

---

Institution University of Utah S.J. Quinney College of Law  
Course 6140-1 Torts -Brown

Instructor NA

Control Code F1061401

60.35

Exam ID 6297

Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	341	1615	1954
Section 2	223	1066	1289
Section 3	2105	10256	12340
Total	2669	12937	15583

Answer-to-Question-\_\_1\_\_

The simple explanation as to why duty is an issue for the judge to decide as opposed to breach and causation which are issues left to the jury is that duty is a question of substantive law while breach and causation are factual determinations. However in many ways that is just a restatement of the question. <sup>yes</sup> The reason that duty is a question of law and therefore <sup>one</sup> for the judge to decide is two-fold. First duty is a question of law b/c of its historical evolution and secondly b/c conceptual role that duty plays in establishing the "rule" or "standard" that the jury will then use.

Duty originated out of the English concept of privity which was actually a contractual concept. Essentially a person's duty could only stem from contractual obligations. This rule began to erode in Thomas v Winchester when the court ruled that a pharmacist owed a duty to avoid giving out incorrect harmful substances. This rule only applied to dangerous substances or objects until McPherson v Buick. That case removed the requirement of privity and established the earliest concept of our modern day duty. As a result of duty evolving from finite legal definitions, it has continued to be viewed as a question of law which only a judge may rule on. *to reign it in...*

Even after duty broke free of the privity requirements it continued to function as the "rule" or "standard" in negligence cases. The court determines what if any duty exists thus laying down the "rule" which the jury then compares to the facts to determine breach, causation and damages. Duty is also a question of law b/c of the policy implications. Courts establish duty or lack thereof partially as a result of a determination as to who is the best actor to prevent injury to persons or property. A specific example of such policy concerns would be judge Calabrisi's Cheapest Cost Avoider concept. Under it duty lies w/ whichever actor is most able to minimize damage or maximize safety at the lowest price.

*And the jury cannot perform this function because? ...*

*3/5*

-----DO-NOT-EDIT-THIS-DIVIDER-----

Answer-to-Question- 2

~~No I believe that~~ the US rule is better for ~~Public Policy~~ reasons. Designers and Retailers are those actors most likely to be able to stop defective products from entering the market. The designer has the ability to affect not just each individual product but can affect the entire line of products, either beneficially to make them more safe or detrimentally to by producing design defects. As a result the law incentivizes designs that are very well researched and tested b/c designers are liable for defective products.

more than manufacturers?

✓ good.

Similarly the designer affects every single item ever produced so this is an efficient part of the production process to focus on. Case support?

On the other hand it is beneficial to hold retailers liable b/c they are usually the last person to have the product under their control b/f it gets to the consumer. As a result, they are the ones best able to detect defects caused by intervening processes after design. i.e. production, storage, and transportation. As such they are the most effective part of the market to focus on. By making both designers and retailers liable for defects it incentivizes those best able to efficiently find defects to do so and those most effective in keeping defects out of the hands of consumers to do, and not to ignore them in the name of profit.

✓ would they have to inspect? why?

✓ good.

obvious

what about burden on small businesses; role of indemnity + contribution  
4/10

Answer-to-Question- 3

(a) How might Tort law address this situation, either prospectively or retrospectively?

how?

I believe that Tort law's ability to retrospectively address this situation is minor but still important. In a case like this the only outcome that would really make a difference for the surviving family would be

the return of their child. Clearly this is not possible through the legal system or otherwise. That said the family will be in need of money to cover funeral costs as well as any longterm costs which may occur like therapy costs, missed work, and emotional injury. A torts case resulting in damages of this sort are the only redress that tort law can provide.

✓  
social

However, tort law can have a large and beneficial affect in deterring this type of injury in the future. One of the main goals of tort law is public policy and encouraging beneficial social interaction. By providing a stiff penalty for actions of the sort discussed in this case, tort law can work to incentive

→  
school?

kids?

appropriate social interaction at school. I think that the most effective way to accomplish such an end would be to allow both parents and the school administration to be liable for the actions of their students. ✓  
In doing so responsibility is placed w/ the parties most able to affect future outcomes. *great.*

The school and its employees are those in the best position to stop this type of egregious bullying b/c it occurs mostly at school where teachers and administrators are present. If the schools as government agencies and the administrators themselves were both liable for their negligence in allowing such a hostile environment to form they would be far more likely to address bullying and to adopt more specific and effective school policies. I believe this is a situation like in TJ Hooper where industry custom is insufficient to show reasonable care. Schools allow this behavior to occur b/c they are not directly answerable for it. If they were liable for damages that occur as a result of bullying they would be far more likely to take additional steps.

