Essay #1 (135 points)

Payton and Derek were both students at Easton High School, a public school in Easton, West Dakota. When walking home from school, Payton would walk by Derek's home. Although the boys were friends in middle school, Derek began harassing Payton in October of 2012 following an argument between the two boys. Initially the harassment consisted of Derek calling Payton names as he walked by Derek's home, such as "nerd," "wimp," and "mama's boy." Payton seethed with anger at Derek's comments and came to dread walking by Derek's home. Unfortunately, there was no alternative route from the school to Payton's home and Payton had no choice but to endure Derek's taunts.

Over time Derek's harassment of Payton escalated. In February of 2013, Derek began making veiled threats against Payton, telling Payton that "someday I'm going to beat the crap out of you" and that he deserved to die while making his fingers into the shape of a gun. Derek also posted on Facebook various postings about Payton, disparaging Payton's intellect and spreading false rumors that Payton was a drug dealer. Other classmates began avoiding Payton. The harassment and social ostracism took its toll on Payton, and he became depressed and anxious, often unable to sleep at night. Unable to concentrate on his school work, Payton's grades also declined.

A month after Derek's Facebook posting, a distressed Payton confided in one of his teachers, Ms. English. After Payton described to her the harassment he was experiencing, Ms. English told Payton that "sometimes kids can be mean" and that "he just needs to develop a thicker skin." An Easton city ordinance requires all city employees who suspect that a minor has been subject to physical or verbal abuse to report their suspicions to law enforcement, with any violations of the ordinance considered a misdemeanor. Easton does not have a school policy on bullying, although a handful of other school districts have adopted such policies. These policies typically take a "no tolerance" stance, with students who bully other students subject to suspension and expulsion. Some schools also train their school staff on how to address bullying.

Fearing for his physical safety, the day after speaking with Ms. English Payton put his father's gun in his backpack. When he neared Derek's house, Payton removed the gun from his backpack and concealed it in his coat pocket. Derek once again threatened to beat-up Payton. This time Payton yelled back "Go ahead!" Derek moved to within inches of Payton, his fists clenched. Payton yanked the gun out of his pocket, aimed the gun at Derek, and pulled the trigger. Fortunately for Derek the gun backfired. Unfortunately for Payton, the bullet braised his arm. A startled Derek, fearing that Payton would fire the gun a second time, knocked Payton unconscious and then fled. Due to a pre-existing medical condition, Derek's punch to Payton led to significant internal bleeding in the brain and Payton suffered permanent brain damage. The brain damage has significantly impacted his cognitive functioning.

The gun, manufactured by Kolt Weapons, misfired due to a defective trigger mechanism. The trigger mechanism was damaged when Payton removed the gun's child safety lock. The gun's

user manual included instructions on how to remove the safety lock, but did not inform users that removing the safety lock could damage the trigger mechanism if done incorrectly.

Although Payton's parents did not know about Derek's harassment of their son until after the gun incident, his declining grades and obvious distress had taken an emotional toll on them. Payton's mother was so upset by her son's distress that she was unable to eat and had lost 20 pounds in the month before the gun incident. Payton's brain damage has devastated his father, and the father now suffers from depression.

West Dakota's civil statute provides as follows:

> "(a) No action for damages for injury or death against a defendant shall be brought more than two (2) years after the date on which the claimant knew or through the use of reasonable diligence should have known of the existence of the injury or death for which damages are sought, whichever date occurs first."
>
> "(b) Contributory negligence does not bar recovery in a tort action by any person or the person's legal representative to recover damages for negligence resulting in death, physical or emotional injury to a person, or injury to real or personal property, but any damages shall be diminished in proportion to the amount of negligence attributed to the person recovering."

On January 1, 2015, Payton and his parents come to your law office. Please discuss the merits of (1) all legal claims that Payton may have against Derek, Ms. English, Easton school district, and Kolt Weapons; and (2) all legal claims that Payton's parents may have against Derek.

Essay #2 (25 points)

Courts in the state of Zexas currently hold persons with mental disabilities to the same standard of care as that of a reasonable person *without* mental disabilities. In a case before the state supreme court, the defendant in a negligence claim suffers from mental disabilities. The jury returned a verdict for the plaintiff and the defendant now appeals. The defendant is urging the Court to abandon the current rule and adopt a new rule that would hold persons with mental disabilities to the standard of care exercised by a reasonable person with similar mental disabilities. You are a law clerk to Justice Smith. She has asked you to draft a memo advising her on the merits of adopting the new rule proposed by the defendant or affirming the current rule.

Exam Memo, Torts 2014
Professor Mantel

I hope you all enjoyed your semester break. The purpose of this memo is to give you a big picture assessment of the class's performance on the final exam. Overall the class performed well on the essay portion of the final exam, but had some trouble with the multiple choice questions. Below is some advice on answering multiple choice questions. I've also highlighted some of the common weaknesses in your essay answers. Also attached are model student answers for the essay questions composed from actual student answers. I believe carefully reading both this memo and the model answers will help you identify ways in which you can improve your performance on future law school exams.

Final Exam Grades

A	1
A-	5
B+	6
B	14
B-	5
C+	2

Average = 3.1

Reviewing Your Exam

I do not return exams. However, if you would like to review your exam, please contact my assistant, Elaine Gildea (egildea@central.uh.edu), to schedule a time to do so. You may review your exam in the Health Law Library, located in suite 104-TUII. If after reading this memo and the model answers you still have concerns regarding your exam, feel free to schedule a time to meet with me.

