LEGAL MEMORANDUM

INTRODUCTION

You have asked me to investigate whether you, Law School, will be found negligent for the psychological injuries suffered by your student culminating in that student dropping out, which originally ensued from harassing e-mails. In order for a cause of action in negligence to succeed, a duty of care must be proven by the plaintiff.…

To determine whether there is a duty of care between a university and its students, we must ascertain whether it falls within an existing or analogous category. If it does not, a novel duty of care can be established by applying the full *Anns/Cooper* test. After briefly answering those questions, I will review the relevant facts, issues and subsidiary issues, and move onto the analysis of those issues. The memo ends with a brief conclusion.

BRIEF ANSWER

Based on existing caselaw, there is an unfavourable chance that the relationship between a university and its students will fall within an analogous category. There is moderate probability that a novel duty of care will be established for a university towards its students.

FACTS

In October, Law School sent an e-mail to its students to warn them about threatening e-mails suspected to come from a student. The e-mail also stated that harassing e-mails violated the Law School Code of Conduct and could result in disciplinary sanctions. Law School took no further action.

One student, Future Lawyer, was a consistent recipient of these threatening emails. The receiving of e-mails coincided with sessions of History of the Common Law, but the sender was never identified by Future Lawyer. She reported the e-mails to the administration but it failed to take action. When the e-mails intensified, Future Lawyer was unable to attend first that class and

then the rest of her classes because of serious psychological injuries that were directly caused by the harassing e-mails. She received care from a physician but was unable to complete the semester and dropped out of Law School. Future Lawyer has launched a cause of action in negligence against Law School.

ISSUES

I. Does a university owe a duty of care to its students to take affirmative steps to halt online harassment from an unknown perpetrator?

1) Is the relationship between a university faculty of law and its student recognized as an existing category?

2) Is this relationship likely to be found to be analogous to an existing category?

3) Is the relationship likely to be recognized as a special category of duty?

4) Is this relationship likely to meet the *Anns/Cooper* test for finding a novel duty of care?

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DISCUSSION

I. Duty of Care

In order for this cause of action in negligence to succeed against Law School, the first requirement is to determine whether a university owes a duty of care to its students to take affirmative steps to halt online harassment from an unknown perpetrator. The legal test for determining a duty of care is known as the *Anns/Cooper* test and requires that the harm is the reasonably foreseeable consequence of the breach, plus a sufficient relationship of proximity between the plaintiff and the defendant. However, to make use of earlier cases that have developed relationships giving rise to a duty of care, if the proposed duty of falls into or is

analogous to a previously established category of relationships, a prima facie duty of care will arise and the full *Anns/Cooper* test for a novel duty of care is unnecessary.[1]

1) Is the relationship between a university faculty of law and its student recognized as an existing category?

The duty of universities towards students recognized in common law is limited to positive acts, or misfeasance, and does not include a failure to act, which is nonfeasance. The leading case on the duty of care owed by universities is *Young v Bella*, where a professor took positive actions to mistakenly report a student as a child sex abuser, consequently ruining that student's reputation and future career. The court ruled that professors owe a duty of care to their students, and extended that duty to the university on the basis of its contractual relationship with it students.[2]

However, the duty of care in question is one of nonfeasance, where Law School is being sued for its failure to take action to stop the threatening emails and protect Future Lawyer from injury. It is unlikely that the court will find this to fall within the established category because of the significance difference between positive and negative duties. It has been said "there is no distinction more deeply rooted in the common law ... than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive [inaction] ..."[3] The duty to take action falls within the category of special duties of care and will be examined in further detail below.

Another key case identifying a duty of care owed to university students is *Powlett v University of Alberta* where the university Board of Governors was found to owe a positive duty of care to a first year student to put an end to or supervise initiation by second-year students

[1] *Childs v Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643 at para 15 (the entire *Anns* test need not be applied if there is an existing or analogous category of relationship).
[2] *Young v Bella,* 2006 SCC 3 at paras 21, 31, [2006] 1 SCR 108 [*Young*].
[3] Francis H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 U Pa L Rev 217 at 219.

which had caused the student's injuries.[4] Although this duty included both an "act or omission", it was founded on the student's status as a student in residence and the Board's duty to exercise care "so long as he [the student] was in residence in the buildings over which the Board had the power and duty of control."[5] This condition is absent in the present case since Law School did not have physical control over the premises where the harassment occurred.

2) Is this relationship likely to be found to be analogous to an existing category?

