Midterm Memo - Torts Spring 2025

This memo carefully reviews the midterm exam. The purpose of this memo is to provide you with information that will help you prepare for taking the final exam and improve your test-taking skills in general.

Included in the memo are sample student answers. These answers are not perfect and each have their flaws, but taken together they represent a set of thoughtful approaches to addressing different exam questions.

Grading

For each question on the exam, students were rewarded for identifying the correct legal issues, applying the correct legal rules, and crafting thoughtful, persuasive, credible legal arguments that dealt with nuances, gaps, contradictions, and ambiguities in the law. Extra credit was occasionally awarded to answers that were particularly thoughtful and precise. Even when students identified the incorrect issues or rules, they could earn partial credit by writing strong legal arguments applying those rules.

In accordance with Loyola Law School policies, I graded each exam anonymously. To minimize bias, I also graded each question separately and randomly sorted the exams for each question.

The character limit instructions — which were discussed in class, provided on our course website prior to the exam, and given at the time of the exam — stated that the character limit for each of the three parts of the exam was 5,000 characters. A separate instruction stated, "Do not exceed the character or bluebook limits. Failure to comply with these limits will result in a severe loss of points." Students received credit for the first 5,000 characters of each part of their exam answers and did not receive credit for any writing past the 5,000 character limit for each question. Some students kept their exam notes below their answers on the exam. That was fine. These exams were not penalized for technically exceeding the character count. I did not read the notes, and they did not factor into anyone's grade on the exam.

As stated in the class syllabus, the midterm exam was worth 25% of your grade in this class. The final exam will be worth 75%.

General Advice

Before diving into the particular questions on the exam, I would like to offer some big-picture feedback based on the class's exam answers as a whole. This is advice to keep in mind as you prepare for the final exam.

Only address the issues that matter to resolve the legal question being asked

Do your job. For each exam question in this class, you have a role and an assignment. You will receive credit for how well you perform on that task.

Don't include trivia. Answers were not rewarded for reciting or referencing legal rules that were unnecessary to answer the legal question in a given case. This uses up your character count and distracts the reader from what matters to decide the particular legal issue.

Resist the tendency to show off how much you know. You won't be rewarded for that. A busy partner at a law firm doesn't care how many legal rules you have memorized. She only cares that you can identify the rules that matter and use them to make a compelling argument.

Ground your argument in legal rules

All of your arguments should be under the umbrella of a legal rule. If your answer mentions facts from the prompt, make sure that you are connecting those facts to a legal rule that makes those facts legally significant. Facts mean nothing on their own. You must show the reader why a fact matters under the governing legal rule.

Separate duty and reasonable care analysis

Whether the defendant owed the plaintiff a duty and whether the defendant breached that duty are two separate legal inquiries that follow different rules. The tools used to determine a reasonable standard of care cannot be used to determine the existence of a duty.

Abide by the character limits

For those students who lost points by exceeding the character count, this is a good lesson to learn early in your legal career. In the practice of law, word and page limits often matter. Courts will reject your brief in its entirety if it exceeds the court's word or page count or otherwise doesn't meet formatting requirements. This is no joke. A state Supreme Court once rejected a brief that I filed because I printed the cover page of the brief on the wrong color card stock.

Use this midterm exam as a learning opportunity

This exam is only worth 25% of your grade in this class. If you performed well, keep up your strong efforts. If you did not perform as well as you'd hoped, use this memo as a springboard for improvement. Read through my commentary on each question and mark out on the exam the issues that you missed. Take notes on how you would rewrite your exam if given the chance. Compare your answers to the sample student answers to understand how you can better structure your answers, string together arguments, and write more precisely and succinctly.

None of these efforts will be wasted. Our final exam will closely mirror the format of the midterm. And the final exam is cumulative, meaning that any of the topics from the midterm may reappear on the final.

Once you have taken these review steps, I am more than happy to meet with you individually (or in groups) to go over your exams. If you finish your review of this exam and still have questions about how to approach an exam for this class, this is great timing for meeting with me one-on-one so that I can understand your approach and coach you for the final. At some point soon, I will put a form on our class website for students to schedule one-on-one meetings with me.

Question 1

You are an appellate court judge in the state of Loyola. The defendant, Oopsie Pies Bakery, is appealing from a judgment for the plaintiff, Ashley Giles, following a jury trial. The only issue on appeal is whether the punitive damages award violates the Due Process Clause of the Fourteenth Amendment to U.S. Constitution.

