

Professor Brown
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15/15

Exam Responses

Response to Question 1: Medical Malpractice and Tort Reform

great
intro

Medical malpractice tort reform has the potential to impact healthcare costs but not as significantly as other means of reform. Our class discussion indicated that while tort reform appears pivotal in Congressional debate, the costs of malpractice litigation make up a very small percentage of overall healthcare costs. A potential for lowering costs with tort reform still exists though in decreasing the need for exorbitant malpractice insurance which in turn increases costs to patients. The need for extensive coverage could be reduced by capping damages or using a system of "loser-pays" which requires the losing party in malpractice litigation to pay the successful party's fees and costs, thereby discouraging litigation beyond non-binding arbitration.

Our class discussion indicated that tort reform does not directly address two critical healthcare reform issues: (1) the United State's low quality of care and, (2) the liberal use of ineffectual or unnecessary tests and procedures. Mr. Thronson indicated that medical error is the seventh leading cause of death in the United States. Mr. Williams discussed the use of "evidence-based medicine" ("EBM") as a corrective measure for both this low quality of care and high care costs. EBM involves gathering more data on the efficacy of procedures and tests and using this in medical decision making. This more scientific-method based assessment would limit the options given to patients in treatment to reduce costs.

Arguments against EBM involve American's emphasis on birth and end of life treatment. EMB's emphasis on socially practical medical decision-making may shift this emphasis to

provide treatment for those most likely to benefit regardless of life stage. Still, widespread use of EMB may decrease provider practice of offering all treatment options as a way of avoiding liability. This method of decreasing provider liability may be more effective in lowering healthcare costs than litigation reform. *excellent*

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Response to Question 2: Law and Economics Theory

The law and economics theory evaluates liability in terms of cost/benefit. Judge Hand used this theory in *United States v. Carroll Towing Co.* to determine damages. Judge Hand suggests that if the probability of injury multiplied by the magnitude of the injury is greater than the cost of preventing the injury, there has been a breach of duty and recovery is allowable. Judge Posner expounded on this theory in the latter half of the twentieth century by measuring the cost of preventing harm against the cost of the harm. Posner suggested that evaluating breach in terms of economy efficiency encourages social economy. Corrective justice on the other hand is about compensating victims and penalizing those in breach with less regard for economic concerns. Corrective justice places the emphasis on the moral consideration that underlies all tort theory, the protection of the individual, thereby placing social economy as a lesser concern.

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Response to Question 3: Cardall Causes of Action

Possible Claims:

- Wrongful Death by Wife
 - Loss of Consortium
- Survivor Action by Estate
 - Battery
 - Assault
 - Emotional/Mental Anguish
- IIED by Wife separate from Wrongful Death
- Products Liability against Taser International
 - Design Defect
 - Manufacturing Defect
 - Failure to Warn

Ms. Cardall has a number of means of obtaining redress for the death of her husband, though some are more likely to succeed than others. Specifically, the claim for wrongful death and the survivor action by Mr. Cardall's estate are less likely to be successful due to law enforcement immunities. Likewise, a claim for intentional infliction of emotional distress by Ms. Cardall, separate from the wrongful death claim, has little likelihood of success. Ms. Cardall is more likely to succeed in a products liability claim against Taser International for failure to warn or instruct. I will address the possible claims in turn and I proceed on the assumption that each of these claims is allowed by Utah state statute unless otherwise addressed.

First, Ms. Cardall has the option of bringing a wrongful death action against Officer Ken Thompson, the Hurricane Police Department, and any other police officers involved in the altercation with Brian Cardall on June 9, 2009. In order to succeed on a claim for wrongful death, Ms. Cardall must first succeed in proving that the act that led to her husband's death was tortious. As there is no evidence suggesting that Mr. Cardall's death was the result of intentional action by the police, Ms. Cardall must prove that death resulted from the officers' negligence.

The four prima facie elements of negligence are: (1) injury, (2) duty, (3) breach of that duty, and (4) a showing that the breach was an actual or proximate cause of the injury. Ms.

Cardall must plead and provide evidence to each of these elements to survive summary judgment and create a question of fact for a jury. The element of injury is satisfied with Mr. Cardall's death. The next three elements involving duty and breach are problematic. First, Ms. Cardall must establish that the officers had a duty to protect or prevent the death of her husband and that by shocking him with the taser twice, they breached that duty. As the county coroner established that the shocks from the taser were the major cause of death, the breach by shocking can be linked to the injury if such a breach can be proven.