Multiple Choice Questions

As a class, you did not score as highly on the multiple choice questions as prior years' classes, so I want to offer you a few tips on taking multiple choice questions:

- Make sure you answer the question asked: Sometimes a student loses sight as to what the question is specifically asking (e.g., which answer is correct vs. incorrect, what is a judge likely to do vs. unlikely to do). For example, a student may quickly hone in on an answer that is legally correct, forgetting that the question asked them to identify which statement

is *incorrect*. Some people find it helpful to mark each answer choice as either "true" or "false." You can then re-read the question to see whether you are being asked to find the answer that is "true" or "false."

- Absolute answers: Be careful of answer choices stating that something is always or never true. As we have seen, there often are exceptions to a general rule. When this is the case, a statement of the general rule − "if X then Y" − will not be correct when the exception applies. For example, assume one of the answer choices is "Defendant acted negligently because individuals are **always** deemed negligent *per se* when they violate a statute that clearly defines the standard of conduct and the statute was intended to protect the plaintiff from the harm that occurred." While this is generally true, it is not always true – a defendant will not be deemed negligent *per se* if their violation of the statute is legally excused. Accordingly, the statement is wrong.

- Disagreeing with an answer's factual premise: Sometimes an answer may be a correct statement of law, but you disagree with the answer's factual premise. For example, assume an answer choice states that "The judge may impose punitive damages **if the jury finds that the defendant's conduct was willful and wanton**." This statement is a correct statement of the law. However, you may be tempted to conclude that the answer is incorrect if you think the jury will *not* find the defendant's conduct willful and wanton. Don't. The answer is correct even though you disagree with the answer's factual premise.

Professors often use multiple choice questions to distinguish students who have a basic understanding of the law from those with a more nuanced understanding. Consequently, students that spend time mastering the nuances are likely to do better on multiple choice questions.

Essay #1 – Bullying Case

In general, what distinguished the higher scoring exams from the lower scoring exams was spotting more of the relevant issues. The strongest answers also tended to provide in-depth and nuanced analysis. Lower scoring answers often missed important issues, missed factual nuances, and sometimes misstated or misapplied the relevant legal standards.

Frequently missed issues included the following:

- Whether Payton consented to Derek's assault when he yelled "Go ahead!".
- With respect to whether the teacher/school district's failure to intervene was a proximate cause of Payton's injuries, there is a Hughes/Doughty issue. A court taking a broad approach would ask whether an altercation between Payton and Derek was

foreseeable. A court taking a more narrow approach would focus on the foreseeability of the specific manner in which Payton was harmed, e.g., whether it was foreseeable Payton would bring a gun or that the gun would backfire. In addition, there is the question of whether Payton and/or Derek's actions were intervening acts that broke the chain of liability.

- Whether Ms. English, Payton's teacher, could have prevented the altercation between Payton and Derek given that it occurred the day after Payton spoke with his teacher. This was relevant to the legal issue of whether her negligence was a factual cause of Payton's injuries.
- Whether Payton's conduct was contributory negligence.
- Whether the school district and Ms. English could invoke sovereign immunity or the public duty doctrine (note that the question stated that Easton High School was a public school).
- Whether Payton could seek punitive damages against any of the defendants, particularly Derek.
- Regarding Payton's claim against Kolt weapons, whether the court would ignore Payton's contributory negligence under the *Bexiga* rule, which states that a defendant cannot raise the plaintiff's contributory negligence as a defense when the defendant had a duty to reasonably protect the plaintiff from his or her own negligence.
- How to allocate damages if two or more defendants are liable for the same harm.
- Whether the statute of limitations is tolled for minority.

As we discussed in class, it is helpful to break down a defendant's conduct into separate acts. In this case, you should separately consider Derek's initial harassment of Payton, the escalated harassment after February 2013, and the gun incident. The better answers separately evaluated the earlier harassment (prior to February 2013) and the post-February harassment with respect to Payton's intentional infliction of emotional distress claim. Also, in determining whether Derek committed an assault against Payton, you should have separately evaluated the harassment that occurred after February 2013 and the gun incident. I also expected you to discuss whether the two-year statute of limitations would bar any emotional harm suffered by Payton prior to January 2013.

In discussing whether Derek can raise the defense of self-defense, some of you stated that he cannot assert self-defense because he is the initial aggressor. That is not quite correct. The issue is whether Payton's conduct was privileged (i.e., he met the elements of self-defense). Even though Derek was the initial aggressor, if Payton's conduct was an overreaction to Derek's threats, Payton's conduct was not privileged and Derek could assert self-defense.

Note that paragraph (b) of West Dakota's civil statute applies to tort actions "for negligence," but says nothing about intentional tort claims. This means the statute would not

apply to Payton's intentional tort claims, and we then revert to the common law rule. Under the common law, a defendant in an intentional tort case cannot raise contributory negligence as a defense.

With respect to Payton's negligence claim against his teacher, Ms. English, some of you limited your discussion to her violation of the local ordinance requiring city employees to report suspected abuse involving a minor. The better answers also discussed alternative ways in which Ms. English may have been negligent, such as failing to inform the boys' parents about Derek's bullying of Payton or failing to reach out to Derek.