An employee of Oopsie Pies bakery was carrying a tub of frosting through the bakery from the front door to the kitchen where the baking is done. The employee mishandled the tub of frosting, accidentally letting the frosting spill out over the floor in an area where customers line up to place their orders. Having noticed the spill but needing to get pies in the oven, the employee waited to clean up the mess until she was done with her baking tasks.

In the meantime, Ashley Giles, an elderly customer, entered the store, slipped on the spilled frosting, fell, and fractured her skull. According to expert witness testimony from Giles's doctor, Giles lost consciousness immediately upon impact and was left in a permanent comatose condition from which she will never recover.

At trial, it was revealed that Giles is not the first customer who has been harmed by Oopsie Pies. After a snowstorm two years ago, Oopsie Pies did not shovel the sidewalk in front of the store. A customer slipped on the icy sidewalk and broke her hip. Last year, Oopsie Pies underbaked a dozen cheesecakes, resulting in nine people having to go to the hospital for food poisoning. None of these injured patrons have sued the bakery. Oopsie Pies has been fined by the board of health on three separate occasions in amounts totaling $1,500 for improper food storage, cross-contamination, and poor personal hygiene. If a health inspector had inspected the restaurant at the time of the accident, Oopsie Pies could have been fined another $1,000 for the offense of having food on the floor.

A jury found Oopsie Pies Bakery negligent and awarded Giles $2,000,000 in compensatory damages and $10,000,000 in punitive damages. The defendant now appeals the punitive damages award.

Write the opinion of the appellate court.

Prof. Doyle commentary

This case turns on the issue of reprehensibility. Strong student answers dug deep into the question of whether the bakery's conduct was sufficiently reprehensible to warrant punitive damages at all. Unlike cases like Matthias, the bakery's conduct was more of a traditional tort accident (a slip and fall) than something bordering on an intentional tort. The harm that was risked and the harm that occurred was a personal injury and was more severe than the harm in the punitive damages cases we've read, but the plaintiff has also been substantially compensated for those injuries. The question also required students to discern how much the bakery's prior bad actions are allowed to affect the reprehensibility analysis. Unlike State Farm and BMW, there's no concern about the defendant being punished for out-of-state action. But reprehensibility analysis is still ultimately about the reprehensibility of the defendant's actions in this case. Prior bad acts are helpful only if they inform us about the reprehensibility of the current action. It would violate due process to punish the defendant for just being rotten in general. Strong students answers took the time to closely consider potential similarities and dissimilarities between the defendant's prior conduct and current misconduct.

The ratio of harm to punitive damages merits close scrutiny. While it is true that that the $10 million in punitive damages to $2 million in compensatory damages is a single digit ratio, *State Farm* tells us only that an excess of the single digit ratio is presumptively unconstitutional. *State Farm* does not tell us that a single digit ratio makes the punitive damages award presumptively constitutional. Students had an opportunity here to compare the nature of the injuries and damages awards with *BMW*, *State Farm*, and Matthias.

The civil fines can be used to inform the court's understanding of the reprehensibility of the bakery's conduct, the degree to which the bakery was on notice that their conduct was wrong, and the proportionality of the punitive damages to related civil penalties. Strong answers also wrestled with the question of whether these civil fines concerned the same kind of harm as the harm that befell the plaintiff.

The plaintiff's loss of consciousness is a non-issue. McDougald v. Garber is a compensatory damages case that stands for the principle that compensatory damages for loss of enjoyment require the plaintiff to be conscious of their loss. Punitive damages are not about compensating the plaintiff but about punishing and deterring the defendant.

Strong student answers

Example 1

Damages in tort law are generally meant to return the plaintiff to their previous position after an accident. They are not typically meant to punish the wrongdoer. In exceptional cases, punitive damages are used to punish tortfeasors who might not otherwise cease offending behavior. In this case, punitive damages of $10,000,000 have been given by the trial court against Oopsie Pies. The punitive damages payment given here was excessive and unnecessary, given the behavior in question was not the type that a court should punish with high punitive damages and the compensatory damages are more than sufficient to send a strong message on the behavior in question. This excessive payment violated the due process rights of Oopsie Pies. Generally, courts look to the Gore test to determine whether a damages payment violates due process rights, balancing three factors: 1) the degree of reprehensibility of the conduct in question, 2) the ratio between the punitive damages and the compensatory damages and 3) the comparison between the award and typical civil or criminal penalties for the offending conduct.

