

Klick
Torts
The Armageddon
December 2020

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. Given that different students will be taking the exam at different times, do not discuss this exam with anyone until December 22, 2020 at the earliest. Remember, you are all above average on some distribution . . . unfortunately, that can't be true on this particular one. Good luck.

1. The St. Bernard's Preparatory High School for Boys has a football team that won the Pennsylvania state championship in both 2018 and 2019. Given the school's location in North Philadelphia, it does not have its own field for home games or practices; instead, it uses a college stadium located in Delaware County (PA) for its games and a Philadelphia municipal field for its practices.

When Covid-19 struck, the Pennsylvania Interscholastic Athletic Association, which governs high school athletics in the state, provided guidance stating that high school football teams could make their own decisions as to whether to go forward with the 2020 season, recommending that practices not involve physical contact with participants maintaining a six-foot distance between each other. It also recommended that all participants wear masks during practices.

Many schools chose to suspend their fall sports altogether, including all the public high schools in Philadelphia and many of the Catholic high schools as well, but St. Bernard's chose to go forward, knowing it would again be the favorite to win the state championship and likely would receive a high national ranking. Prior to the start of summer practice, St. Bernard's required a parent of each player to sign a waiver that included the following language:

"IN CONSIDERATION for being permitted to participate in, or granted use of, ST. BERNARD'S PREPARATORY SCHOOL'S ("SBP") facilities, services, and programs, and/or for my minors listed above to so participate or use, the undersigned, on behalf of himself or herself, on behalf of such participating minors, and on behalf of our current or future personal representatives, heirs, and assigns (hereinafter, collectively, "the UNDERSIGNED"), and intending to be legally bound, does hereby acknowledge and agree as follows:

"Participation" is to be construed broadly and includes, but is not limited to, the observation of, or participation in, any SBP program, service, or activity (academic, athletic, social, service, or otherwise), whether on-campus or off-campus. It likewise includes the use of, or attendance at, any SBP facility or other venue utilized by or affiliated with SBP in any manner.

Novel coronavirus ("COVID-19") infections have been confirmed throughout the United States, including in Pennsylvania and New Jersey. SBP has taken certain steps to implement applicable, recommended federal and state guidance and protocol for slowing the transmission of COVID-

19, including, without limitation, the implementation of its COVID-19 Stay Safe Plan for the resumption of in-person training.

The UNDERSIGNED has received and reviewed SBP's COVID-19 Stay Safe Plan (the "Plan") and agrees that SBP may revise the Plan at any time based on updated recommended federal and state guidance and protocols. Participation in any SBP program, service, or activity is entirely voluntary, and the UNDERSIGNED expressly agrees to comply with Plan, and any updates or modifications to the Plan, during any period of participation in or use of SBP facilities, services, and/or programs (other than any exclusively online services and programs).

Assumption of Risk

The UNDERSIGNED has inspected and carefully considered the premises, facilities and equipment designated for use in the subject SBP program(s), service(s), or activity(ies) and finds and accepts them as being safe and reasonably suited for the use or participation by the UNDERSIGNED and/or such participating minors. The UNDERSIGNED further acknowledges and agrees that participation in and use of the premises, facilities and equipment designated for use in the subject SBP program(s), service(s), or activity(ies), may not always allow for social distancing of 6 feet. The UNDERSIGNED fully understands, appreciates, and accepts that, despite SBP's reasonable efforts to mitigate COVID-19 related exposures, the risk of exposure to COVID-19 cannot be eliminated, and could result in quarantine requirements, serious illness, disability, and/or death.

The UNDERSIGNED acknowledges that participation in SBP programs, services, or activities and/or use of SBP premises, facilities and equipment involves an inherent risk of personal injury and/or illness to the participant. The UNDERSIGNED voluntarily agrees to assume all risks of personal injury and/or illness, including quarantine requirements, serious illness, disability, and/or death.

The UNDERSIGNED acknowledges that participation in athletic endeavors, in particular, involves an inherent risk of bodily injury, including, in some instances, disability and/or death. The UNDERSIGNED voluntarily agrees to assume all such risks.