As to whether the school district was negligent for failing to adopt policies to address bullying or training its staff, many of you argued that it is customary for schools to adopt such policies. The facts stated that a "handful" of other schools have adopted policies on bullying. A handful of other entities doing something does not make something a customary practice. Rather, the school district could argue the opposite -- that the prevailing custom among school districts is *not* to have policies on bullying, and therefore its failure to adopt such policies was not negligent. Payton would then respond that customary practices nevertheless may be unreasonable.

In discussing whether Ms. English/Easton School District owed Payton a duty of care based on a special relationship, some of you only discussed whether the student-teacher/school relationship is a special relationship. You must also discuss whether the risk of harm was both within the scope of this relationship and foreseeable. Because Derek's harassment of Payton occurred off the school premises, you might argue that the harassment was outside the scope of the special relationship. However, as we discussed in class, harassment taking place off-campus may nevertheless have an impact on the school environment (particularly if the harassed student starts to do poorly in school), and therefore it arguably falls within the scope of the student-teacher/school relationship.

<u>Essay #2 – Policy Question</u>

Many of you gave thoughtful answers on whether to hold persons with mental disabilities to the same standard of care as that of a reasonable person without mental disabilities. Those who scored highest also hit on most of the policy considerations we covered during this course, while others limited their discussion to only a few issues. The better answers also made parallels to other tort law rules.

The better answers discussed the tension between the current approach and other areas of tort law. For example, higher scoring answers discussed whether it is inconsistent for tort law to hold mentally disabled persons to the same standard of care as a non-mentally disabled person

when tort law holds children and the physically disabled to a standard of care that takes into account their minority/physical disability.

Some of you argued that although the mentally disabled defendant is not blameworthy, it is more fair to hold liable the defendant causing plaintiff harm than to leave the innocent plaintiff uncompensated. The problem with this argument is that we generally favor the non-blameworthy defendant over the innocent plaintiff (see Van Camp vs. McAfoos). You might disagree with the Van Camp decision, but judges are guided by precedent and (ideally) try to be consistent.

The better answers also discussed counterarguments to an argument. For example, many of you noted that the current standard incentivizes the family members of the mentally disabled to closely monitor or restrain their loved one. Only a few of you, however, discussed possible counterarguments, such as whether it is unfair to impose this burden on family members. The better answers also drew parallels to other areas of law, noting that tort law often does not require individuals to be "their brother's keeper." For example, the traditional suicide rule for proximate cause is defended in part on the grounds that we should not expect individuals to protect others from intentionally harming themselves. Similarly, families generally do not have a duty to protect others from a dangerous family member.

<u>Comments for Those Who are Disappointed with Their Grade</u>

For those of you who had hoped for a higher grade, I want to let you know that even among the lower scoring exams, I saw in your answers the potential to be good lawyers. This was especially true this year, as the lower scoring exams were generally stronger than the lowering scoring exams from prior years. Usually a lower grade was not due to your applying the law incorrectly – often your discussion of the issues you identified was solid. Rather, you simply missed more issues than your classmates, or your discussion of an issue was less nuanced than your classmates' analysis. In the "real world," however, you obviously will have more than a couple hours to analyze a case. In the real world, you will have the time to carefully review a case, and thus are likely to spot most of the relevant issues. Also, as you become more familiar with an area of law, you will become better at identifying the issues relevant to your client's case. You also will have the time to conduct legal research when necessary to clarify your understanding of the law and how it may apply to your client's case.

Also, please understand that law school grades are very different from most undergrad grades. The Law Center has a very strict grading policy that limits the number of As a professor can give, as well as requires that first year professors give a certain number of B-s and C+s. So in contrast to undergrad grades, a low grade does not necessarily mean that you had a poor

understanding of the course materials; rather, it reflects your performance on the final exam relative to your classmates' performance.

* * * * *

Thank you again for a very enjoyable semester. I wish you the best of luck in the remainder of your time here at the Law Center, and hope you all have successful and rewarding legal careers.

Essay #1

QUESTION

Payton and Derek were both students at Easton High School, a public school in Easton, West Dakota. When walking home from school, Payton would walk by Derek's home. Although the boys were friends in middle school, Derek began harassing Payton in October of 2012 following an argument between the two boys. Initially the harassment consisted of Derek calling Payton names as he walked by Derek's home, such as "nerd," "wimp," and "mama's boy." Payton seethed with anger at Derek's comments and came to dread walking by Derek's home. Unfortunately, there was no alternative route from the school to Payton's home and Payton had no choice but to endure Derek's taunts.

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A month after Derek's Facebook posting, a distressed Payton confided in one of his teachers, Ms. English. After Payton described to her the harassment he was experiencing, Ms. English told Payton that "sometimes kids can be mean" and that "he just needs to develop a thicker skin." An Easton city ordinance requires all city employees who suspect that a minor has been subject to physical or verbal abuse to report their suspicions to law enforcement, with any violations of the ordinance considered a misdemeanor. Easton does not have a school policy on bullying, although a handful of other school districts have adopted such policies. These policies typically take a "no tolerance" stance, with students who bully other students subject to suspension and expulsion. Some schools also train their school staff on how to address bullying.

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MODEL ANSWER

Payton v. Derek

Assault: Derek's threats to Payton

1. initial harassment of calling names

2. veiled threats like "someday I'm going to beat the crap out of you"

3. threat to beat up Payton and then moving within inches of Payton with clenched fists

Payton (P) could claim assault for the three situations listed above where Derek (D) threatened or harassed him, though the outcome of all except the third would likely be no liability for D.