In this case, the particular conduct in question was certainly negligent but was not so reprehensible as to warrant the high punitive damages payout in this case. There appears to be no systematic corporate mandate to ignore spills on the floor. Although the harm ended up being physical in nature with a horrific result, it was not intended by the employee of the store and he in fact intended to clean up the mess. Oopsie Pies has been guilty of other unrelated negligent actions in the past, but the point of punitive damages is to punish this very conduct, not all of the bad conduct that the defendant has engaged in. No business is perfect, and likely any restaurant open to the public will be guilty of a few bad incidents. Although the result here was horrible, the conduct itself was not as systematic and reprehensible as general punitive damages are meant to target.

The State Farm decision suggests that the ratio of Punitive Damages to Compensatory Damages should not exceed 10/1. In this case, the ratio is only 5/1. But, given the compensatory damages payment is so high, this 5/1 ratio is still extremely harsh for the defendant. In cases like Mathais, courts have found reason to allow high punitive damages payments when the compensatory damages payments for this sort of wrongdoing would always be so low as to not discourage the bad behavior. In this case, the compensatory damages are $2,000,000, which should be enough on its own to discourage negligent behavior on the part of the defendant. Adding a $10,000,000 payment on top of that would likely imperil the defendant's ability to continue operating their business.

Lastly, courts look to other civil and criminal penalties to determine whether punitive damages are too high. In this case, Oopsie Pies has not yet been sued for other offenses, but could have been fined $1,000 by the health board for the behavior that caused the accident. This shows that even the health board,

while acknowleging some potential danger, does not consider this kind of accident to be worthy of massive penalty. The defendant was on notice that they should clean up a mess like this, but not on notice that there could be such a massive penalty.

Given that the behavior in question, while negligent and with a terrible result, was not the result of malicious intention on the part of Oopsie Pies, this court rules that the punitive damages are unwarranted and the compensatory damages should suffice to make the plaintiff whole and to deter this sort of behavior from the defendant in the future.

Example 2

The damages awarded to Giles, due to the enormous number, violates the Due Process clause and therefore is unconstitutional.

Punitive damages should only be awarded in cases where the defendant has acted grossly negligent or, as Judge Posner put it, is engaged in "willful and wanton" conduct that results in injury to the plaintiff. While it is a question whether the defendant here acted in such a grossly negligent manner as to allow for punitive damages, while this court is skeptical, we will err on the side of the judge and jury of the trial court since they had the opportunity to view all of the evidence in determining the gross negligence of the defendant. At issue here is whether the punitive damage amounts are excessive. We believe we must rule that they are due to the Gore factor test enumerated in Gore. The three factors in determining whether Due Process was violated looks to the reprehensibility of the defendant's conduct, the ratio of compensatory damages to punitive damages, and the civil and criminal penalties available for the defendant's conduct.

Here, all three factors point towards a Due Process violation. Reprehensibility of the defendant's conduct looks to how bad the defendant was acting in causing the injury. This could be whether the tort was intentional, economic vs physical harm, willful and repetitive or other metrics against humanitarian concerns. Here, the defendant's conduct was failing to clean up a spill in the restaurant. This is far removed from the systemic and continuous behavior which resulted in punitive damages in other cases such as State Farm, where the company was engaged in a nationwide scandal in misrepresenting the value of their cars. Here, the defendant's conduct was an honest mistake, a busy worker who could not clean up the spill in a speedy manner which unfortunately resulted in an injury to Giles. The trial court looked to the outcome of the plaintiff's injury, and sought to punish the defendant for that, as opposed to the conduct of the defendant. Some similar acts occurred in the past at Oopsie Pies resulting in some injuries, but these occurred years ago and are sporadic, not intentional repetitive conduct. As such, this factor favors not granting excessive punitive damages.

The ratio initially appears fine in this case as the Supreme Court said cases where the ratio exceeded single digits is where Due Process concerns arise. However, this does not tell the whole story. The court, in Gore and Campbell said generally anything under a single digit ratio would be constitutional however in cases where the compensatory damages are either really low or really high then a strict examination of the ratio fails. Here, the compensatory damages are fairly high, $2,000,000, which while there are some concerns that this number "shocks the conscience" and suggests some prejudice, we, like the court in Seffert, will not question the trial jury's decision to grant this award since we did not review the evidence. However, the high amount therefore changes the Supreme Court test. Something under the single digit ratio could be unconstitutional, and in this case, we think the $10,000,000 does exceed an

acceptable ratio for the harm that was caused. As such, this factor also weighs in favor of lowering the punitive damages.