as schools as repeat players

While parents are not at school, they too are in good position to stop this type of behavior. Ultimately, parents should be more responsible for the actions of their children. They are in by far the best position to view and seek change in their children's' actions and behaviors. Currently Parents can only be

for what they could reasonably know

liable for actions of their children if: 1.P can prove that they knew of specific similar past actions; and 2. were in a position to stop the acts. I think the language should be changed "know or reasonably should have know" in regards to their children's past actions. This would casue parents to be more proactive in monitoring their children's actiosn. By shifting the paradigm as to WHO is liable in these bullying cases it will allow tort law to better affect beneficial public policy.

✓  
social

(b) Do you think that Tort law ought to redress these wrongs, or would they be better left to school regulation or criminal law? Why?

Yes I believe tort law should address these wrongs for 3 reasons, which parallel the 3 main goals of tort law most often cited.

1. Compensation: There are often costs associated w/ bullying which can be redressed by tort law. In more minor cases injuries may include therapy or the costs associated with moving a tormented child to another school. In more serious cases like the Phoebe's the need for redress is even larger. Phoebe's family will incur many costs as a result of the bullying and the suicide that it caused. Minimally, they will have funeral costs and possibly medical costs if Phoebe was taken to the hospital before her death.

Additionally, they may need therapy, it is likely that work was missed by her parents, her parents may suffer long term psychological or even physical ramifications all of which should be redressed through tort action.

*Why can't criminal law respond/punish adeq?*

2. Punishment: In this case both the individuals involved, their parents, and the school and its administrators all deserve punishment for their negligence in creating a fatally toxic environment. All of them bare a portion of responsibility and should pay the consequences involved. Tort law can be especailly effective in bullying cases, where clearly morally reprehensible actions occurred, which yet may not raise to the level of a crime. Tort law provides a much needed from of punishment in these types of cases. On the other hand Criminal law is ill suited to address and punish these types of crime b/c of it high bar for establishing facts, and focus on only the most heinous of behaviors.

*not an issue here?*

*assault / battery criminal*

3. Deterrence/ Public Policy: Tort law has the ability to shape social behavior by establishing a well know series of encouragements and punishments often explained through the "carrot and stick" analogy. In

*discretionary  
DA!*

cases such as this the public has a huge interest in creating an atmosphere at schools which promotes learning and positive social interaction. This has major ramifications for the quality of our work force, the strength of our economy, and the tone and nature of public discourse. Bad habits and anti-social behavior learned at a young age are unlikely to change. For this reason there is arguably a larger public policy interest with regards to schools than almost any other institution. As a result, this is an area that tort should not only address but make a priority. Schools are not capable of addressing these issues as effectively as tort law can b/c schools lack the punishment and enforcements mechanism necessary to be effective. This is evidenced through S Hadley's no tolerance policy which fails to even define bullying.

Thus, neutering it of any ability to actually be enforced.

*(Don't have to go that far)*

*Such as...?*

*Why not have state educ. stats enforced by state?*

(c) As Phoebe's parents whom would you sue first and under what tort theory?

I would bring a Wrongful Death claim against the School and its Administrators. The theory being that the school was negligent by allowing a toxic school environment to form, which was the direct cause of Phoebe's suicide. I chose the school b/c they are in the best position to prevent this type of injury in the future which can be one of the few comforting results for greiving parents I will address each of the elements necessary to show wrongful death; injury, Duty of D owed to protect a class of citizens like P from such injury/death, D breached that duty, D's breach was the actual and proximate cause of the injury/death.

*hope you justify*

*Tricky's should have focused on*

The injury in this case is clear, it is the death of Phoebe. Under a wrongful death doctrine a decedents family has a derivative right to receive damages which the loss of life caused them, but may not collect for pain and suffering on the part of the next of kin. In certain cases like Nelson v Dolan the estate may also collect damages for the pain and anguish decedent suffered before their death which were a result of the same actions by D. I believe that Phoebe's family should bring claims under both rationals.

*emotional harm pre-death*

The evidence is overwhelming that Phoebe was under extreme emotional and physical pain and distress in the hours leading up to her death.