Assault requires that D intended to cause harmful or offensive contact OR intended to cause imminent apprehension of harmful or offensive contact. The first set of threats/initial harassment from D did not hint at any contact, whether harmful or offensive. The threats of someday beating P up and the threat to beat P up followed by moving within inches of P with clenched fists probably amount to intent to cause harmful or offensive contact.

The second requirement of assault that P must prove is that P had a reasonable apprehension of imminent battery. The first situation of name calling does not satisfy this. The threat to beat P up in #2 does not satisfy this because the threat is "someday", not imminent. The threat in #3 however, seems to satisfy the requirement. When D said he was going to beat P up, and then moved close to P with clenched fists, P had reason to be apprehensive of an immediate battery. Therefore, D would be liable for assault when he threatened P the third time.

D may claim that P consented to the assault. P did tell D to "Go ahead," but a reasonable person would know that P's words were not "effective consent" to beat him up, as most people do not desire to be bullied. P is also still a minor and might not be found to be able to give effective consent to being beaten up by a bully.

Intentionally inflicted emotional distress (IIED)

P could also bring a claim for IIED against D for the bullying. To prevail on a claim of IIED P must first show that D's conduct was extreme and outrageous. P would argue that since the bullying was repeated and prolonged as opposed to a one time occurrence, spanning from October 2012 past February 2013, and because the act involved threats of physical harm to P, it should be considered extreme and outrageous. However, D would argue that considering the context and relationship between the parties, two kids in high school, name calling and threats of beating someone up are common and, while perhaps frowned upon, are not so severe and

outrageous as to qualify for IIED.

Second, P would have to show that D had intent or knew with substantial certainty that he would cause severe emotional harm or that D had reckless indifference to the risk of severe emotional harm. P would argue that D had intent, as the whole point of bullying someone is to cause emotional distress. At the very least D was indifference to the risk of harm, as emotional distress is a common outcome of bullying and D presumably knew this.

Fourth, the result to P must be severe emotional harm. P's emotional harm consists of depression, anxiety, and inability to sleep. This would probably constitute severe emotional harm.

If found liable, which is doubtful since the bullying probably won't be considered by a jury to be extreme and outrageous, D would not likely have any appropriate affirmative defenses, since D was not exercising a legal right by bullying.

Negligently inflicted emotional distress (NIED)

P could also bring a claim for NIED against D. To prevail on a claim of NIED, the majority approach requires that P fit into 1 of 3 categories: fright-to-self, bystander, or direct victim.

Fright-to-self: Here P would have to show that D satisfied a modified negligence prima facie case: that D owed him a legal duty to protect from physical harm, D breached that duty and the result was emotional distress. P would also need to show that D was the factual and proximate cause of the harm. P would be unlikely to prevail, as D's actions did not put P at physician risk.

Direct victim: This approach to NIED would not apply because it requires a pre-existing relationship between P and D of the sort where we expect the D to protect P from emotional harm. Peers at school would not meet this, as we generally do not expect school children to protect one another from emotional harm.

Bystander: this approach to recovery for NIED does not apply because it in involves witnessing negligent conduct that harms a third party.

Therefore, P probably will not recover from D for NIED.

In courts that follow the *Camper* rule for NIED, P may prevail. Under Camper, D owed P a legal duty (a general duty of care to protect from emotional harm). D breached the duty when he harassed P knowing it was foreseeable his actions would cause P emotional distress. Actual harm occurred, as P suffered severe emotional distress as evidenced by his depression, anxiousness, and sleeplessness. In the absence of D's harassment P would not have suffered such harm

(factual cause), and such harm was within the scope of risk.

Battery: when Derek knocked Payton unconscious after the gun backfired

P could claim battery against D if he can prove first that D intended to touch or contact him without consent and also intended to harm or offend him or induce imminent apprehension of harmful or offensive contact. This will easily be satisfied because D clearly hit P with the intent of harming him to prevent P from firing the gun a second time. P would not have consented to this harmful contact, so the intent element of battery is met.

Second, P would have to prove that there was contact and that the contact was harmful or offensive. This would not be disputed because D came into contact when he knocked P unconscious, and by doing so the contact was harmful.

D may try to argue that while he intended to knock P unconscious, he did not intend to cause permanent brain damage to P. However, this argument will be unsuccessful because the concept of extended liability applies to make D liable for all harms, even if unforeseeable/unintended. Since the harms to P were not far removed from the contact and were a direct consequence of the contact, D would be liable for all of the harms caused by the battery.

D of course would use the affirmative defense of self-defense to remove himself from liability for the battery. Self-defense requires that a reasonable person would have perceived an imminent threat and the response was reasonable and not excessive. Since P had just pulled out a gun and tried to fire it at D it seems that any reasonable person would perceive a threat that P may try to shoot again, so D was privileged in fighting back. Knocking P unconscious was not necessarily excessive. You could consider the other options he had, one of which would be grabbing the gun and shooting P with it, or punching P several times until he lost consciousness -- those would probably be excessive. All we have from the question prompt is that he knocked Payton unconscious. Of course, P would want to gather evidence of exactly HOW D knocked him unconscious, and if excessive at all would present it in court for the jury to consider.

However, D's defense will be ineffective if P’s conduct was privileged. P will argue that he acted in self-defense against D’s assault when he pulled out the gun. D would counter that P's act was not self-defense. D will argue that using a gun should be considered excessive force, because even considering all of D's previous harassment, use of deadly force is only justified when there is threat to life and limb. Because P's response was excessive, a court may find that P’s conduct was not privileged, and that that D's defense of self-defense is effective.