The final Gore factors has us take a look at the civil and criminal penalties available for this type of behavior from the defendant. Oopsie Pies is not a wholly perfect defendant. The company has violated some penalties regarding food safety that has resulted in other people getting injured. However, it does not relate to the type of conduct done for this claim. The claim arises by failing to clean up a spill, not food contamination and while there has been some other slip-and-fall type injuries in the past, these are not the result of some injury scheme the company is imposing on the public. Additionally, unlike in Mathias where the punitive award needed to be high to deter the defendant from continuing to act in such a reprehensible manner, here, the injury from a slip-and-fall would award the other customer who slipped the necessary compensatory damages to pay for the injuries from that incident should they bring a claim, and them not bringing a claim should not have a bearing on the available civil penalty for this claim. Since the penalties available for Oopsie Pies conduct is not fully relevant to the claim at hand, in addition to the penalties being very minimal, this final factor also weighs in favor of the punitive damage award violating Due Process.

After going through the Gore factors, it is clear the punitive damages awarded here far surpass what should be granted and violate Due Process of the defendant. Although this court is not convinced the defendant's conduct was grossly negligent and question the award of punitive damages at all, we will err on the side of the trial court and jury in granting some punitive damages with an award of $10,000.

Example 3

I would hold that the punitive damages awards violated the due process clause. Punitive damages are generally only awarded when the defendant acts willfully, maliciously, or egregiously, such as if they were grossly negligent. Here, the act of the defendant through their employees of purposefully choosing to not clean up a spill is not particularly malicious in itself, however this failure caused significant harm, leaving an older woman comatose. Thus, it is still sufficiently egregious to qualify for punitive damages.

Due process as it relates to punitive damages is concerned with notice to the defendant, proportionality, and punishment based on misconduct, rather than identity of the defendant. The Supreme Court in BMW v. Gore outlined three guideposts courts must use to determine if these principles are followed and the damages award is consistent with due process. The first is reprehensibility of the defendant. Here, while the act of spilling frosting itself is not very reprehensible. However, the fact that it was willfully left where customers line up, in order to further the bakery's own interests by continuing baking, and caused substantial harm does raise the level of reprehensibility. Further, the defendant did also commit similar misconduct in the past, when the it did not shovel ice from its sidewalk leaving a customer to slip and break her hip. Such repeated conduct shows a higher level of reprehensibility. Also, because the harm is similar to what occurred to Giles and occurred in Loyola, it may also be considered when calculating punitive damages. However, even though the past harm was similar, it was not completely the same and thus did not give the defendant substantial notice that such misconduct would cause the harm that occurred here, unlike in Mathias where the defendant was completely aware their misconduct of allowing bedbugs in the hotel rooms had caused the plaintiff and others harm. This is significant, as due process is concerned with giving adequate notice to defendants before depriving them of money, especially when the punitive damages award is as large as $10 million. Moreover, the harm to other customers through serving underbaked cheesecakes, even though it occurred in Loyola, is completely unrelated to the harm that occurred to Giles and cannot be used to establish its reprehensibility. Thus, the defendant certainly exhibited reprehensible conduct, but the other factors must also be considered given the massive punitive damages award.

The second guidepost from Gore considers the disparity between the actual harm caused. State Farm also added that a punitive damages award with a ratio to actual harm greater than single digits gives a presumption of a due process violation. Here, the ratio to actual harm is in the single digits, being 5x the actual harm. Thus, there is no immediate presumption of a due process violation. However, Judge Posner in Mathias made it clear State Farm did not set out a bright-line rule, and may not always be applicable in all circumstances. For example, there the court upheld a ratio of over 37 to 1. But, the actual amount of punitive damages here is significantly higher than the punitive damages awarded in Mathias, which must also be considered. Further, there is no evidence of the

defendant evading review unlike in Mathias, and the actual harm here was able to be adequately calculated since it was not entirely dignitary, unlike the harm in Mathias. This is important, because punitive damages that are significantly higher than compensatory damages is usually only appropriate when the compensatory damages are so low that they would not make litigation worthwhile for plaintiffs, nor deter the defendant. Here, $2 million is a significant award, that would undoubtedly have a deterring effect on a presumably small bakery, unlike a compensatory damages award in the mere thousands to a multi-billion dollar company, as was the case in Mathias. Thus, regardless of the ratio being in the single digits, the punitive damages award here seems to violate due process.

