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1. Medical malpractice tort reform would not significantly impact the cost of health care generally. As the members of our expert panel pointed out, the “hype” over medical malpractice suits is probably excessive. In Utah, for example, only a few hundred cases out of the roughly 98,000 civil suits filed each year are related to medical malpractice claims. Because damage awards from these suits are sometimes large, however, they tend to receive a disproportionate amount of publicity, and this leads to many people fearing that malpractice litigation is rampant and “out of control.”

But, as the Keefe news article pointed out, costs relating to malpractice litigation may account for “less than 1 percent of the total cost of U.S. healthcare.” If this figure is accurate, then even a complete annihilation of medical tort liability would not significantly affect healthcare costs. (I would not consider a \$1 reduction in a \$100 medical bill to be a “significant” reduction.)

It should be noted that the Keefe figure may be grossly inaccurate. It may take into account only insurance and litigation costs, without considering the inefficiencies that result from practitioners’ fears of tort liability. Doctors, for example, may conduct expensive and unnecessary testing for their patients, merely to ensure that they will not be found negligent.

But even allowing for substantial error in the 1 percent figure, it is a stretch to argue that reforming tort liability will “significantly” reduce the overall cost of healthcare. As David Arkush (quoted in Keefe article) points out, the costs of malpractice litigation are “at an all-time low, even though overall health care costs continue to rise.” This strongly suggests that the goal of reducing health care costs must be achieved through measures that do more than just curb tort litigation.

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2. The “law and economics” theory of tort liability is a utilitarian approach to justice. It suggests that courts should “maximize aggregate social wealth” (text, p. 200) by imposing liability only where the defendant has failed to act in economically efficient way. Where, for example, a precautionary measure would protect one individual, but impose a disproportionately high “expense” on the rest of society, “law and economics” theorists would argue that the precautionary measure should not be taken. ✓

Corrective justice, on the other hand, suggests that tort liability should be based on compensating a plaintiff for his injuries and deterring potential tortfeasors from engaging in harmful behaviors. As a more Kantian approach to justice, it is less concerned with overall social efficiency and more concerned the rights and interests of individual parties.

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3. Ms. Cardall may assert several causes of action following her husband’s death. Against the officer who deployed the taser, and, via respondeat superior, against the Hurricane police department, she might assert the following claims:

- Battery/Assault – Officer acted with intent to stun plaintiff with taser, causing death.

- IIED – Where plaintiff herself did not suffer physical injury, she may still recover on IIED theory where she directly witnessed family member’s death at the hands of the defendant.
- Negligence – invoking the eggshell plaintiff rule, if necessary. Officer, who had a duty to exercise care in deploying electrical stunning weapon, breached duty by placing weapon on bare skin over decedent’s heart.
- Wrongful Death – a survival action for the decedent’s injuries up until the moment of death, and a wrongful death action to recover for pecuniary harm suffered by family members of the deceased.

None of these claims are likely to succeed. Courts are extremely reluctant to impose tort liability on police officers, since doing so might impose enormous expense on city governments and hamper the officers’ ability to do their jobs effectively. To defeat liability, the officer and the police department would simply have to assert that Thompson’s conduct was “privileged.” As we discussed in class, unless an officer’s conduct represents an extreme violation of what would be considered appropriate under the circumstances, it is almost certain that his “privilege” will defeat liability. There is nothing in the facts we have been given to suggest that the officer’s behavior was outrageous; indeed, Taser deployment is commonplace in such circumstances. To impose liability here would be to subject municipal authorities to no end of counter-productive litigation from disgruntled civilians “injured” at the hands of the police.

Ms. Cardall stands a much better chance of succeeding in a products liability suit against the manufacturer of the Taser involved in her husband’s death.

As outlined in the text, the prima facie elements of a products liability claim are as follows:

1. P has suffered an injury
2. D sold a product
3. D is a commercial seller of such products.
4. At the time it was sold by D, the product was in a defective condition

5. The defect functioned as an actual and proximate cause of P's injury.

First, Ms. Cardall will certainly be able to show that her husband suffered an injury. Brian Cardall died.

Second, Taser, International (hereafter "Taser") manufactured and sold the weapon that was involved in Brian Cardall's death. Third, Taser is a commercial seller of such products. The facts indicate that the company supplies similar weaponry to police departments across the country.

Ms. Cardall's case against Taser will hinge on whether or not she can establish the last two elements of her products liability claim: the weapon's defective condition at the time of sale, and its proximate cause of her husband's death.

Courts recognize three types of product defects: a manufacturing defect, a design defect, and a "failure to warn or instruct" defect. If Ms. Cardall can show that her husband's death was proximately caused by any of these three deficiencies, she will prevail at trial.