Payton v. Ms. English

Negligence: failure to protect Payton from bullying

To prevail on a claim for negligence, P must prove that the defendant owed him a legal duty, that the duty was breached and that there was actual harm to P, the factual and proximate cause of which was the defendant's negligent act.

Duty:

ME would argue that she had no duty to act, no duty to take reasonable care for P's safety. However, P would have many counterarguments to this. First, there is an ordinance that requires ME to affirmatively protect P by alerting law enforcement. Second, there is a special relationship between P and ME and between ME and D – a teacher-student relationship. The risk must arise within the scope of the relationship, which arguably it does since the risk involves another student at school. Although the harassment occurred off-campus, it impacts the school environment, as evidenced by P's declining grades. There is a clear foreseeable risk to P that D will act on his harassing threats, and ME has the ability to control D by alerting the school, law enforcement, or at least taking steps to talk to D about it.

Ms. English (ME) owed P a duty of ordinary care. This would require ME to act as a reasonable prudent person (RPP) in her position as a teacher would under similar circumstances to minimize the foreseeable risk of harm to P.

ME's duty as laid out above is further defined by the Easton city ordinance requiring all city employees who suspect a minor has been subject to physical or verbal abuse to report their suspicions to law enforcement. The conditions of applying the doctrine of negligence per se (NPS) are that the regulation clearly defines the required standard of conduct, the regulation is intended to prevent the type of harm D caused P, and P is a member of the class of persons the regulation was designed to protect. The city ordinance clearly defines the required conduct: report suspected verbal abuse. Presumably the ordinance is designed to protect victims of verbal and physical abuse, preventing further abuse by alerting law enforcement so that they can investigate the suspicions thoroughly.

Breach: If the intentions of the ordinance are interpreted correctly above, by failing to report the verbal abuse that P told ME about, ME would have violated the ordinance. In a majority of jurisdictions this would constitute breach, supplanting the general standard of care to the duty ordained by the statute/regulation. A minority of jurisdictions would still consider the duty of ordinary care (that of a RPP teacher to a student) as the duty owed to P, and the jury would be charged to determine what a RPP teacher would do under the circumstances, considering the

ordinance as a possible way the RPP teacher should have acted, but not absolutely the correct way.

In addition to violating the ordinance, P will argue that ME was negligent in other ways. She could have spoken to D about his conduct, alerted D and P's parents, or alerted the school's principal. Since bullying is a current issue in schools, especially online bullying that has led to students going so far as to commit suicide, I would think that a RPP teacher would take P's allegations of bullying seriously. Of course, this is for a jury to decide and they will consider factors like the risk-utility balance of the teacher acting to protect P (low burden to alert the principle, talk to D about it compared to the risk that D would actually beat up P, though ME would argue the likelihood that D would act on his threats would be too low).

Therefore, ME would probably be held to have breached her duty to P.

Actual harm: P suffered the required legally cognizable harm because he was knocked unconscious as a result of the bullying and has brain damage.

Factual Cause: P would have a hard time proving that ME was the factual cause of his harm. Factual cause is determined in a majority of jurisdictions by applying the but-for test. But-for the defendant's negligent act would P still have been harmed? If no, the defendant's negligence is a factual cause. Here, but-for ME not taking greater steps to minimize the risk to P by D's threats, would P have been knocked unconscious by D?

P will have trouble establishing factual cause using the but-for test. The altercation took place the day after P confided in ME. If ME had reported P's experience to the police, the police may not have had time to stop D from abusing P. Similarly, had ME spoken with D's or P's parents that night, the altercation may have still happened. D bullied P for months, so it would be difficult to show that D or P's parents would have quickly intervened and that their intervention would have stopped the bullying.

In a minority of jurisdictions the court could apply the substantial factor test in addition to the but-for test to determine factual cause. The substantial factor test states that ME was the factual cause of P's harm if the negligent action was a material or substantial factor of the harm. In determining whether ME's act was a substantial factor of the harm, courts examine factors similar the Palsgraf dissent factors for proximate cause: whether the harm allegedly resulting from the act was a natural and continuous sequence of events, a direct connection, or remote in time and space from the negligent act. Under the substantial factor test, it is still difficult to say that ME was a factual cause of P's harm. D was determined to bully P over time, and the bullying occurred mostly in front of D's house, where the school has no authority. ME's failure to report P's experience had little direct connection to whether or not D would have harassed P

in front of D's home the next day, so her failure cannot be considered a substantial factor either.

Proximate Cause: The majority approach to proximate cause is the analysis of scope of risk. First, there must be a foreseeable harm or risk of the same general type to the general class of persons that includes P. This is a backward-looking concept of foreseeability. We know what harm befell P, he was knocked unconscious by D. ME would argue that the foreseeable risk of harm should be defined more narrowly, and that the actual manner in which P was harmed -- P bringing a gun that backfired and D hitting him because he was afraid P might shoot him -- was not foreseeable and so does not satisfy the proximate cause requirement. However, as laid out by the Hughes court, actual harm can be within the scope of risk even if the exact manner of its occurrence was not foreseeable. P would define the foreseeable risk of harm broadly to be some sort of altercation between P and D. He would argue that this was foreseeable, as he had complained of bullying by D and it is not uncommon for bully's verbal harassment to escalate to violence.

A second requirement of the scope of risk analysis is that a RPP would have taken greater precautions to avoid risk than ME took. See discussion in breach above, a RPP teacher probably would have taken at least some action.