The use of categories for finding a duty of care is not restricted to identical fact situations but can be extended by analogy when conditions are similar to an existing duty.[6] One similar relationship giving rise to a duty of care is the one owed by school boards to secondary students to take action to prevent discriminatory harassment from other students: *North Vancouver School District No 44 v Jubran*.[7]

However, that case can be distinguished from the present relationship on three key differences: 1) secondary students are typically minors while university students are not (however this fact must be clarified); 2) the nature of a secondary school environment is different from that of a university; and 3) *Jubran* concerned physical and verbal harassment but Future Lawyer endured online harassment. The duty of secondary schools derives from the doctrine of *loco parentis* – that parental rights have been delegated to school authorities and impose obligations of supervision and control. *Pacheco v Dalhousie University* outlines how modern universities have explicitly excluded *loco parentis* in its Code of Conduct so it is unlikely that the duty owed by secondary schools will be held as analogous.[8]

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[4] *Powlett v University of Alberta*, [1934] 2 WWR 209 at para 129, [1934] AJ No. 14 **[***Powlett*].
[5] *Ibid* at paras 117, 140.
[6] *Cooper v Hobart*, 2001 SCC 79 at para 31, [2001] 3 SCR 537.
[7] *Vancouver School District No 44 v Jubran,* 2005 BCCA 201 at para 87, 253 D.L.R. (4th) 294.
[8] *Pacheco v Dalhousie University* 2005 NSSC 222 at para 23, 238 NSR (2d) 1 [*Pacheco*]*; Acadia University v Sutcliffe,* 30 NSR (2d) 423, 95 DLR (3d) 95*, (loco parentis is* further rejected to have "no validity today" for modern universities at para 12).

The case most likely to assert an analogous category is *Pacheco,* which demonstrates that a university has a "duty to protect its students**,** faculty, members of the administration, staff and, indeed, members of the public who may be affected by the conduct of any member of the University community".[9] This is not considered an established category for the present lawsuit because of the small but important distinction focusing on the university's "control over the non-academic behaviour of its students" to prevent harm to third parties, rather than the present cause of action which focuses on a duty of the Law School to protect its students from unknown third parties. In other words, it is the difference between preventing positive and harmful acts from being committed and protecting potential injured parties from harmful acts that are committed within or beyond the control of the university.

Nonetheless, this duty is the strongest case for establishing a duty of care owed by Law School, especially since the harm was also perpetrated through threatening emails. However, an argument can be made to differentiate *Pacheco* on the facts, since in that case the perpetrator was not only a student of the university, but also plainly self-identified, but in the present suit, not only is the perpetrator unknown but it is uncertain if he/she is a student or employee of Law School. This is significant because it is unreasonable to hold a Law School or any party responsible for acts that are beyond their control, and this will be an important element in the Standard of Care issue.

3) Is the relationship likely to be recognized as a special category of duty?

Common law duties of care focus primarily on positive acts causing harm, however, as previously mentioned, there are notable exceptions that impose a duty of affirmative action. The foundation of this duty is a "special relationship", therefore it is necessary to examine the likelihood that the court will consider the relationship between universities and students as such.

[9] *Ibid* at para 24

Duty to Control

Potentially three special duties to control could be claimed: duty to control, vicarious duty, and fiduciary duty. However, because the second two have a very low chance of succeeding, only the duty to control will be analyzed.[10] Similar to but distinct from vicarious liability, the duty to control creates a positive obligation to prevent harm.[11] An important condition for caselaw is the acceptance of the notion "that the relationship of student to university as educator can bear many of the hallmarks of the relationship of employee to employer" from *University of Western Ontario*."[12] The relevant case law concerns situations of harassment in the workplace and the duty of the employer to control the environment and halt the harassment. The affirmative duties required of employers include: 1) A duty to respond promptly and effectively with a thorough investigation;[13] 2) A duty to take reasonable steps to prevent further incidents of harassment;[14] and 3) The response must be both timely and corrective.[15]

The duty owed by employers to stop harassment includes harassment caused by non-employees as well as employees because the failure to act "perpetuat[ed] the poisoned work environment".[16] Furthermore, in *Hinds v Canada*, the employer was found liable for the racial discrimination suffered even though the harasser was never identified.[17] Although it is clear that employers owe a duty of care to prevent harassment in the workplace, it has not been established