As stated above, the issues of duty and breach are problematic, particularly when involving law enforcement. Again assuming Utah statute thus provides, law enforcement has an affirmative duty to rescue and protect. This affirmative duty can fall into two categories, both of which apply to the facts presented. By the other officers failing to act while Officer Thompson shocked Mr. Cardall, the non-acting officers' behavior could be considered nonfeasance. Officer Thompson's shocking of Mr. Cardall in order to restrain him could be considered misfeasance if done in a way that was wrongful. Either of these behaviors could be considered a breach of duty.

Unfortunately for Ms. Cardall's claims, law enforcement is oftentimes statutorily immune from tort liability. Due to the increased affirmative duties of law enforcement, states often consider tort immunity essential to police officers being able to maintain social order.

Good Specifically, statutes give law enforcement discretion for the use of excessive force. Thus it becomes necessary for Ms. Cardall to prove that the use of excessive force was not permissible, therefore the act of shocking her husband was not protected by statute and the officer(s) can be liable for negligence. As Washington County has already determined that the use of force was reasonable to restrain Mr. Cardall, it will be difficult to argue otherwise. Of course, the decisions for criminal proceedings are not determinative for civil counterparts. This means that Ms.

Cardall can still bring an action based on negligence, arguing immunity is not available for the specific use of excessive force, and possibly succeed.

Overall, the success of proving actionable breach of duty is minimal due to law enforcement immunities. Therefore, it is unlikely that the wrongful death action would succeed. Such a claim may not be in Ms. Cardall's best interests to litigate as she is likely only able to recover loss of consortium, that is, the reduction in quality of life without her husband. As Mr. Cardall was a student at the time of his death, loss of economic benefits will be minimal.

The potential survivor action by Mr. Cardall's estate is confronted with the same issue of law enforcement immunity as Ms. Cardall's wrongful death claim. A survivor action allows recovery for those claims that Mr. Cardall would have been able to bring if the altercation had not ultimately resulted in his death. Assuming that these claims would survive the probable motion to dismiss and/or summary judgment based on immunity, the survivor action could include claims for battery, assault, and emotional/mental anguish.

As battery and assault fall within the category of intentional torts, the level of intent required is higher and thereby harder to prove than that of negligence. Specifically, battery requires: (1) an act, (2) by someone intending to cause contact with the plaintiff, (3) of a type that is harmful or offensive, and (4) that is not privileged or consented to. The intent requirement here is not intent to cause the specific consequences as per *Nelson v. Carroll*, that is, the officer did not have to intend to kill Mr. Cardall. Due to this, the facts which indicate that the officer intentionally shocked Mr. Cardall twice would seem to substantiate the allegation that the officer intended to cause harmful contact.

An assault claim within the survivor action on the other hand is substantiated by: (1) a defendant voluntarily acting, (2) intending to cause in the plaintiff the apprehension of imminent

harmful or offensive contact, and (3) the defendant's act causes the plaintiff to reasonably apprehend such contact. Actual contact is not required for this tort but can be involved. The difficulty in satisfying the prima facie elements of this claim arise from whether or not Mr. Cardall actually apprehended the harmful contact. The facts suggest that Mr. Cardall's mental state may not have allowed him to understand the imminent harm. Regardless, apprehension is interpreted under the objective, reasonable person standard and therefore the estate may be able to establish that a reasonable person would have apprehended imminent harm when confronted with a taser.

In the survivor action, the estate can also make a claim for the mental anguish Mr. Cardall felt in between the time he was first shocked and his death. It is suggested in *Nelson v. Dolan*, an estate may recover for mental anguish in the moments between the injury and the decedent's death from that injury, even if this time frame may be as little as five seconds. The facts indicate that Mr. Cardall was screaming for at least five seconds between shocks and it is possible that Mr. Cardall's estate could recover for the suffering in that time.

Overall, I believe the survivor action would be ultimately unsuccessful due to law enforcement immunity from tort actions, particularly those based in negligence. Immunity is sometimes not granted for intentional torts though, so it is important to investigate Utah statute as to law enforcement liability for the battery and assault claims. If the immunity obstacle were overcome, the estate may be able to recover for the five seconds of mental anguish and perhaps funeral costs.

An avenue of more likely success for Ms. Cardall is through a products liability action against Taser International. I believe Ms. Cardall can advance claims under design defect and failure to warn, with a higher likelihood of recover for the failure to warn. Products liability is a

strict-liability tort meaning that a plaintiff is not required to show that the defendant owed a duty of care that was breached. Manufacturers have an assumed duty to provide safe products and the existence of an unsafe product is inherently a breach of that duty.

Therefore, the prima facie case of products liability is substantiated by showing (1) the plaintiff suffered an injury, (2) the defendant sold a product, (3) the defendant is a commercial seller of the product, (4) at the time the product was sold by the defendant it was in a defective condition, and (5) the defect functioned as an actual and proximate cause of the plaintiff's injury. To substantiate Ms. Cardall's case, I will address each of these elements in turn.