An alternative minority approach to proximate cause includes the multifactor test laid out by the Palsgraf dissent (see discussion in factual cause substantial factor test).

ME would argue that there were negligent intervening acts that act to break the chain of liability. First, that D was an intervening actor. The modern approaches to intervening negligent acts apply either the scope of risk principles (the majority view), as discussed above, or assess whether the specific negligent act was foreseeable (and if so, the intervening act does not supersede ME's negligent act). Here the arguments about foreseeability would be very similar to the scope of risk argument, see above.

ME may also argue that in threatening D with a gun, P was an intervening negligent actor to his own harm. See above discussion for scope of risk analysis. Courts focusing on the specific foreseeability of the P's actions may conclude that P's negligence was not foreseeable, and therefore breaks the chain of liability with respect to ME.

Affirmative defenses:

Contributory Negligence: For P to be contributorily negligent, P must satisfy each element of the prima facie case of negligence.

Duty: P had a duty of ordinary care to himself, of minimizing harm or risk as any other reasonable prudent person would do for himself.

Breach: Arguably, P breached his duty when he pulled out the gun and fired it at D. As he was engaging in an inherently dangerous activity, D is held to the RPP standard of an adult and a RPP adult likely would have foreseen a risk of harm from a gun being brought into a fight that had not escalated to that level, and a RPP would have minimized that risk of harm by not pulling out the gun and shooting it when the threat did not amount to a threat of death. P would argue that he was threatened by D and so he reasonably had the gun out and reasonably fired it. This would be for a jury to decide whether it was reasonable, but they would likely find that P breached the duty owed to himself by escalating the fight to one potentially involving fists to a potentially deadly altercation.

Actual Harm: P was injured by the gun back-firing, knocked unconscious

Factual Cause: But-for taking the gun out and firing it, would P have been knocked unconscious? P would argue that chances are good he would have been knocked unconscious/injured anyway by D since D was planning to beat him up. D would argue that the only reason he knocked P unconscious was because he had a gun and D was scared, making P taking the gun out and firing it the but-for cause of P's injuries. As for the substantial factor test, in the way the events unfolded, P taking the gun out was a material factor in being knocked unconscious because his firing it was the reason D knocked him unconscious (he was afraid of him firing it again) and D hit him directly after it happened.

Proximate Cause: P would argue that by taking the gun out and shooting it at D, the gun backfiring was not a foreseeable harm, nor was D then knocking him unconscious foreseeable. D would argue the opposite and a jury would decide which to believe.

If P is found contributorily negligent, which he likely will be since he escalated the fight by using the gun, his damages will be reduced in proportion to his negligence (discussed in further detail below.)

Payton v. Easton School District

Vicarious Liability for the torts Ms. English is liable for

For an employer-employee relationship through the concept of respondeat superior, an employer is automatically liable for the torts of their employee if the employee is acting within the scope of their employment. Since ME's hearing of her student's complaint was motivated in part to serve the school, and since she was generally performing a function that promotes the employer's interests by hearing the complaint, even though the act not to report the harassment was discretionary, the school district would likely still be vicariously liable for her negligence in not

taking steps to prevent the bullying.

Negligence for not taking steps to prevent bullying

The school district itself may be negligent by not taking steps to prevent bullying.

Duty: the school has a duty to its students much like ME has to students, to minimize harm as a reasonable prudent person would in their position given the circumstances

Breach: Some indicators of foreseeability are that other school districts have adopted policies against bullying, taking a no tolerance stance. As for how a reasonable and prudent school district would act, the fact that other school districts have policies does not conclusively establish that the School was negligent for not having those policies. The School would argue that only a "handful" of other schools have policies against bullying, so the custom is NOT to have these policies. P would counter that customary practices may not be reasonable, and that the burden on the School of adopting an anti-bullying policy would be significantly lower than the probability and magnitude of harms suffered by victims of bullying. It would not take much time or money to implement an anti-bullying policy.

Actual Harm: see above

Factual Cause: But-for the school district not training their school staff or having no tolerance bullying stance, would the harm still have befallen P? There is a similar argument here to the one discussed above for ME's case of negligence. We don't know for sure that these steps would actually have prevented the harm to P, particularly given that the incident took place the day after P spoke with ME.

Proximate Cause: see discussion in for ME's case of negligence above.

Affirmative defenses:
The school district would plea that P was contributorily negligent, as discussed above in ME's affirmative defenses

The school district also would argue that they owed no duty under the sovereign immunity duty, as they are a public school and therefore a government entity. To invoke sovereign immunity, the school must show that it acted with discretion and that its actions were susceptible to social, economic, or political policy analysis. As there was no law requiring the school to adopt anti-bullying policies, whether to have such policies was discretionary. While P would argue that the school was merely exercising professional judgment in deciding whether it was necessary to have anti-bullying policies and staff training, the school would counter that the decision was a

policy decision, as it involved prioritizing staff time and resources among competing concerns. Because courts often are not sympathetic to resource allocation arguments, P would likely prevail on this issue.

The school also would invoke the public duty doctrine. The public duty doctrine provides that a government official does not owe a specific duty to protect P when there is a general duty to protect the public. P would argue that the public duty doctrine does not apply because there is a duty owed to particular group of which P is a member – school children. P would likely prevail on this issue.

ME similarly would claim sovereign immunity and public duty doctrine, but would fail for the same reasons.