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[10] *Students for Life v University of British Columbia*, 2003 BCSC 864, [2003] BCJ No 1326 [*Students*] *(*rejects vicarious liability of a university for the torts committed by its students because the necessary relationship of agency of the students was missing at para 120);
Ogden v Simon Fraser University [1988] BCJ No 2288, (no clear ruling about whether a fiduciary duty is owed by a university although there is some indication that courts are reluctant to recognize such a duty at para 64)*; Students* (finds no fiduciary duty on the part of a university student union at para 129).
[11] *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at para 17, [1987] SCJ No 47.
[12] *University of Western Ontario,* [2007] OLRD No 5152 at para 52.
[13] *Uzoaba v Canada (Correctional Services),* [1994] CHRD No 7 at para 42, [1994] DCDP No 7.
[14] *Nixon v Greensides,* (1992) 12 LW 1234-008.
[15] *Hinds v Canada (Employment and Immigration Commission),* 10 CHRR 5683, [1988] CHRD No 13.
[16] *Guzman v T,* [1997] BCCHRD No. 1 at para 101 [*Guzman*].
[17] *Ibid* at para 123.

for universities in relation to online harassment suffered by its students. The nature of the harassment suffered by Future Lawyer was not a product of her physical environment of which she had no control over, but through e-mails. In the cited cases, the harassment was a form of discrimination, which has not been confirmed in the content of the threatening e-mails. Moreover, common law has not established that the duty owed by a university is equivalent to the duty owed by an employer.

The content of the threatening emails is unclear and is important to ascertain because it will determine whether *Guzman* and *Hinds* are likely to be interpreted as binding precedent for the present lawsuit. In *Guzman*, the sexual harassment suffered was considered a form of discrimination in violation of the British Columbia Human Rights Act[18], and the issue in *Hinds* concerned harassment in the form of racial discrimination in contravention to the *Canadian Human Rights Act*.[19] Both Acts imposed a statutory obligation on employers to maintain discrimination-free employment.[20] It is presently unknown whether the content of the emails received by Future Lawyer would amount to discrimination, which would essentially determine the relevance of *Guzman* and *Hinds.* In addition, since the protection from discrimination identifies employment but not enrolment in a university, it is necessary to examine the Law School's Code of Conduct for any equivalent provisions that might give rise to a duty to control.

[18] *Human Rights Act,* SBC 1984, c 22 s 8.
[19] *Canadian Human Rights Act, SC 1976,* c. 33 s13.1(1)(c) .
[20] *Human Rights Act* at note 17 (s 8(1) "No person shall (b) discriminate against a person with respect to employment or any term or condition of employment, because of the ... sex of that person ..."); *Ibid* (13.1(1)(c) "It is a discriminatory practice, (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination", 48 (5) "Subject to subsection (6), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.")

4) Is this relationship likely to meet the test for finding a novel duty of care?

Since there is no obvious precedent that establishes an affirmative duty of care owed by a university to its students, there is a considerable chance that the court will apply the full *Anns/Cooper* test to see if a novel duty of care will arise. The first branch of the *Anns/Cooper* test considers if the harm that occurred was the reasonably foreseeable consequence of the defendant Law School's act. If so, a prima facie duty will arise and the test moves on to the second branch of the test, which allows the defendant to raise any countervailing policy considerations that might negate the duty of care.

A. Is it reasonably foreseeable that a university student will be harmed by online harassment due to inaction of the university?

The court will seek to discover if it was reasonably foreseeable that the alleged carelessness of the university would cause i) a risk of injury ii) to the plaintiff.

a) Foreseeable Risk of Injury

Specifically, the court will ask the plaintiff to prove that Law School's conduct or failure to take action to stop the threatening emails created a foreseeable risk of injury to Law Student. Although this risk is not limited to the actual injuries suffered, in situations of serious psychological injury, the Supreme Court of Canada in *Mustapha v Culligan* ruled that the plaintiff must establish the foreseeability that "a mental injury would occur in a person of ordinary fortitude".[21]

When applied to the facts, it is doubtful whether it was reasonably foreseeable to Law School that its inaction would cause a risk of serious psychological injury to a student receiving threatening emails. However, evidently it is foreseeable that some harm would arise from threatening emails given a) its prohibition in the Code of Conduct; and b) its inclusion as an

[21] *Mustapha v Culligan of Canada*, 2009 SCC 27 at para 15, [2008] 2 SCR 114 [*Mustapha*].

offence in the *Criminal Code*.[22] But alone, this foreseeability of harm to a student does not equal a foreseeable risk of injury caused by the conduct or inaction of the Law School. The outcome of this issue will depend upon how specific or broad the court frames it. However, even if it is generally decided that the Law School's conduct created a foreseeable risk of injury, in view of the decisions on psychological injury in *Mustapha* and *Vanek v Great Atlantic & Pacific Company of Canada Limited*, it is somewhat probable that the court will dismiss the injuries suffered as too remote.[23] This will be discussed in further detail under Remoteness of Damages.

b) Foreseeable Plaintiff

In this complementary component of foreseeability, the court will consider if the plaintiff is likely to get injured by the careless act or omission. It is likely that it will be easily established that Future Law belongs to a class of persons foreseeably at risk due to the fact that the Law School administration initially sent an e-mail to warn all students.