The question of duty is also fairly easy in this case. The school owed Phoebe and all of its students the highest measure of duty requiring the highest diligence and care. It is equivalent to that of a common carrier and its passengers b/c the student must stay w/in the confines of the school and are at the mercy of its employees. Even if the court finds that the school does not owe general or extraordinary care, they surely owed Phoebe a duty to protect like that established in Tarasoff. In that case the court cited 3 factors which would create such a duty to protect. First was a "special relationship" like that of psychiatrist and patient. In this case such a relationship clearly exists between students and faculty especially the school nurse and counselor which Phoebe reached out to. Second, is a likelihood/ foreseeability of harm test, which is also present in our case. The threats against Phoebe were violent and continuous. Surely the school should have realized that Phoebe was in danger of direct physical harm. She was threatened in the halls and even had a student follow her into class and deliver threats. The harm of suicide is slightly more attenuated but still should have been obvious to the school. Suicide rates are very very high amongst teenagers, in our case this general knowledge of suicidal proclivities is strengthened by the fact that Phoebe was at new school, in a foreign country and culture, and was being continually taunted. These are all facts that the school knew or should have been aware of. combined with the schools specialized knowledge of adolescents these facts should have allowed them to view the possibility of suicide as likely. Finally, public policy plays a role in duty. As stated in sub answer (b) society has a huge interest in policy which creates a tolerant environment conducive to learning in our schools.

Next we move on to the breach element. The school breached their duty of care when they allowed a toxic environment to form. If the court finds that school owed Phoebe extraordinary care as a result of their relationship, the breach can be demonstrated by the toxic environment itself. However even if the court finds that the school only owed Phoebe specific duty of care breach can be shown. By failing to intervene when they witnessed bullying, and by not following up on Phoebe's complaints the school failed to use the "ordinary care" which would be expected of an "reasonable person". — Vaughn

Not  
Surely.  
Need  
>  
facts.  
Unfort.  
lots  
of  
bullying -  
not all  
results  
in  
suicide.

USO  
winn

agree;  
specifically  
what  
should  
they  
have done?

how? warning parents? Conferencing w/  
all involved?  
We need > facts for breach

meaning

similar

because

? why

some bullying off-campus

Finally we move on to cause, the most difficult element to prove in this case. Actual cause should be fairly easy to show. "But for" the negligence of the school Phoebe would not have felt so threatened that she resorted to suicide. Proximate cause is more difficult. Ordinarily, simply creating an atmosphere of danger can not be a proximate cause. For example in Union Pump v Allbritton Union's pump causing a fire which resulted in a wet environment which caused Allbritton to fall, was not held to be a proximate cause b/c their negligence simply created the environment which required additional negligence on the part Allbritton to cause injury. However, there are exceptions to this rule, in Clark v Du Pont the court ruled that Du Pont was still liable for injuries caused by their explosives, when they were left behind by an employee. The intervening action of a person moving the explosive did not change the fact that Du Pont's negligence was the proximate cause. The schools lax enforcement of anti bullying rules is parallel to the leaving of dynamite. Intervening <sup>factious?</sup> action by students affected WHO was harmed but did not affect the proximate cause of the harm. The schools failure happened to result in the bullying and death of Phoebe, but even if id had not been Phoebe someone was going to be harmed by the lack of discipline in the school. Thus, the toxic social environment at South Hadley functions the same way as the explosives. <sup>similar?</sup> They were going to hurt someone eventually it was just a matter of who. As a result the action/inaction of S Haldey and its administrators is the proximate cause of Phoebe's death. Paisgraf?

more  
mechanical  
& predictable

(d) identify additional facts needed

- Is South Hadley a private or public school? b/c this will affect who could possibly be held liable
- Does Massachusetts law shield public schools and or their employees from negligence or wrongful death claims as a result of their being state agencies? ✓
- What did Phoebe say to her principal or counselor? How aware were they of the situation? — exactly.
- Did Phoebe's parents contact the school?
- Why did none of the teachers or administrators stop the bullying they witnessed?
- What type of training do school employees have in dealing w/ bullying? This could affect Duty issue
- What type of training did school counselor or other receive in

regards to diagnosing depression or suicidal behaviors? will affect duty issue and foreseeability

-What is the veracity of the claims that Phoebe suffered from pre-existing conditions which affected her mental health?

-What types of damages did the Phoebe's family incur as a result of her death ?

-Were there any other prior instances of serious bullying or suicide at S Hadley? against this may affect foreseeability

-Did the school take any action at all as a result of Phoebe's complaints? If so what were they?

-Did Phoebe tell anyone of her suicidal tendencies? Was there intervening negligence?

Didn't earn all conclusions,  
assumed certain facts for  
analysis - then stated  
at end you needed more info  
(should have acknowledged  
lack of facts + weakness/  
counterarguments)

64/85