Payton v. Kolt Weapons

Products liability

For P to bring a claim of products liability against Kolt Weapons (KW), they have three ways to go about it.

1. Manufacturing Defect
P would have to show that the gun was either dangerous beyond what an ordinary consumer contemplates, applying the consumer expectation test, or that it departs from its intended design. Since the gun backfired, P could show that it departed from its intended design, which surely would be to shoot forward, not backward, injuring the shooter. The consumer expectation test would hold that the product was defective if it failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. A reasonable consumer would expect a gun to shoot forward, not backfire, so it fails this test.

Second, P would have to show that the product was defective when it left the manufactures hands, although the exact nature of the defect is not necessary. Here P knows that the trigger was defective but it was damaged when P removed the gun's child safety lock, not by the manufacturer. However, P could argue that the defect lies in the faulty nature of the trigger, and that that existed when the gun left the manufacturer's hands, but this might be difficult to prove.

P is unlikely to prevail in establishing a manufacturing defect.

2. Design Defect
There are three approaches here. First, the consumer expectation test, as described above in manufacturing defect. As concluded above, P may successfully argue that he reasonable consumer would not expect the gun to backfire.

Second, the reasonable alternative design approach, which requires that there was a reasonable alternative design that would have prevented or significantly reduced the risk, but would not have substantially impaired the products utility. Further, safer alternative must have been both technologically and economically feasible, and third that the safety benefits of the alternative design must be greater than the costs. To establish these requirements P would have to bring in experts to analyze the trigger mechanism that failed to figure out if there actually was a defect that could have been avoided with a feasible alternative design, and if that alternative design would have prevented the backfiring. Finally, the harm to P must have been foreseeable. While gun back firing is somewhat foreseeable, KW would argue that it is so unlikely as to make its foreseeability minimal. More information is needed to determine if there was a reasonable alternative design.

The third approach to design defect is that the design must not be manifestly unreasonable. KW would argue that the gun is by nature supposed to be dangerous and its utility is not negligible, or that the thing that makes the product dangerous cannot be substituted by anything else.

3. Information defect
For P to prove an information defect, he must show a foreseeable risk of harm (discussed above in the reasonable alternative design approach to design defect), that the risk would be reduced or avoided if the manufacturer would provide a reasonable warning, that a reasonable and prudent manufacturer would have provided a warning, and that the warning given would have been reasonably adequate. Had KW provided a warning about backfiring P may have been more careful, though if he had still used the gun and it backfired he still probably would have been injured. So, it is questionable that the warning would have been reasonably adequate in preventing P's harm from the gun backfiring.

For the manufacturer to be held liable for the product defect, the other elements of negligence are still required to be met.
Actual harm: by the gun backfiring, P's arm was braised by a bullet. (the other harms to P would likely fall outside the scope of risk of the gun backfiring)

Factual cause: Under the rebuttable heeding presumption, the information defect is presumed to be a but-for cause of P’s arum injury. D would have the burden of proving otherwise.

Proximate cause: since proximate cause of defects takes into account foreseeable uses of the product (shooting a gun is foreseeable), by definition if something is defective in a foreseeable way, the harm is within the scope of risk.

Affirmative defenses:

Contributory negligence of P:
Kolt will assert as an affirmative defense that P was contributorily negligent in removing the lock incorrectly. Because that was a foreseeable misuse of the product, this defense would fail under the *Bexiga* rule and would not result in a reduction of P's recovery.

Assumption of the risk:
This would only apply if P knew that the product was defective and used it anyway. There is no evidence of this.

General affirmative defense for everyone P is claiming liability against:

Statute of limitations: The state's civil statute provides that no action for damages for injury shall be brought more than 2 years after the date when the claimant knew/should have known of the existence of the injury. Since most of the harms occurred on or after Feb 2013, they are not yet barred. However, D would argue that any emotional distress suffered by P prior to January 2013 would be barred. In most jurisdictions, P would successfully counter that because he is a minor, the statute of limitations should be tolled.

Payton's Damages
Assuming some of the defendants are held liable, P will be able to recover compensatory damages including past and future medical expenses, pain and suffering, and, though far in the future, any lost wages that may result from his injuries. These damages will need to be adjusted according to interest for any past expenses or losses as well as adjusted to the present value of future expenses/losses (the wages he could lose in the future).

He may also be able to recover punitive damages to provide deterrence for future transgressions and punishment for the wrongdoers. D could be considered to act with malice or wanton conduct because his behavior contained an element of hostility/cruelty in bullying P. P would argue that the school and ME could qualify for punitive damages because of their indifference to the risks associated with D's bullying, but this would be difficult to show.

Under the statute, for any negligence claim, any damages P is awarded will be reduced by the percentage he is at fault if the court finds him contributorily negligent for his injuries. As the state here applies a pure comparative fault statute, a high percentage of negligence on P's part will not bar recovery from the other tortfeasors, only reduce it. The comparative fault statute does not apply to intentional tort claims. This means D will be 100% liable for any harms caused by his intentional torts.

If this is a joint and several liability jurisdiction P can collect in full from any defendant for the indivisible harms which they caused. A minority of jurisdictions follow several liability rules,

meaning P must collect separately from each defendant in proportion to their fault.

Payton's parents v. Derek

IIED
As discussed above in Payton v. Derek, for recovery on IIED, the act must be extreme and outrageous. This is questionable for a situation of bullying (which supposedly is why P's mom has emotional distress), though may be viable for knocking a child unconscious (which is what supposedly caused P's dad's emotional harm).