First, it is well substantiated that Mr. Cardall (by and through his estate, likely represented by Ms. Cardall) suffered an injury in that he was killed. Second, it must be established that (1) the taser is a product and (2) it was sold by Taser International. Products are generally defined by what they are not. For example, products are not services, text, intangible materials, or real estate. Assuming that tasers have not been made exempt by Utah statute, tasers are not found in any other exception and are therefore considered a product. The facts state that Taser International provided the product in question so the second prima facie element is satisfied.

Third, Ms. Cardall must establish that Taser International is a commercial seller of the taser. To qualify as a seller, Taser International must take steps which put the taser on the market. Even without specific knowledge of the distributive chain, it is reasonable to assume that Taser International is a commercial seller of the taser, particularly as the company has been and is currently subject to products liability litigation. More specific knowledge of the distributive chain may be gained through investigation and discovery to more firmly establish Taser International as a commercial seller.

Fourth, Ms. Cardall must establish that the taser was defective at the time it was sold. There are three theories of defect which could be advanced to substantiate this element: (1) a manufacturing defect, (2) a design defect, and/or (3) a failure to warn. There are no facts to suggest that the specific taser used deviated from the intended design during manufacture therefore I would not advance the theory of manufacturing defect without further investigation. ✓ (good)

The other two claims have possibility though. Ms. Cardall can claim that the tasers are inherently flawed in design due to causing cardiac arrest via electrocution. Taser International has specifically issued statements which contradict this claim but as more litigation and more deaths occur from the use of tasers, it may be possible to successfully advance this claim. Design defect claims can be evaluated under two tests: the consumer expectations test or a risk-utility test. The consumer expectations test is rarely used but involves evaluating a design based on how dangerous a consumer would expect the product to be. The taser design question would become whether or not a reasonable consumer would expect a taser to be lethal. The risk-utility test on the other hand weighs a products design against the products utility as described in *Cepeda v. Cumberland Eng'g Co.* As more deaths and injuries occur from the use of tasers, I believe either test may be satisfied. At this time though, Ms. Cardall may have difficult in succeeding under a design defect theory.

More likely to succeed is a products liability claim under failure to warn. Ms. Cardall must offer evidence that the taser was without proper warning and instructions to users at the time of Mr. Cardall's death. The facts make for a strong failure to warn case. Four months after the death of Mr. Cardall, Taser International altered its warnings and trainings to include an advisory that attaching the prongs on the skin above the heart can be more dangerous. This warning or a similar warning appears not to have been issued at the time Officer Johnson

shocked Mr. Cardall by attaching the prongs directly above his heart. Other facts concerning the altercation lead to questions about whether additional warnings are needed regarding the protection the shocked individual is wearing or the number and time between shocks. More information regarding the actual training and warnings issued with the taser at the time of the incident are required to properly evaluate the strength of this claim but from the given facts, it appears that Ms. Cardall can make a strong claim. Great

Finally, Ms. Cardall must prove that the product defect was an actual and/or proximate cause of Mr. Cardall's death. The failure to warn cannot be considered an actual cause of Mr. Cardall's death so an evaluation of proximate cause is required. A proximate cause is an act by a defendant which is close enough to the injury in the causal chain of events to make the defendant legally responsible for the injury, as is discussed extensively in the case *Palsgraf v. Long Island Railroad Co.* Proximate cause is often determined by reviewing the foreseeability of an injury, as suggested by *Clark v. E.I. Du pont de Nemours Powder Co.* The question becomes, was it foreseeable that by not warning/training users as to the risks for cardiac arrest in using the taser on the chest above the heart, that injury could occur? The issue of causation is one for the jury and I believe the facts could reasonably lead a jury to the conclusion that injury or death due to taser use was a foreseeable consequence of Taser International's failure to warn.

Overall, I believe the products liability case for failure to warn and failure to properly train is the strongest possible claim Ms. Cardall can advance on behalf of the estate. It is important to note that regardless of which claims are advanced, if any are successful, the damages recovered may be limited due to the factual circumstances surrounding Mr. Cardall's death. While products liability is a strict-liability tort so there is no comparative fault, the damage award could still be reduced by any contribution to his death the jury attributes to Mr.

Cardall. In particular, the mental history and the decedent's reduced use of medication despite an ongoing condition may become an issue in damage awards and more information as to the reason behind this decreased use should be garnered from Ms. Cardall.

In conclusion, claims against the officers or Hurricane Police Department are likely to be unsuccessful if based on underlying claims of negligence because of law enforcement immunities. The survivor actions based in intentional torts may be allowable by Utah statute so it is important to do additional research before advancing this option. The most success is likely to be had with a products liability failure to warn or instruct claim against Taser International. I would recommend this action above the others to Ms. Cardall.

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