr. Prof. Click, Esq. contributed from his monthly pay and received matching contributions from PSU—Philly, as well as a permanent disability insurance benefit paid for by PSU—Philly that covers the equivalent of one half of Click's pay for 10 years after the date of disability.

McMeany sprints off of campus toward the zoo where he encounters Samusmell Click and Neb Click (who also look just like NoA). "How many of them are there," yells McMeany before pulling out his gun and shooting at Samusmell causing him significant pain, but no long term harm after he is treated at the PSU—Philly hospital, the cost of which is borne by Dr. Prof. Click's insurance provided by PSU—Philly. Neb, however, is so frightened by the incident that he refuses to leave his parents' home ever again. McMeany is tackled by a hobbling NoA and placed in police custody.

Outline any tort claims the Click family may have related to the incidents above, including all potential defenses.

The potential damages in the hypothetical are suffered by Dr. Prof. Click, Esq. (pain and suffering, lost income, lost enjoyment of his job, healthcare costs), Samusmell (pain and suffering, healthcare costs), and Neb (lost enjoyment of life). It was fine to discuss the initial loss to NoA as well. Claims for these damages can potentially be brought against McMeany and PSU-Philly. In principle, there may be potential claims against Goofman and the campus police as well (the structure of those claims would not differ much from the claims against PSU-Philly), but even those claims would likely be brought against PSU-Philly under respondeat superior since it is likely easier to collect against the larger assets of PSU-Philly and there is nothing within the fact pattern to suggest that these PSU-Philly employees were not acting within the scope of their employment. Claims against the municipal police and/or the police clerk specifically (a negligence claim for not catching the false information provided by McMeany) would be difficult given immunity issues and causation issues (even had accurate information been provided, this does not guarantee that McMeany would have shown up for his court date; his intentional torts are intervening actions breaking the causal chain between their negligence and the Click family's damages), but are otherwise fairly straight forward.

Against McMeany, the theories of liability are battery (for Dr. Prof. and Samusmell) and assault (for Neb). Many people discussed claims by Chakey (such as assault or intentional or negligent infliction of emotional distress), but the fact pattern provides no indication of any harm/damages suffered by Chakey. Without damages, there is no claim.

Although McMeany didn't intend to shoot Dr. Prof., transferred intent would apply. While these claims are fairly straightforward, McMeany does have some potential defenses. First, regarding the Dr. Prof. claim, McMeany will claim self defense as Chakey ran menacingly toward him and he feared for his life. In such a case, McMeany will claim, it was reasonable to defend himself. While such a reasonableness claim is generally a jury question, Dr. Prof. will claim that a) using the gun was a disproportionate response to someone charging and therefore not reasonable and b) McMeany's drug use exacerbated his fear and limited his ability to make reasonable choices. McMeany will also argue that Dr. Prof. essentially consented to the battery by jumping in front of the bullet. Dr. Prof. will respond that "danger invites rescue" and that individuals cannot consent to the use of lethal force against them. Perhaps more usefully, McMeany will attempt to argue that Dr. Prof.'s damages are limited to pain and suffering and only some of his lost income since he has disability insurance as well as the savings from the 403(b). As for the healthcare expenses, McMeany will argue that Click did not bear those costs due to his health insurance; and the lost enjoyment claim should also be limited since there is no way to demonstrate how much the enjoyment was worth to Click and the normal presumption is that people do not enjoy work. As regards the insurance based defenses, unless PA has abolished the collateral source rule, these defenses should go nowhere. The collateral source rule allows recovery to maintain the incentives discouraging tortious acts.

To defend against Samusmell's claims, the same insurance based defense with respect to the healthcare costs will be raised but it will likewise be defeated due to the collateral source rule. The pain and suffering damages admit no obvious defense beyond the normal claim that pain

and suffering awards are hard to calibrate and therefore courts should be cautious when awarding them.

Claims against PSU-Philly may be especially important given that this defendant likely has larger assets/insurance coverage than does McMeany. However, the theories of liability are less straight forward. The Clicks might argue negligence per se given PSU-Phlly's failure to comply with the federal law requiring the school to check its students/applicants against the criminal database. This strategy might be viable for Dr. Prof.'s damages but would be more problematic for Samusmell and Neb's damages since a) neither is a member of the university community which is the population meant to be protected by the statute (and their damages did not even occur on the defendant's property) and b) even for Dr. Prof., given the falsified info provided by McMeany and the system's failure to flag it as falsified, causation would be difficult to establish since even if PSU-Philly had done the check, McMeany wouldn't have matched a SSN in the system. That said, the plaintiffs might argue that the statute was meant to protect a broader population and simply used the college nexus as a pragmatic checkpoint to identify the location of at large criminals. As for the causation point, the plaintiffs might argue that if PSU-Philly had done a check, at least the name might have raised a flag through its match in the system. These factual issues would be jury questions and presumably would require some evidence regarding how the system responds to partial matches, etc.

Even without the statutory basis, however, the plaintiffs will attempt to bring negligence claims. Once the university was made aware of McMeany's history (through Chakey's report), the plaintiffs will argue that it would have been reasonable to remove or at least investigate/monitor McMeany and the failure to do so constitutes a breach of PSU-Philly's duty, which may be heightened due to the special relationship the university owes its employees/students (though not Samusmell and Neb who were not students and who were injured outside the college campus). Additionally, the decision to keep the Philadelphia police from entering McMeany's dorm might also be flagged as another negligent act.
PSU-Philly will argue that McMeany's intentional acts break any causal link between the school's negligence and the resulting damages, to which the plaintiffs will respond that McMeany's harmful acts were foreseeable. This determination will hinge on any precedent in the jurisdiction regarding whether criminal acts constitute a break in the causal chain as well as jury determinations of the foreseeability of McMeany's violence. Again, determinations about the school's special relationship status (wrt Dr. Prof) will also be important here. Dr. Prof. will argue that the special relationship strengthens the argument for the breach of a duty since as an employee he must interact with students and has little ability to take his own precautions on the campus against student aggressions. The school will respond that the damages could have just as easily been inflicted by non-students walking through campus and it is unreasonable to require the school to establish check-points and other safety precautions to protect the campus community from random acts of violence. As for entry to the dorm, the school will argue that its requirement for a warrant is not unreasonable, given that it owes a duty to its students to protect their liberties while housing them. As regards the negligence of not heeding Chakey's warning, the school may reply that the warning was ambiguous/speculative ("this guy is dangerous", as opposed to a more specific and urgent warning like "this guy has a gun and is threatening people") and so it would be unreasonable to require the school to follow up on all vague and unsubstantiated claims of students.

PSU-Philly will also argue that the normal collateral source rule should not be enforced against it since it is the one bearing the cost (of hospital bills and the disability insurance) in any event and, therefore, the normal grounds for the collateral source rule (maintaining incentives) do not exist. In essence, the school will argue, the court can avoid the unfairness of "double" compensation without the cost of weakened incentives. Dr. Prof. will counter that he himself has paid for the insurance, both explicitly through premiums and implicitly through lower wages, and so it would be unjust to block his compensation and perhaps more broadly, doing so would discourage people from buying insurance to begin with.

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 1/3 of the potential points for the exam.