

TORTS FINAL

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QUESTION #1

Tort reform may decrease costs of health care, but the impact of tort reform is inconclusive.

First, tort reform may decrease costs of defensive medicine. Defensive medicine increases costs because doctors fear lawsuits. Doctors cover the costs by spreading costs to other patients or by implementing expensive procedures.

One way reform may decrease costs is by requiring practices such as evidence-based medicine (EMB) that would decrease the risk of malpractice. Presumably, EMB decreases the volume of cases by increasing efficiency in practices.

Second, and related to the first, tort reform may drive down costs associated with damages. The cost of health care is high and a medmal lawsuit may yield exorbitant compensatory and punitive damages. Tort reform may require more proof of damages. In *Sohm v. Dixie Eye Center*, the appellate court held that the plaintiff didn't need to prove damages precisely to hold the eye center liable. This allowed the jury wide discretion in awarding very high damages, including punitives.

In conjunction, the availability of punitive damages may encourage frivolous lawsuits and in turn increase the costs of health care. Tort reform can mitigate this by placing increased restrictions on the availability of punitives and damages in general.

Though tort reform may impact health care in general, the impact is inconclusive. As for the panel discussion, the volume of medmal cases in Utah is comparatively low. There were 70,000 debt collection cases filed by IHC, and only 229 medmal cases. This may illustrate a potentially very low impact on the health care industry in general. many mistakes unlitigated

In conclusion, tort reform may impact costs of health care by mitigating costs of defensive medicine and damages. But the general impact is inconclusive given the very low volume of medmal cases. doesn't that argue for limited impact of damage caps?

QUESTION #2

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harm

In *U.S. v Carroll*, Learned Hand provides a cost-benefit analysis ($B < LP$) asserting that if the burden of precaution is less than the gravity of injury times the probability of the barge breaking away, then the D is liable. This formula essentially "asks the factfinder to measure the dollar cost of precautions against the dollar value of expected harm." (Book p. 200). Judge Posner argues that this approach maximizes aggregate social wealth by encouraging actors to take only cost-effective precautions. Judge Traynor asserts this general idea in *Escola* when he argues responsibility should be fixed wherever it will most effectively reduce hazards to life.

Corrective justice isn't so much about efficiency as it is about making sure people are compensated for wrongs imposed on them. This may include policies give incentives to take precautions or a deterrence rationale, as posited by Judge Traynor in *Escola*.

QUESTION #3

PART ONE

CLAIMS AGAINST HURRICANE POLICE DEPARTMENT

- Negligence
- Wrongful Death
- Survival Action

CLAIMS AGAINST TASER INTERNATIONAL

- Products Liability
 - Design Defect
 - Failure to Warn/Instruct
- Wrongful Death and Survival

PART TWO

good
In Anna's case, she may have claims against both the Hurricane Police Department ("HPD") and Taser International ("Taser"). Notably, she may not bring a claim of battery or assault because these two claims are barred by the Government Immunity Act, Utah Code Ann. § 63-30d-301(5)(b)—ruling government immunity is waived with the exception of claims asserting assault and battery. (Case Book, page 578, assuming this exception has not been overruled).

NEGLIGENCE

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First, Anna may have a claim of negligence against the HPD. The main issue may be phrased as whether Officer Thompson was negligent when he stunned Brian Cardall twice with the X-26 taser in aiming the taser at his heart. To assert a claim of negligence, Anna will have to show that (1) Brian was injured, (2) HPD officers owed a duty to Brian in using a taser, (3) HPD officers breached the duty, and (4) the breach of the duty was the cause of Brian's death. Because she may have difficulty in arguing HPD breached its duty, she might have difficulty establishing a claim of negligence.

to do what?
As for element one, Anna can establish unequivocally that Brian was injured (i.e. he died). As for element two, besides the normal duty of care to the public arising from Thompson's position as a police officer, Anna can likely establish that Thompson owed a duty by applying the Rowland factors to her case. She can likely show (1) the foreseeability of the harm, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness in connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, (5) the burden on the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach.

In Anna's case, the harm may have been foreseeable because the officer aimed the taser at Brian's heart. But this may be difficult to show because Thompson may not have realized the danger in doing so. However, Thompson definitely realized there would be a temporary harm otherwise he would not have used the taser twice. Also, hearing Brian scream on the first stun more than likely conveyed to Thompson that he was harming Brian. So whether a second shot (stun) would harm Brian was likely foreseeable, even though Thompson may not have realized it would result in death.

Additionally, there are definite public policy concerns over misuse or overuse of the taser, which likely imposed a duty on the police officers. In conjunction, the training Taser provided illustrates that

and policy of protecting police

the HPD was aware that misuse or overuse may result in harm to a citizen. This likely imposed a duty on police officers to not misuse or overuse the taser. Similarly, the burden of providing training to police officers appears to outweigh the negative consequences of not imposing a duty (i.e. death or harm to more victims of the taser).