However, this claim will fail because the claimants must have been present for the acts. There is no indication that P's mom or dad was present when he was tormented or knocked unconscious.

Negligence for bullying their son
Since the parents did not experience actual harm they will have to try for NIED rather than negligence.

NIED
The only way P's parents could recover for NIED would be as bystanders, which would not prevail because P's parents presumably did not witness the acts and were not within the zone of danger themselves.

Loss of consortium
P's parents could try for a loss of consortium claim, though only a minority of jurisdictions allow parents to recover on this claim. This would allow recovery for loss of love, companionship, affection, etc. because of the injury to P but would be derivative of D being found liable to P. If P was deemed contributorily negligent, the parent's loss of consortium claim would be reduced according to P's fault.

Essay #2

QUESTION

Courts in the state of Zexas currently hold persons with mental disabilities to the same standard of care as that of a reasonable person *without* mental disabilities. In a case before the state supreme court, the defendant in a negligence claim suffers from mental disabilities. The jury returned a verdict for the plaintiff and the defendant now appeals. The defendant is urging the Court to abandon the current rule and adopt a new rule that would hold persons with mental disabilities to the standard of care exercised by a reasonable person with similar mental disabilities. You are a law clerk to Justice Smith. She has asked you to draft a memo advising her on the merits of adopting the new rule proposed by the defendant or affirming the current rule.

MODEL ANSWER

RE: Abandoning the *Creasy* Rule

Justice Smith,

It could be argued that a person should be liable for the harms they cause even if they didn't intend to cause the harm, as it would be unfair to leave an innocent plaintiff holding the bag. Moreover, we have a policy goal of compensating innocent plaintiffs for their losses. However, *VanCamp* holds that we should only attribute liability to blameworthy defendants. A mentally disabled person may not have the ability to control his or her actions, so it is fair to say that a mentally disabled person is not blameworthy at all (due to a lack of choice in their action). For similar reasons, we generally do not hold children to an adult standard of care, as they may not appreciate the offensiveness of their actions or have the ability to control their actions. The current standard is therefore inconsistent with the rules applied in other context.

A goal of torts is deterrence of conduct that makes the world a less safe place. Because a mentally disabled person is incapable of understanding or comprehending the risks posed by their negligent conduct, the current standard does not deter them from acting negligently. However, the current rule gives caregivers incentives to prevent harm and restrain the mentally disabled. This is a strong argument, especially for those persons whose disability is severe enough so that they cannot take care of themselves. However, this rule cuts against the idea that we should encourage teaching mentally disabled persons to learn to take care of themselves and may have a chilling effect regarding the education of mentally disabled (i.e. why would educating mentally disabled persons be important if responsibility for them is going to be left to

their caregivers?). Moreover, it may be unfair to expect family members to care for or restrain their mentally disabled family members. As a society, we value individual autonomy and do not expect others to be their "brother's keeper." An example of this in tort law is that family members do not have a general duty to protect a plaintiff from a potentially dangerous family member.

An argument could be made that the current rule avoids administrative problems with courts and juries having to asses an actor's mental disability. However, some may argue that juries are perfectly up to the task (the *White* court believed that they are), and also that we ask juries to make difficult assessments all the time, such as when we ask them to attribute fault among multiple negligent actors.

Another procedural argument for keeping the current rule is that it avoids inducement for defendants to fake a mental disability, and prevention of fraud is a substantial goal of tort law. However, this worry could be alleviated by the use of expert witnesses who could testify as to a defendant's mental abilities. The flip side of such an argument is that doing so would raise the already expensive costs of litigation, as expert witness are usually very costly to retain.

Finally, the current rule simplifies the adjudication process, as attorneys will be able to better predict for their clients the likely outcome of the case without having to first litigate the mental status of a party. This leads to another issue of abandoning the rule: mental disabilities are not black and white, there is a wide spectrum of mental disabilities which import various levels of intelligence and self-control. If courts abandoned the rule it would raise the concern of having to determine a threshold of mental disability, which would be difficult.

Relatedly, if we allow the standard of care to take into account mental disabilities, there is a concern that pedophiles and those with anger management issues will bring forth medical experts to testify that those persons have mental illnesses (and certainly they do), which raises the concern that if we excuse mental disabilities generally, there is nothing to stop the next step of excusing pedophilia on a similar basis.

Further, it may be argued that it is unfair if those with mental disabilities have the benefits of being part of society as a whole without having to bear the full consequences of their actions. Therefore, we should require persons with mental disabilities to pay for damages they cause if they choose to "live in the world," especially given the likelihood that they will engage in substandard conduct. Relatedly, the rule also reflects the public policy preference that society treat mentally disabled individuals the same as the non-mentally disabled. A counter argument would be the fact that mentally disabled persons are not the same as people of ordinary intellectual capacity. Moreover, holding the mentally disabled to a standard of care they cannot meet would discourage them from participating in the normal, everyday life of

society, frustrating the goal of integrating them into society.

There is also no reason to believe that mentally disabled defendants are better positioned than plaintiffs to spread the risk of harm from their conduct. In fact, it would reasonable to assume that someone with a mental disability will not have the resources to compensate injured persons, as they may be unemployed. In addition, they may not have liability insurance. Many plaintiffs, however, will have health insurance or property insurance.

Overall, I think our system is ready for the *Creasy* rule to be abandoned, and would be able to address the difficulties raised by doing so.

-Clerk