Waiver of Liability and Indemnification

The UNDERSIGNED, on his or her behalf and on behalf of such participating minors, hereby WAIVES, RELEASES, DISCHARGES, HOLDS HARMLESS, and INDEMNIFIES SBP, together with its directors, officers, employees, volunteers and agents (collectively, "SBP Releasees"), from any and all liability for personal injury and/or illness (including quarantine requirements, serious illness, disability, and/or death) impacting the UNDERSIGNED and/or his/her participating minors, arising out of or relating to (i) participation in any SBP program, service, or activity, or (ii) use of SBP premises, facilities or equipment, even if such personal injury and/or illness occurs as a result of the negligence, active or passive, gross or ordinary, of SJP or any of the SJP Releasees.

I HAVE CAREFULLY READ, UNDERSTAND, AND VOLUNTARILY AGREE TO THE TERMS OF THIS PARTICIPATION, RELEASE AND WAIVER AGREEMENT. I FURTHER AGREE THAT NO ORAL REPRESENTATIONS, STATEMENTS, OR INDUCEMENT APART FROM THE FOREGOING WRITTEN AGREEMENT HAVE BEEN MADE. I AM AWARE THAT BY AGREEING TO THE TERMS OF THIS AGREEMENT I AM GIVING UP VALUABLE LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE AND THE RIGHT TO RECOVER DAMAGES FROM SBP IN CASE OF ILLNESS, INJURY, DEATH OR PROPERTY LOSS OR DAMAGE, INCLUDING, FOR THE AVOIDANCE OF DOUBT AND WITHOUT LIMITATION, EXPOSURE TO COVID-19 AT THE FACILITIES OR AS A RESULT OF PARTICIPATION IN ANY SBP PROGRAM, SERVICE, OR ACTIVITY, AND ANY ILLNESS, INJURY OR DEATH RESULTING THEREFROM.

IF SIGNING ON BEHALF OF MINOR: I ALSO UNDERSTAND THAT THIS AGREEMENT IS MADE ON BEHALF OF MY MINOR CHILD(REN) AND/OR LEGAL WARDS AND I REPRESENT AND WARRANT THAT I HAVE FULL AUTHORITY TO SIGN THIS AGREEMENT ON BEHALF OF SUCH MINOR(S)."

The aforementioned "Stay Safe Plan" included a protocol where players were instructed to take their temperatures before attending practice, staying home if they recorded a temperature above 100.4 degrees, and at practice were to be asked whether they exhibited any Covid symptoms. The plan also indicated that coaches will ensure that any facilities used will comply with state and city guidelines. The football coaches also communicated verbally that practice will not involve contact drills (e.g., tackling, person to person blocking, etc.) though they did reiterate that it will not always be possible to maintain a six-foot separation.

The SBP coaches adopted a policy of not allowing anyone except players and coaches to enter the practice facility in order to limit possible Covid exposure arising from individuals who are not on the team. In the early weeks of practice, coaches did limit contact drills, but as the season grew near, they engaged in normal full-contact blocking and tackling drills. While coaches generally wore masks during practice, essentially no players did because they found it difficult to breathe while exerting themselves with masks.

Prior to the first game of the season, rising Covid cases in the city of Philadelphia led the city's health department to place a ban on all contact sports within the city as a means to halt the spread of the virus. To avoid this ban, the SBP coaches secured a practice field in Delaware County. SBP players continued to attend class at the school's North Philadelphia campus during this time. SBP started its season easily winning its first two games of the season. Before its third game, the school shut down operations for a two-week period due to a Covid outbreak in the school. No football players tested positive for the virus (though it is not clear how many were tested at all), but the closure suspended all football operations, leading the team to cancel its third game and stop all practices. The two-week closure ended right before the football team is scheduled to face its toughest regular season opponent. Having not practiced at all for two weeks, the SBP team beat its opponent 52-6.

As SBP took an undefeated record into the state playoffs, many other teams were forced to forfeit their playoff games as they had players test positive for Covid, as a positive test result

required a two-week quarantine for all team members. Fearing the same fate, many players shared advice with each other on player group texts to not say anything if you felt sick. There is no evidence coaches were aware of these text messages. The team had no capacity to administer tests on its own, but the “Stay Safe Plan” required any player exhibiting symptoms of Covid to secure a doctor’s approval before returning to team activities.