Manufacturing Defect:

If Ms. Cardall can show a material difference between the weapon involved in her husband's death and other weapons of the same make and model, she may be able to prevail on a "manufacturing defect" cause of action. In *Gower v. Savage Arms*, the plaintiff hunter was able to overcome summary judgment by alleging that the gun that accidentally discharged, shooting his foot, had a "metal ridge" that adversely affected the operation of the gun's safety mechanism, and that the ridge was not present on other guns of the same make and model.

or TI, through discovery
In our case, Ms. Cardall would have to undertake a comparison of the subject weapon with other tasers produced by this manufacturer. Did this particular gun emit an exceptionally high voltage upon discharge? Was there some safety mechanism present in other tasers but absent in this particular weapon? If there is some quality unique to the taser involved in her husband's death, and if that defect was present at the time the product

left the hands of the manufacturer and was a “but-for” cause of the injury, Ms. Cardall will have an excellent chance of prevailing at trial.

Design Defect:

Ms. Cardall may be able to prevail on a “design defect” theory if she can show that the risks inherent in this weapon are not justified in light of its utility. Her case will be substantially strengthened if she can point to a technically feasible alternate design that would have rendered the product safer without defeating its usefulness. As quoted in *Cepeda v. Cumberland*, Dean Keeton asserted that “a product is defective if it unreasonably dangerous as marketed.” (text, p. 890) It is somewhat more difficult for plaintiffs to prevail on a “design defect” theory than on “manufacturing defect” theory, since the former requires not simply an examination of the subject in comparison with other like products, but a creative leap into the realm of what might have been possible as an alternative design. Nevertheless, many defects design cases do succeed. In *Cepeda*, the court found that a pelletizing machine installed with a bolted guard may have been unreasonably unsafe, since a hinged guard with an electronic “interlock” mechanism may have proven substantially safer while imposing minimal extra cost on the manufacturer.

In *Cepeda*, the plaintiff had the advantage of being able to compare the product that injured him with similar products made by other manufacturers; Ms. Cardall may or may not have such an advantage in this case. We are not aware of any other manufacturers of similar weaponry. Our facts do indicate that medical examiners have linked Taser products to many deaths. We also know that at least 97 law suits have been filed against the company in its 16-year history. If Ms. Cardall can establish that some other manufacturer’s stun guns have rarely or never been cited by medical examiners or in law suits as a contributory factor in causing severe injuries, Ms. Cardall has an excellent chance of persuading a jury that Taser’s products are unreasonably unsafe as marketed.

However, if Taser manufactures a product which is unique – a product which cannot effectively be compared with any other present design used by another manufacturer, then Ms. Cardall will have a greater burden in establishing her claim. She will either have to invent her own alternative design (which would be difficult, at best, unless Ms. Cardall has the technical expertise to do that), or she will have to argue simply that the utility of the Taser weapon is manifestly outweighed by the risks it poses to society.

Dean Wade, as quoted in Cepeda, presents several factors which might be considered in conducting a product risk/utility analysis. These include (1) the usefulness and desirability of the product, (2) the safety aspects of the product, (3) the availability of a substitute product, (4) the manufacturer's ability to eliminate the unsafe character of the product, (5) the user's ability to avoid danger through exercising caution, (6) the user's anticipated awareness of danger, and (7) the feasibility, on the part of the manufacturer, of spreading loss through higher pricing or by carrying insurance. (text, 890)

In this case, Taser will argue that (1) society benefits greatly when police officers are able to effectively subdue people who pose some threat to themselves or to others. (2) Taser will further argue that under normal circumstances, their products are reasonably safe. They may cite the large number of tasers presently in use and contrast that with the relatively miniscule number of incidents of injury. They will argue, further, that the only case in which their product was found to have contributed to a subject's death involved a party who was shocked 25 times and whose normal body functions were compromised by the use of methamphetamines. (3) Taser will argue that there are few, if any, effective substitute products, and (4) that to eliminate the "shocking" capacity of their weapon would be to completely nullify its usefulness. (5) Taser clearly believes that where police officers exercise caution in their use of the weapon, any risk of danger can be minimized. Further, (6) Taser will assert that police officers will intuitively sense that any device emitting an electric signal ought to be handled with caution, and that manufacturer warnings can effectively bolster this awareness. Finally, (7) Taser will assert that while cost-spreading and insurance are available, the company should not have to bear the cost of insuring against injuries where the products they manufacture are not unreasonably dangerous.