B) Is there a relationship of sufficient proximity between Law School and Future Lawyer?

Proximity describes a "close and direct" relationship where one party will be reasonably contemplated to be affected by the other party's acts or omissions.[24] Proximity can be determined by reference to existing statutory or contractual obligations, in particular for public bodies such as a university.

The notable *Young v Bella* and *Ciano v York University* recognize a contractual relationship between a university and its students upon an educational basis.[25] It is highly likely that regulatory documents including but not limited to the university Code of Conduct will be

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[22] *Criminal Code*, RSC 1985, s 264(1), (2)(b).
[23] *Mustapha, supra* note 20 at para 18; *Vanek v Great Atlantic & Pacific of Canada*, 48 OR (3d) 228 at paras 59-61, 180 DLR (4th) 748.
[24] *M'Alister (or Donoghue) v Stevenson,* [1932] AC 562 (HL).
[25] *Young*, supra note 2 at para 31; *Ciano v York University*, [2000] OJ No 183 at para 15, [2000] OTC 37 ("The relationship between student and university is contractual. Upon enrolment into classes, registration and tuition payment, the student enters into a contract with the university to provide higher education, access to resources and class instruction" at para 15).

interpreted as a strong indicator of a sufficiently proximate relationship, especially if it explicitly governs the relations between Law School and its students, although this fact must be confirmed by closer examination. This possibility is expanded in *Pacheco*, which maintained that the Senate Constitution and the Student Code of Conduct revealed that "the University intended to have the right to exercise control over the conduct of its students."[26]

A relationship of supervision might be precluded within the same document itself, as in *Pacheco* which identifies Dalhousie University's Code that the university "has no general responsibility for the moral and social behaviour of its students."[27] The decision in *Powlett* bolsters this claim:

> Neither can I find ground for accepting the plaintiffs' contention of a contract, express or implied, to supervise and care for the mental and physical welfare of the infant plaintiff…having regard to the purposes for which universities generally have been established**,** the comparative freedom of thought and action which it is common knowledge must of necessity be accorded students in their university life …[I]t cannot, I think, reasonably be said that either party had in mind under the circumstances the creation of any such legal obligation."

It is uncertain whether this will be capable of negating a finding of proximity due to the existing educational and administrative relationship that exists between Law School and Future Lawyer which will in all probability establish sufficient proximity. If both foreseeability and proximity are present, a prima facie duty of care will arise.

C) Are there policy reasons that would negate the finding of a prima facie duty of care?

Policy considerations can potentially negate a prima facie duty of care but since the courts have typically given less weight to them, they will not be considered in great detail here. One consideration that might limit the scope of the duty is the difficulty associated with preventing Internet-based harassment over which the university has no control, especially in

[26] *Pacheco*, *supra* note 8 at para 27.
[27] *Ibid* at para 23.

cases of unknown perpetrators. Such a broad scope of harm only tenuously linked to the university may invite unlimited liability. Secondly, it may be an inappropriate forum for dealing with serious concerns – while universities have some control over their students and employees, crimes occurring outside a university's jurisdiction may be best dealt with by the police.

II. Standard of Care…

III. Causation in Fact…

IV. Causation in Law/Remoteness…

V. Damages…

VI. Defences…

CONCLUSION

The first element for a successful claim of negligence is the existence of a duty of care. There is a modest to moderately high chance that the court will find a duty of care owed by a university to its students to take affirmative steps to halt online harassment. The strongest probability of recognizing a duty of care relies upon the recognition of *Pacheco* as an analogous duty. The relevance of other caselaw is substantially limited by the important distinction between a duty of nonfeasance and of misfeasance since common law is more cautious about imposing an obligation for positive acts.

It is necessary to clarify if Law School has identified the perpetrator or is able to trace him/her due to the importance of the relationship between Law School and the source of harm. Another imperative step is to examine the Code of Conduct and other regulatory documents to resolve whether it imposes a general obligation to protect or includes an explicit exclusion of a relationship of supervision and control. Finally, it is recommended that the content of the e-mails be inspected to ascertain if the harassment would constitute discrimination, in order to evaluate the weight of relevance cases concerning discriminatory harassment.