The SBP team went on to win the state championship. After the championship game, many players and their families stayed overnight in a common hotel where the players shared a late night meal and celebrated together in a hotel ballroom. Three days after the final game, a 16-year-old SBP football player tested positive for Covid. No other players reported positive test results.

For background information, the immediate effects of Covid are relatively slight for young people in good health, however exceptions exist. Children represent about 12 percent of all Covid cases, less than 3 percent of Covid related hospitalizations, and less than 0.25 percent of all Covid deaths. However, children are just as contagious as anyone else with the virus. Many infected people are asymptomatic. The long-term consequences of Covid are unknown, but some have hypothesized that the virus may lead to heart and lung complications. While it is too soon to evaluate these claims, there is substantial research suggesting individuals exposed to the 1919 Spanish influenza suffered significant negative health and socio-economic effects in their later years as compared to people who were not exposed.

- a. The Covid positive player’s family approaches you to bring a case against SBP. Assume the player spent 3 weeks in the hospital. While it appears as though the player has made a recovery from Covid, the player reports trouble concentrating in school (he had previously been a good student but now barely gets passing grades) and has anxiety about the long-term risk of the virus that keep him from sleeping at night, further compounding his concentration problems. The family also notes that the player’s 80-year-old grandmother was diagnosed with Covid five days after the player tested positive for the virus, later dying from the virus. The grandmother lived with the player’s family and had not left the house since the Covid pandemic began. Each of the other residents of the house have been tested for Covid antibodies. The results indicate that none of the other residents of the house have had Covid. The antibody test they took accurately identifies people who have had Covid 99 percent of the time (i.e., false negatives occur with just 1 percent probability). Lay out the case the family has against SBP.

The two people harmed directly are the football player (for hospital bills, potential pain and suffering, and perhaps something related to his on-going attention and anxiety issues including eventual reductions in college and employment opportunities) and the grandma (wrongful death). Indirectly, the other family members might have some claims for loss of consortium. These claims would be brought against SBP for its own negligence (both on regular reasonableness grounds as well as under grounds based on a heightened duty owed because of the special relationship between a school and its students) and for the negligence of its employee coaches (via vicarious liability/respondeat

superior). Claims might also be considered against the coaches themselves (for negligence), though it likely would be harder to collect any awarded judgements against the coaches.

Regarding the duty/breach element, the school and the coaches have a duty to run their football program in a reasonable way. This requires implementing cost-justified precautions against harm. In the covid context, this requires taking reasonable precautions against the spread of covid among the players themselves. It might be possible to argue that it was not reasonable to have a football season at all. Covid is highly contagious and football requires repeated contact in close quarters, making it very difficult to reduce exposure and spread among the players. This argument is potentially risky, however, because it would require the plaintiff to argue that very little could have been done to mitigate risk, which might undercut subsequent arguments hinging on the failure to take precautions (which will require showing that such precautions would have been effective). If the argument against playing is to be successful, the plaintiff needs to show that the benefits of playing football are less than the risks created by playing. Given the potential to undercut the precaution argument, it may be prudent to not take this approach for the following reasons: 1) if the cost-benefit case were clear, presumably the state would have prohibited playing and 2) football already poses a host of risks to players (including the potential for long-term cognitive harms) that do not lead schools to drop the sport, leaving the presumption that the benefits of playing football are seen as being large. On top of this, courts are reluctant to hold that simply engaging in an activity is grounds for negligence (as opposed to engaging in it in an unreasonable way) though the covid context admittedly might change this. In any event, it may be more sensible to argue that the school did not engage in reasonable precautions.

One of the strongest arguments for breach is that the coaches actively avoided the Philadelphia prohibition on contact sports by seeking alternative practice space outside of the jurisdiction. The Philadelphia regulation creates a presumption that the benefits of practicing at the time were lower than any benefits. Perhaps it even establishes per se negligence as the team did not abide by the regulation. This breach might even constitute the kind of willful recklessness that could give rise to punitive damages. Even if it is not per se negligence (since, formally, the regulation applies only within the jurisdiction, though presumably it was meant to protect people in the city and some of the children live in the city and they all go to school in the city, so arguably still applies), the fact that later in the season the team easily defeated their strongest opponent without practicing, suggests that the value of the practice was quite low. Further, the team's own safety plans indicated they would comply with relevant regulations, suggesting an evaluation that it is reasonable to follow rules set by the relevant regulators.