Ms. Cardall may effectively counter several of these arguments. (1) She will not dispute that tasers offer society the benefit of helping police officers subdue potentially dangerous people, but (2) she will assert that even under normal circumstances, tasers are not reasonably safe. She will point to medical examiner's reports from across the country that cite to tasers as having played some role in leading to deaths. She will argue that 97 law suits over a period of 16 years is a high number, especially given the fact that most people who suffer injury from a defective product do not seek legal redress. (3) She will assert that there must be *some* alternative product that would fill the same purpose – like a paralyzing agent that temporarily cripples the dangerous party without any use of electricity. (4) She might try to show that the shocking capacity of the Taser could be significantly reduced while not compromising its effectiveness. (5) She will argue that widespread evidence of injury suggests that police officers *do not* routinely exercise the necessary caution in using these weapons and (6) *do not* anticipate the magnitude of potential harm. (In making this point, Ms. Cardall might quote the police officer who aimed the Taser at her naked husband's chest as saying that he understood the weapon to be "less than lethal." Clearly, this officer was not aware of the taser's dangerous nature when used in this way.) Finally, (7) Ms. Cardall might point to this company's profits over the course of its history as evidence that it would not be unjust to impose on the company any loss from injuries or to require the company to pay for insurance. *could employ delay in shocking / pulse after first employed*

In the end, Ms. Cardall's ability to prevail at trial will hinge on whether a jury is satisfied that the risk imposed by this product outweighs its benefit to society. Given the fact that 96 other plaintiffs have failed to effectively argue against the utility of these weapons, Ms. Cardall has only a slim chance of succeeding on a design defect theory, even if she can show proximate causation, which will be discussed next.

Ms. Cardall will argue that the medical examiner's report, citing "ventricular fibrillation following conducted energy weapon deployment" as the cause of Mr. Cardall's death, lends substantial weight to her theory that the weapon proximately caused the death. However, Taser will aggressively contest this point. They will argue

that Mr. Cardall suffered from “excited delirium,” exacerbated by his bipolar condition and his use of marijuana and the prescription drug Seroquel. Even had the weapon not been deployed, they will argue, Mr. Cardall would have died.

A sympathetic jury is likely to lean in favor of Ms. Cardall on the issue of causation. The taser shot two powerful electric impulses directly over the decedent’s heart while he had no clothing on. To suggest that “excited delirium” was the true cause of death, rather than heart failure linked to the electric impulses, will strike many jurors as a shady assertion at best.

On the whole, Ms. Cardall’s chances of recovery on a design defect claim are, as previously noted, somewhat weak. She will likely prevail on the issue of causation, but she faces substantial hurdles to persuading a jury that the utility of the weapon is outweighed by its danger.

“Failure to Warn or Instruct” Defect

Ms. Cardall has one last avenue to recovery under a products liability theory. She may prevail if she can show that the manufacturer failed to effectively warn or instruct police officers who would be using Taser weapons. To prevail on a “failure to warn or instruct” theory, Ms. Cardall would have to show not only that the weapon manufacturer did not effectively caution police officers, but that its failure to do so was a proximate cause of her husband’s death.

We do not know the nature or extent of any warnings issued by the manufacturer to end users; neither are we aware of how police officers are typically trained with regard to taser use. We do know, however, that Officer Thompson, who placed the taser’s “barbs over the Cardiac axis,” while the decedent was unclothed, was not aware that doing so would pose any significant threat to the man’s safety. Thompson unreservedly claimed that he understood the weapon to be “less than lethal,” and his recitation of the incidents surrounding the death give no indication that he weighed, prior to discharging the weapon, any potential risk of a cardiac failure. Further,

given the fact that other officers claimed Thompson's behavior was "reasonable under the circumstances," none of the other officers clearly recognized that there was a substantial risk of cardiac failure where the subject was naked and the taser was placed over the man's heart. Given these circumstances, Ms. Cardall will argue that Taser failed to effectively communicate the weapon's risks to its users.

But had those officers known of the risk, would the outcome in this case have been any different? Ms. Cardall must also show that "but-for" the deficient warnings, her husband would have survived the altercation. In Gower, the plaintiff could not prevail under a "failure to warn" theory because he failed to show that the defendant's "failure to warn" changed the outcome of the incident in any material way. Here, Ms. Cardall would have to persuade a jury first that Thompson would have behaved differently had he been adequately warned, and second, that Thompson's behaving differently would have spared her husband's life. The answers to these questions will likely hinge on testimony from both Thompson himself and from medical experts who could speak to the likelihood that the Cardall's death was proximately caused by the placement of the weapon over his heart.

Overall, Ms. Cardall's best chance of prevailing on a products liability claim is probably under a "failure to warn" theory.

General defense possibly available to Taser

Ms. Cardall's recovery may be barred by a statute of repose. Statutes of repose sometimes impose limits on tort liability relative to the date of a product's manufacture or sale. In this case, for example, an applicable statute of repose might limit tort recovery to ten years from the original date of sale, and if Brian Cardall's death occurred more than 10 years following the sale of the weapon to the police department, a court would have to deny recovery to Ms. Cardall.

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