In short, applying the *Rowland* factors to Anna's case illustrates that Thompson likely owed a duty of care in not using the taser ^{correctly}, so Anna can likely satisfy the duty element of negligence.

As for element three—breach—Anna may encounter difficulty in arguing this point. Anna will need to show that Thompson breached the use of force standards under Utah Law and the local statute and that Thompson breached the standard of training he received from Taser International. On both points she can likely show that an ordinary standard of care is appropriate, not that required by the TJ Hooper exception—professionals like doctors, lawyers, accountants require special witnesses.

As for use of force law, county attorney Belnap has reviewed Utah law and the local statute delineating use of force in cases like Anna's and argues that his behavior did not deviate from the statute. Her attorney would need to research both Utah law and local statute to ensure there are no claims on these points.

Also, Belnap concludes that Belnap's behavior did not deviate from the standard of training Thompson received from the HPD and Taser. *Myers v. Heritage*. To prevail on breach, Anna would need to argue that Thompson's behavior was not reasonable in light of the training he received as applied to the case at hand, or that any training he received from the HPD was not reasonable in light of training they received from Taser. *Vaughan—reasonable person standard*. Thompson's behavior may have been reasonable if he did not know about Brian's bipolar disorder and felt threatened by Brian's behavior.

The HPD/Thompson may claim they are not liable for the death because they did not know that using the taser could cause death or that Brian was more susceptible to death because of his drug use or excited delirium. However, if Anna proves a breach, under the Eggshell Skull Rule, the HPD will be held liable for the death as well. *Vosburg*.

As for the third element—causation—Anna can definitely establish that Thompson's conduct (assuming there was a breach) was the actual cause, but she will have a more difficult time in establishing proximate cause.

Anna will have to first establish that were it not for Thompson's breach, Brian would not have died (but-for test). In *Skinner*, the plaintiff failed to establish actual cause because he did not assert a logical sequence that could lead one to believe that his theory was more likely than not more probable than other theories. In this case, Anna can definitely establish a logical sequence showing that Thompson's conduct caused Brian's death. Brian would not have died but-for Thompson's second deployment of the taser.

As for proximate cause, it may be more difficult because proximate cause requires the test of foreseeability. *Palsgraf*. The police department and/or Thompson may not have had adequate training as to the risk involved in shooting the taser at Brian's heart, or overusing the taser. If this was the case, Thompson may not have foreseen any risk of harm resulting in death.

In *Mussivand*, the court held "the test for foreseeability is whether a reasonable prudent person would have anticipated that an injury was likely to result from the performance...of an act." In this case, Thompson may not have foreseen the likelihood of death when he believed the taser would only stun Brian. Also, there may be a myriad of other causes (perhaps combined) in this case that led to Brian's death, including his purported excited delirium and electrocution combined with marijuana in Brian's system. In short, Anna will have to show that death was foreseeable when Thompson stunned Brian in the heart with the taser and that any intervening causes were not a more probable explanation of the death. Anna will have to show that Thompson knew or had reason to know that his conduct would lead to Brian's death.

Good

only for "physical" activity

In conclusion, Anna may have a difficult time arguing negligence when the question of breach and causation still lingers. If Anna can determine that Thompson and Excell deviated from the standard of care they owed to Brian in using the taser, she can prevail. This will likely depend on information gathered about the training Thompson and other officers received in using the taser. Also, if Anna can establish that the breach was the proximate cause of Brian's death, she can prevail on a negligence claim.

PRODUCTS LIABILITY: DEFECT AND FAILURE TO WARN

Second, Anna may bring a claim of design defect and failure to warn under products liability theory. To bring a claim of design defect, Anna will need to show either that the risks of using the taser outweigh the intended utility under the risk utility test or that the aspects of the taser's design are more dangerous than a reasonable consumer may expect under the consumer expectation test and that the design defect caused Brian's death, assuming Thompson was using the Taser in a manner that it was intended to be used.

In *Cepeda*, the court held that the risks of using a pelletizing machine outweighed the benefits of its utility. The court further ruled that a product is defective if it is unreasonably dangerous as marketed. In this case, it is obvious that the taser was only manufactured for the purpose of stunning, and not killing a person, otherwise the officer would be carrying a gun, and not a taser. Since Brian's death is not the only reported death from the use of the taser, it is apparent that the taser is unreasonably dangerous as marketed—i.e., for the purpose of stunning and not killing. Additionally, Thompson openly admitted that he understood the taser would only stun and not kill. As a primary consumer, officers who understand that the taser stuns and does not kill illustrates that the product is defective under the consumer expectations test.