The last guidepost considers how the comparable civil or criminal penalties compare to the punitive damages award. Here, the civil penalty for spilling frosting on the floor and not cleaning it up is at least $1000, but may be $2500 if leaving frosting on the floor is also considered improper food storage. The punitive damages award is massively greater than the civil penalties Defendant would have been subjected to for the misconduct they exhibited. While the plaintiff may argue that such civil penalties gave notice to the defendant and thus the actual amount they have to pay is less important, the civil penalties were presumably related to hygiene and food safety, rather than protecting customers from falling.

Accordingly, the punitive damages here are excessive and the defendant's due process rights were violated when considering the BMW v. Gore guideposts.

Question 2

You are a junior attorney at a law firm representing YumYum Donuts, a donut franchise that is being sued for negligence by Brendan Patterson, a customer who suffered serious physical injuries during an armed robbery at a YumYum Donuts location.

Patterson was the only customer at YumYum Donuts when a masked robber brandishing a handgun entered the store and demanded that Patterson and the two store employees put their hands in the air. The robber put the gun to Patterson's head and told him to hand over his wallet. Patterson complied. The robber then demanded that the cashier open the cash register and give him all of the money. The cashier did not do so. Instead, she said, "Oh, I don't know how this cash register works. I need to call my manager and ask her how to open it. Just let me call her on my cellphone and let her know there's a robbery, and then she can tell me how to open the register for you." The robber became extremely agitated, struck Patterson in the face with the butt of the handgun, breaking Patterson's nose, and told the cashier that he would shoot Patterson if the cashier did not "quit playing games" and open the cash register immediately. Patterson, who believed that he was going to die because of the cashier's actions, screamed at the cashier to open the drawer and give the money to the robber, at which point the cashier complied and opened the cash register drawer. The robber took the money and fled. YumYum Donuts was unaware at that time of any prior similar crimes or any crimes at this donut shop.

The plaintiff's complaint alleges that the cashier breached a duty to the plaintiff because she did not comply promptly with the robber's demands.

A partner at your firm has asked you to develop a legal argument for your client.

From: Process, Drew Drew.Process@deweycheatemhowe.com
Sent: Monday, March 4, 2025 10:49 PM
To: You
Subject: Need your big brain on that donut case

Hey,

YumYum Donuts wants this case gone yesterday. Very bad publicity if this drags on, no time for arguments in front of a jury on this one. Can we get this case dismissed ASAP because YumYum didn't owe the plaintiff a duty of care? What have you got?

Because we have other attorneys analyzing issues of contributory and comparative negligence, assumption of risk, factual causation, and proximate cause, don't address those issues. Also, I know you studied vicarious liability in law

school, but in case you forgot, YumYum Donuts can be held liable for the tortious conduct of its employees. So if the cashier was negligent, YumYum is liable. Donut screw this up!

Best,

Drew

Prof. Doyle commentary

Boy, this question had you run some laps through that duty flowchart. The first question to ask is whether the cashier's actions created a risk of physical harm. Remember, the actions we're supposed to consider are the actions that the plaintiff is alleging are negligent. In this case, that would be the cashier's refusal to open the register and telling the robber a story about needing to call her manager. One way to look at it is that the cashier's refusal to comply with an armed robber's demands created the risk that the robber would hurt someone to force the cashier's compliance, which is exactly what happened. Tort law doesn't normally impose a duty to control the independent tortious actions of another. But the plaintiff would argue that this duty does not stem from the cashier having control over the robber — it stems from the cashier's actions that made a dangerous situation that much more dangerous. It's also worth considering any duties that landowners or occupiers owe to invitees on their property, as the plaintiff in this case was an invitee. Landowners owe a licensee a duty of reasonable care to protect them against both known dangers and those that would be revealed by inspection. This deserves some analysis: although the armed robber is not the kind of "danger" the rule was designed to address, it's hard to say that the robber is not a "danger" to the invitee. It was also worth considering the affirmative duty exceptions. The common law definition of special relationship would be a stretch here, but you can only arrive at that conclusion by analyzing the relationship between the parties, including the commercial dynamic and whether a customer depends on a shop for protection. Undertaking, non-negligent creation of risk, and non-negligent creation of injury are inapplicable. The Rowland factors are the plaintiff's best shot at imposing an affirmative duty and merit the closest consideration.

In the end, the answer to the question comes down to policy — either through the Rowland factors or through a policy exception for imposing a duty. There are strong policy arguments to be made against imposing this duty. Imposing this duty might encourage more armed robberies because the robbers know that the stores have an incentive to comply with their demands because the stores can be held liable for the harm that the armed robbers inflict. We don't want tort law rules that produce a greater amount of harm in the world and force store owners to be responsible for the bad actions of people who are holding them at gunpoint. Your client has a strong chance at getting this case dismissed on these grounds.