Another argument for breach arises from the fact that the team did not follow its own safety protocols. The original establishment of the protocols indicates that the team viewed them as reasonable, but then they abandoned them (e.g., engaging in contact drills).

Outside of these arguments, the plaintiff can also argue that the team did not engage in a host of reasonable precautions. As stated before, the benefits of practice would appear to be low (since they were able to win even without practicing) while practices obviously increase the risk of covid spread. Similarly, they could have eliminated contact drills during practice and required social distancing (as

avoiding contact and prolonged close proximity are things that everyone is being encouraged to do during the covid times). The coaches could have required the wearing of masks (which most other people have been doing during the pandemic) which is known to reduce the spread of the virus. The coaches could have done more to screen for covid, especially knowing the incentives individual players will have to hide any symptoms, including providing rapid testing, taking temperatures when the team gathered, etc. Also, knowing the likelihood that players and families would gather to celebrate, the team could have done more to discourage this, including explicitly prohibiting such gatherings, requiring players to leave the championship location (perhaps transporting the players back to the school where they would then be more likely to simply return to their individuals homes), etc. Although demonstrating that these breaches also constitute violations of a duty to the grandma will obviously be harder, because the school/coaches know that players will come in contact with family members (being high school students, obviously none of them lives alone) any such duty extends to household members of the players. To reinforce this point, it could be noted that high school football teams in general (and SBP in particular) rely on player families substantially for transportation, fund-raising, etc.

It will be necessary to address the waiver. First, the plaintiff will argue that it is improper to enforce waivers against children (and not possible to enforce them against third parties). Pennsylvania does not enforce them against children as a matter of law. However, even if the waiver were not voided on these grounds, the waiver is over-broad (e.g., it is not possible to disclaim gross negligence in virtually any jurisdiction) which also undercuts its enforcement. Beyond these general issues, there are specific defects for the waiver. The waiver was premised on a number of factors that SBP did not follow through on, such as following its safety plan, following applicable regulations, and, perhaps most egregiously, the entire assumption of risk clause is premised on parents inspecting facilities that they were actively barred from visiting. In sum, the waiver will not impede the plaintiff's case.

It is also necessary to link these breaches causally with the harms suffered by the player and the grandma. Since the grandma has only interacted with members of her household, and since all of the other members have been proved to not have had covid, she could only have gotten the virus from the player. Thus, establishing a causal link between the breach and the player's damages will also establish the link with the grandma's damages.

For the player, it is helpful that none of his other household members (except the grandma, but she could have only gotten it from the player) has gotten covid, ruling out infections through them. The general causal link between covid and his hospitalization for covid and subsequent anxiety is established in the medical literature (see, for example, <https://onlinelibrary.wiley.com/doi/full/10.1002/acn3.51210>). In terms of his specific case of covid and its effects, it would be necessary to rule out other sources of infection outside of the football activities. Admittedly, this is the weakest part of the plaintiff's case. Even if the plaintiff can rule out other sources of infection, it is necessary to link the specific breaches discussed above with the infection.

In terms of damages, the hospital bills are self-evident. As for pain and suffering, the plaintiff might provide evidence indicating his previous good school performance and the like. As for subsequent

effects, it would be helpful to have some discussion of what colleges SBP students with his previous academic profile get into vs. the schools they get into with his current performance. As for the grandma, standard wrongful death damages would apply and if it is possible to show evidence of pain and suffering before death, that would be helpful. As mentioned above, the willful recklessness of avoiding the Philadelphia prohibition might justify punitive damages. Also, given the likelihood that many players might hide their infections, SBP might have anticipated that they would be “off the hook” for their wrong-doing, so punitive damages are necessary to induce efficient behavior.

b. Provide SBP’s defenses.

The strongest defense revolves around causation. For most of the breach claims, there is no connection between the claimed breach and the ultimate harms. The supposed regulation avoidance occurred weeks before the covid manifested even though covid’s latency period is less than two weeks. So even if this did constitute per se negligence, it was not causally connected to either the player’s or the grandma’s damages.