Anna can also bring a claim of failure to warn against Taser. To bring a claim of failure to warn, Anna will need to argue that the training provided by Taser and warning labels conveyed to the police department did not "adequately warn" of the risks associated with using the taser like Thompson did. *Wyeth*.

In *Wyeth*, a doctor inserted an IV using one of two techniques. Unfortunately, it resulted in gangrene and amputation. The doctor was unaware of the detrimental impact of his technique. The court ruled that the manufacturer was responsible warning and instructing consumers on the risks of the techniques, regardless of whether the FDA had approved the label, so the absence of the detrimental technique resulted in liability. Similarly, Thompson used one of two techniques in using the taser—aiming at the heart as opposed to aiming lower. This likely resulted in death. Since Taser failed to warn the police department of the risks of aiming at the heart (subsequently posting the warning), Taser will likely be held liable for inadequate warning and training.

Assuming she prevails on design defect and failure to warn, Anna can also establish cause. The medical examiner's office (Christensen) released information ruling out excited delirium as a cause of death, leaving only the possibilities that either the taser was the cause of death alone, or that the taser combined with a presence of marijuana caused the death. In the latter case, Taser can likely assert comparative fault, which will only decrease damages to Anna.

In conclusion, Anna has a good case against Taser on design defect and failure to warn. The taser was designed to stun, not to kill. Brian's case isn't the only case claiming cause of death. Also, even police officers acknowledge the expected use is to stun and not to kill. Since Anna can likely show that the taser is defective under the risk utility test and the consumer expectation test, she has a strong case under a claim of design defect. As for failure to warn, Thompson's testimony illustrates that he was

inadequately instructed on the risks of pointing the taser at the heart. By showing this, Anna can likely prevail on a claim of failure to warn or instruct.

WRONGFUL DEATH AND SURVIVAL ACTIONS

Third, assuming Anna can prove breach and causation against the HPD and prevail on a products liability claim against Taser, she can likely bring a wrongful death and survival action against the HPD and Taser. This may raise a claim of joint liability in that it will be difficult to determine whether any breach by Thompson or a claim of failure to warn (or defect) by Taser is more culpable for Brian's death. Also, both Taser and the HPD will likely assert comparative negligence in that Brian was using marijuana, which may have contributed to his death.

To bring a claim of wrongful death, Anna must show that Brian's death resulted in a pecuniary loss—like his income, as stated in *Nelson v. Dolan*. In *Nelson*, the court ruled “only damages can be recovered that are shown by the evidence to have a monetary value” or damages for pecuniary loss. In this case, it would be necessary to find out who provided the primary source of income. Assuming Brian did, Anna has a good case in a wrongful death claim.

To bring a claim of survival action, Anna must only show by a “reasonable inference” based on evidence that Brian consciously suffered mental anguish before his death. *Nelson*. In *Nelson*, the appellate court held that a reasonable trier-of-fact could infer that the decedent suffered conscious mental anguish during a 5 second interval between two vehicles interlocking and the decedent's death. In Anna's case, a 911 call revealed that Brian screamed for 5 seconds after the initial stun and after two seconds the officer deployed the taser again before Cardall died moments later. It is highly likely that a trier of fact could reasonably infer from this evidence that Brian was conscious and suffered mental anguish before he died. Thus, Anna likely has a good case of a survival action.

If Anna prevails on claims against the HPD and Taser, she may need to claim joint liability in seeking damages. In *Ravo v. Rogatnick*, the court established that “when two or more tort-feasors act concurrently or in concert to produce a single injury, they may be held jointly and severally liable.”

In *Ravo*, one doctor employed improper surgical procedures before the plaintiff's birth and a second doctor misdiagnosed and improperly treated the plaintiff's condition after birth. This resulted in brain damage. The jury could not determine the degree to which each doctor's negligence contributed to the brain damage. The court held that when two parties' acts of negligence result in a single indivisible injury, they will be held jointly and severally liable. Similarly, Anna may have a claim of joint liability against the HPD and Taser. HPD may have breached their duty towards Brian, which resulted in his death. Also, Taser may have failed to adequately warn of the risks and train the HPD in proper techniques in using the taser. So if Anna prevails on both, she can likely have a claim of joint liability. However, even if she prevails on one claim against one of the defendants, she has a good case of wrongful death and survival action.

CONCLUSION

Anna's claim against HPD on negligence is somewhat weakened by the breach element. It appears Thompson did not deviate from training and HPD was not aware of the risks. So she may not prevail on a negligence claim against HPD, but it depends on the discovery of requirements for training and how much HPD knew about the risk of using a taser like Thompson did. However, she likely has a stronger case against Taser International on a design defect and failure to warn claim. So even if she cannot claim joint liability, Taser will likely be held liable under products liability.

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on design

