

Toxic Harms

and factual causation review

Toxic Harms

Why is the tort system such a poor fit?

Three frequent problems:

1. Can't be certain that the toxin was a “but for” cause
2. Can't be certain of the magnitude of the harm
3. Can't be certain who is responsible

Mass Torts

A procedural story in two parts:

1. Amchem killed the mass tort class action
2. But multidistrict litigation (MDL) took over

Factual Causation Speedrun

Causation

Two parts:

1. _____

2. _____

Two different tests for factual causation

1. _____

2. _____

Causation

Two parts:

1. Factual cause
2. Proximate cause

Two different tests for factual causation

1. “But for”
2. Substantial factor

Stubbs v. City of Rochester

Zuchowicz v. United States

Summers v. Tice

Hymowitz v. Eli Lilly & Co.

Joint and Several Liability

vs.

Several Liability

Alternative Liability

Market Share Liability

Exercise #1

You are an attorney at a plaintiff's side firm in the state of Loyola.

Luna Waters was driving her car and rolled to a stop at a red light. Just behind her on the road, Joseph Meyer was texting while driving and negligently rear-ended Waters's car. Minutes later, another driver, Myla Morales, was lost in thought, awestruck by the idea that causation can never be directly observed but is always an inference vulnerable in some way to *post hoc ergo propter hoc* "since Y followed X, X must have caused Y," and negligently rear-ended Meyer's car, which struck Waters's car a second time.

In one collision or the other, Waters sustained an injury to her neck. She doesn't know which of the two accidents caused the injury. The doctors that treated her injury cannot determine whether it was the first or second impact that caused it.

Waters visits your office as a prospective client. She wants to know if she has a viable negligence claim against Meyer or Morales, who she should sue, and if she will win. Please advise her.

Exercise 2

Same initial fact pattern as the first exercise. Except now, in addition to being hit by Meyer and Morales, Waters was also hit by two other drivers who fled the scene.

In one of the four collisions, Waters sustained an injury to her neck. She doesn't know which of the four accidents caused the injury. The doctors that treated her injury cannot determine which of the four impacts caused it.

Waters visits your office as a prospective client. She wants to know if she has a viable negligence claim against Meyer or Morales, who she should sue, and if she will win. Please advise her.

Exercise 3

You are an attorney at a plaintiff's side firm in the state of Loyola.

A labor activist, Ayla Ross, comes to visit you in your office. She has been organizing workers at a slaughterhouse in the region. She's learned that the slaughterhouse had been euthanizing chickens with a particular gas, BirdBeGone, for the many years. but stopped using the gas when it was taken off the market six months ago. The gas was banned by state authorities after emerging research indicated that human beings exposed to the gas could develop skin cancer and that the gas could induce miscarriages and result in severe birth defects.

Ross wants to talk with these workers about the possibility of suing the slaughterhouse for negligence. She is particularly interested in the possibility of a class action lawsuit so that the workers don't need to litigate individual cases, but she knows that issues of causation can be challenging in toxic harm lawsuits.

For this question, assume that duty and breach can be proven. Please advise her on the most pertinent remaining issues.