Generally, it is not possible to rule out that the football player caught covid outside of football. In fact, if he caught it in football, why has no other player contracted the virus. This would seem odd, given how contagious it is. Further, because football occurs outside, it is unlikely he caught it while playing football, as outdoor conditions are much less likely to generate disease spread. The plaintiff must provide evidence he did not contract the virus in any of the other activities he engages in, many of which take place indoors where spread is much more likely.

A potentially novel proximate cause defense, with respect to the grandma, might involve analogizing a virus to a fire. Maybe SBP is responsible for the first harm (the player), but not subsequent harms (the grandma) as any “conflagration” would generate a ruinous burden. Beyond that, on proximate cause grounds, the school could argue it was not aware the player lived with an elderly grandma.

Generally, the defendant can argue that it owes no duty to students’ family members. As for the specific breach claims themselves, the Philadelphia regulation applied to activities in Philadelphia. The relevant practices occurred outside of Philadelphia, therefore there is no per se negligence. As for the claims about practicing, contact drills, distancing, and the like, it is not possible to play football without doing these things, as football is a contact sport. Since the state chose not to cancel high school football, this is evidence that decision-makers deemed football, and all it entails, worth the risk. Further, regarding masks, wearing masks during intense physical activity likely generates a greater risk of harm. Regarding the celebration after the championship, this was not something organized, much less mandated, by the team. SBP bears no responsibility for this gathering. Nothing SBP could have done would have stopped families from celebrating (e.g., if the defendants had transported the players home, families likely would have celebrated in Philadelphia).

It would be unreasonable for the team to pay for individual rapid tests before every gathering, as such tests are quite costly. Even intermittent tests would be costly, and would do little to rule out infections on the other days when tests weren’t performed. It is reasonable for the team to rely on

individuals to self-monitor and disclose, as this is the practice followed by many entities in the area (e.g., Penn). SBP was not aware of private texts among players telling each other to hide their symptoms, and, therefore, had no duty to protect against this possibility.

Generally, because the harms of covid to children are slight, these proposed precautions are not cost-justified in any event. Although it might not be sensible to argue from an optics standpoint, the baseline risks of football (injury, cognitive impairment, etc) are likely orders of magnitude higher than the covid risks.

Further, the waiver serves as a defense on assumption of risk grounds. The waiver explicitly noted that SBP could not always ensure distancing and the like, and it spelled out the risks quite clearly. If it is not possible to have a waiver in a circumstance like this, football, even outside of covid times, and most other contact sports will cease to exist. That would be a bad outcome from society's perspective.

Beyond this, the player (who chose not to wear a mask) is contributorily negligent, generating a complete defense.

As for the damages themselves, any effect of covid on the player's ultimate academic performance and (even more) on his ultimate college admissions and future income are highly speculative. At best, these are unmanifested future risks. Even regarding the direct effect on anxiety and concentration, there is no scientific link between covid and these outcomes. The fact that his grades seem to be slipping could just as well be due to the fact that high school gets harder as one moves further in the curriculum. As for the grandma's wrongful death claim, at 80 years old, she had very little life left in any event. As for loss of consortium, it is unlikely the grandma was providing much in the way of household services at such an advanced age.

2. Producers of childhood vaccines (e.g., measles, mumps, etc.) are shielded from liability for harms associated with the use of their products. The National Childhood Vaccine Injury Act of 1986 created the National Vaccine Injury Compensation Program which is a no-fault based system where children who were administered a vaccine and then experienced a known (and scientifically demonstrated¹) complication of the vaccine could be compensated for hospital costs, lost future earnings, up to \$250,000 for pain and suffering, and up to \$250,000 for wrongful death. The system is funded by an excise tax administered on vaccines. The system is adjudicated without a jury in the Court of Federal Claims. Plaintiff win rates in the no fault system are about twice as high as plaintiff win rates in tort generally. Also, the no-fault system tends to resolve claims much quicker than does the tort system in general.

¹ Plaintiffs can either prevail on a claim regarding a vaccine-injury relationship previously included in the Vaccine Injury Table maintained by the Secretary of Health and Human Services or the plaintiff can attempt to prevail by presenting new evidence of causal links. For example, in 2002, cases regarding the link between vaccines and autism were rejected for failing to demonstrate a causal link.

