

Model Answer to the Duty Hypo

Belinda was a faultless victim of unreasonable conduct, and yet she will have difficulty recovering for her losses. Because her situation may not fit neatly within traditional rules, we may need to argue for either the extension of these rules or the application of broader principles of tort law.

In general, tort law recognizes a broad duty of reasonable care with respect to risks of physical harm but not with respect to risks of pure emotional harm. However, a plaintiff who is physically injured can also recover for related emotional harm. Accordingly, we might argue that the blood from Agnes that soaked Belinda constituted a direct physical impact. Similarly, since rescuers are foreseeable victims, we might investigate whether Belinda, who is barely mobile, sustained any physical injury in instinctively rushing to Agnes's side. In addition, a zone of danger rule might allow Belinda to recover at least for pure emotional harm resulting from a fear for her own physical safety—but the initial facts suggest that Belinda was not herself in physical danger from the careening trash can, as she lacked a direct line of sight to the place where Casper's truck struck the can and was 30 feet from where the can struck Agnes.

If these arguments fail, Belinda's claims will depend in part on how the court treats her relationship with Agnes. Statutory claims for wrongful death and common law claims for pure emotional injury generally require a significant personal relationship between the plaintiff and the person physically injured. Although what this means can vary widely across jurisdictions and even between statutory and common law, in practice a "spouse" can generally recover but a mere "friend" generally cannot. A formalist court might give little to no legal effect to labels like "best friend," "housemate," "sister," and even "long-term romantic partner" that, while arguably capturing Agnes's importance to Belinda, lack the legal sanction of "spouse." In contrast, a court focused on the substance of the relationship would find the essential components: over half a century of a deep emotional bond that was, in Belinda's own words, "love."

The possible romantic element of this relationship raises a quandary: Revealing any such intimacy, if it in fact existed, could alienate a socially conservative judge or jury—or may not accord with Belinda's own wishes. And yet such intimacy could also be powerful evidence of the significance of the relationship and could provide, at least on appeal, the best argument against limiting these claims to only lawful spouses, since same-sex couples were until recently denied the right to marry. To the argument that Agnes and Belinda should have married as soon as they were legally able to do so, we would respond that tort law should remedy rather than perpetuate what may have been a decades-long violation of their rights.

The analysis that follows assumes that we can either (a) demonstrate a direct physical impact to Belinda or (b) satisfy the court of a legally sufficient relationship between Belinda and Agnes. Our potential defendants include Casper, Erdoil and its employee, and Front-n-Center and its employee. The facts presented do not suggest any viable claims against Drexels.

Casper (as a motorist) owes Agnes (as a pedestrian) a duty of reasonable care with respect to physical risks, which he has clearly breached by driving recklessly and under the influence. Indeed, any conviction for reckless or intoxicated driving could establish negligence per se. This breach was a but-for cause of Agnes's (and by extension Belinda's) injuries, and although the trash can's trajectory may have been surprising, it is entirely foreseeable that driving recklessly and under the influence can cause collisions that harm other people.

Analysis of Erdoil's liability is complicated by the fact that Agnes was not on Erdoil's land. Had she actually been at the gas station when she was struck, duty would be more straightforward: She would be an invitee under the status trichotomy or owed a general duty of reasonable care under the Rowland approach. Under either rule, Erdoil would have a duty even if it had not affirmatively created the danger.

As slip-and-fall cases illustrate, specific conduct is not necessary to create this duty, and unreasonable inaction can constitute the breach.

Even though Agnes was not on its premises, Erdoil will likely owe her (and by extension Belinda) a duty. The tipped-over trash can was an artificial condition on the premises and closely connected to Erdoil's activities on those premises, either of which generally creates such a duty. Beyond this rule, we could argue that principles of premises liability should apply by analogy. Agnes is a foreseeable victim and, as a member of the public invited onto and around the premises, is comparable to an invitee. Moreover, the history of premises liability is one of expansion toward a general obligation to reasonably maintain one's premises. Indeed, the fact of a trash can shooting from a gas station evokes *Byrne v. Boadle*, in which the defendant was famously liable for injuries sustained by a passerby hit by a barrel falling from the defendant's warehouse.

Alternately, we could identify specific conduct by Erdoil that "create[d] a risk of physical harm" (R3d). We could argue that Erdoil affirmatively acted by (improperly) hiring a careless employee, (improperly) supervising that employee, (improperly) installing a trash can that could tip into the driving lane, or (improperly) designing the parking lot to accommodate fast speeds. In each case, Erdoil arguably incurred a duty by acting.

Breach depends on the nature of the duty. If nonfeasance suffices, then Erdoil unreasonably failed to remove the trash can (about which it should have been—and through its employee was—aware) in a timely fashion. If malfeasance is required, then we would argue that Erdoil unreasonably performed the action (like hiring or supervising the employee or installing the trash can) that triggered the duty. We may be able to rely on *res ipsa loquitur* (as per *Byrne*) if we can successfully argue that, *inter alia*, Erdoil had exclusive control over the trash can or the premises. For both approaches, we would also need to link the breach to the remaining elements of negligence.

Erdoil is also vicariously liable for the negligence of its employee, who was acting (or not acting) within the scope of his or her employment in maintaining (or not maintaining) the premises. Again, in the absence of an affirmative duty to a noncustomer outside the premises, a challenge here would be to identify some actual act by the employee that caused the harm.

Front-n-Center presents a more difficult case. Our jurisdiction may have case law or a dram shop law that imposes a duty on alcohol providers to those who are foreseeably injured by the drunken acts of the providers' customers; this grocery store might fall within such a rule. Providing more alcohol to an intoxicated driver likely breached any such duty. This breach is independent of the statutory prohibition on Sunday alcohol sales. While we could argue for negligence *per se* (and would like to make the jury aware of this violation), the once-a-week ban was probably not enacted to protect against drunk driving and hence was not intended to protect against the kind of risk presented on these facts.

Causation is likewise difficult. The unreasonable sale of whiskey to Casper was a but-for cause of the crash; had the grocery store refused, Casper might not have struck the trash can, and (because of timing) the trash can almost certainly would not have struck Agnes. However, the sale may not be a substantial factor in that injury: Apart from changing the timing, the sale itself may not have contributed to the crash. Casper was intoxicated prior to the purchase, very little of the whiskey he did buy was consumed, and the intervening time may not have been sufficient for that alcohol to enter his blood stream. The scope-of-liability question here is closely related to the duty question; although Casper's drunken driving was the most immediate cause of the crash, recognition of Front-n-Center's duty here would also suggest that third-party victims of drunken driving are within the scope of such liability.

If Belinda succeeds in one or more of her common law claims, she could recover for her emotional damages. If the state's wrongful death statute extends to her, she may also be able to recover for any additional damages contemplated by that statute....