Producers of adult vaccines are not generally afforded a similar system; instead, claims regarding adult vaccines are generally treated the same way as other tort claims.

- a. Discuss the pros and cons of the National Vaccine Injury Compensation Program.

Developing vaccines is a long, risky, and expensive process. Firms will only be induced to undertake such investments when there is a prospect of large gains to success. Liability represents a reduction in those gains, so limiting it is an implicit subsidy to vaccine development. This benefits consumers and society in general. Also, the system makes compensation much faster, cheaper, and more certain for those harmed. On the bad side, the limits may lead to under-compensation and that may in turn reduce safety precautions by the firms. Also, funding by a tax on the vaccine will reduce its use, reducing social benefits.

- b. Identify and evaluate any reasons why childhood and adult vaccines should be treated differently liability-wise.

There is evidence that juries are particularly sympathetic regarding harms to children. Therefore, removing these cases from the general litigation context might counteract this “bias” in the system. On the other hand, maybe it doesn’t represent a bias so much as a social determination that children should receive more protection. Beyond this, evaluating harms to children (e.g., future loss income, on-going medical care, etc) might be more speculative/harder to estimate and so it might make more sense to come up with these valuation outside of the litigation context (the vaccine court can task experts to examine the issue).

- c. In early 2020, the US government announced that companies providing Covid vaccines in the US would be completely shielded from liability related to the vaccines through the Countermeasures Injury Compensation Program (a 2010 program that was aimed at vaccines designed to counteract a pandemic or Ebola outbreak) funded by general federal tax revenues. Discuss the relative merits of this funding mechanism as opposed to the excise tax mechanism used to fund the childhood vaccine no-fault system.

As mentioned above, a tax on the vaccine will lead fewer people to get the vaccine, which undercuts the social value of having vaccines. Further, the benefit of a vaccine is not just to the taker of the vaccine but also society more broadly when it comes to contagious diseases. Both of these factors favor a more broad-based funding mechanism. By funding from the general budget, there is no disincentive to taking the vaccine and the cost is more broadly spread over the society that benefits from vaccination.

- d. Evaluate the pros and cons of making any of these no-fault systems voluntary. Specifically, compare i) a mandatory system (consumers must use no-fault system; no tort option); ii) an ex post choice system (consumer can choose between bringing case in tort or bringing case to the no-fault system); and iii) an ex ante choice system (manufacturers choose which

system consumers will be subjected to and consumers are made aware of that choice presumably with different producers of a given product making different choices).

I accepted a lot of answers here. My own favored answer is that i has the benefits and costs outlined above; ii is sort of the inverse – you do not get much of the implicit subsidy benefit of a no-fault system since consumers will always pick the avenue with a bigger judgment; you do avoid the worry that consumers will be under-compensated; iii allows for market competition on this dimension – if firm A offers the product with a no-fault system and product B offers it with liability, consumers choose depending on their risk aversion levels, the value they place on being able to litigate, etc. Choice is often good in terms of welfare as long as we think consumers are well informed and competition is vigorous. We also learn from the variation provided by such a system.

3. Choose one of the questions (1 or 2) to count double, or choose to have the two questions weighted equally (i.e., I multiply the points for both of the questions by 1.5). If you do not make your choice clear, I will choose the least advantageous option (i.e., the option that provides you with the fewest points) for you.

Bonus (not worth anything beyond my esteem for you in anonymity): During the semester, my intro and break music selections only repeated one artist on more than one day; specifically, the first and last class days. Name that artist.

Of course, it was James Brown. 10 people answered correctly. There was no correlation between whether you knew this and what your grade was (but those who knew it gained my un-dying respect; the rest of you need to give the godfather of soul his due respect).

Note on grading: Generally, for each question, I assign the following point determinations: 3) you were spot on, getting the forest and the trees, appropriately applying the law to the facts and noting where the law generates potential problems and/or could be improved; 2) you were mostly right, though you may have missed something here or there but were more or less on point; 1) you were lost saying little that was right or made sense.

Q1: average score – 2; 15 people chose to double

Q2: average score – 1.9; 8 people chose to double

Q3: average score – 2; 12 people chose to diversify

Total average: 5.9

Correlation between getting James Brown and total points: -0.05 ($p < 0.80$)