Students needed to be careful in their analysis not to shift from the question of whether a legal duty existed to the question of whether the cashier exercised reasonable care under the circumstances. Remember, duty does not equal liability. We have a legal duty to exercise reasonable care every time we engage in activities that have some inherent risk of harm.

Strong student answers

Example 1

We can likely get the case dismissed because YumYum did not owe a duty of care to the plaintiff. Here, the plaintiff is claiming YumYum had a duty to promptly comply with the robber's demands.

YumYum did not have a duty to the plaintiff because their actions (failing to promptly comply) did not create a risk of physical harm to the plaintiff. The inherent nature of failing to promptly comply with a robber may create a risk of harm, but likely to the person failing to comply. Once the robber threatened Patterson and made it clear there was a risk of physical harm to the plaintiff, the cashier immediately complied. Furthermore, if found the actions did create a risk of physical harm to the plaintiff, there are compelling policy reasons to impose no duty. The goal of tort law is to rectify harm, and this liability would punish the defendant for the robber's crimes. Additionally, imposing this kind of duty would begin a parade of horribles. As in Strauss, this would open too many avenues to liability for failing to comply with criminals. Then, companies could be held responsible for refusing to negotiate with terrorists or blackmailers, as well as robber's demands.

YumYum did not have an affirmative duty to comply with the robbers demands.

Generally, there is no duty to control the conduct of a third person to prevent another from causing physical harm unless a special relation exists that gives the other a right of protection. While this is a commercial relationship, YumYum did not have any particular control over the situation and the plaintiff was not deprived of all normal opportunities of self-protection by entering the store. If the actions plaintiff was alleging were negligent were contained within the control of YumYum, the defendant might have had a duty. However, here, the defendant could not have controlled the conduct of the third party by nature of the control they had over the business.

Similarly, YumYum is a commercial business, and the plaintiff is likely an invitee because they entered the premise for the purpose of which the land is held open. Because of this, YumYum had a duty to warn of dangers. Here, YumYum was not aware of similar crimes in the area so was not under a duty to warn the plaintiff of these dangers.

YumYum was under no obligation to mitigate further risk of harm because they did not contribute to the initial action of the robber robbing the store (non-negligent creation of risk). Additionally, they did not attempt to aid the plaintiff, so no undertaking duty would apply.

A person may be expected to have an affirmative duty to comply with a robber's demands for policy reasons. Imposing an affirmative duty is appropriate when the harm to plaintiff is foreseeable, the degree of certainty of that harm, the connection between defendant's conduct and the injury, the moral blame at-

tached to the conduct, policy of preventing further harm, the extent of the burden to defendant, consequences to the community, and availability of insurance for the risk involved.

As discussed above, failing to comply with a robber may create a risk of harm, but to the person failing to comply. It was more foreseeable the cashier would have been harmed than the customer. The harm to the plaintiff was not certain because of the cashiers initial failure to comply. Once the connection between the defendant's conduct and the injury was certain, the defendant did promptly comply. To impose this liability earlier, before the plaintiff was hit, would be to hold a company accountable for guessing correctly at the intentions of the robber.

There is liability insurance for people harmed in a store, but likely inapplicable to those injured when a person fails to comply with a criminal. That action is outside of what a normal store-customer relationship would imply.

Likely the plaintiff will argue, if there was duty imposed to promptly comply with demands, it would prevent further harm of the same sort. However, if so, the consequences to the community will be very large. As explained above, this kind of liability would open the doors for many companies to be blamed for the actions of criminals. If a person threatened to blow up a building if they didn't receive free rent for life, the apartment owner would be liable for every injury caused by failing to promptly comply with the demands. There is no moral blame attached to failing to comply with a robber, in fact, the opposite. If television is anything to go by, there is honor in not "negotiating with terrorists."

If this burden were placed on the defendant, they could be liable for warning shots too. If an employee did not comply immediately and a bullet shot straight up burst a pipe in the apartment above the store, the company would be liable for water damage.

Similar to Randi W., the cashier misrepresented that she was unable to open the register. However, unlike in Randi, there was no reliance on this misinformation, and therefore no liability can be imposed.

Example 2

YumYum's is clear of a duty to comply with the robber's demands.

Under common law, entrants are divided into three groups: trespassers, licensees, and invitees. Because YumYum is open to the public, Patterson would be classified as an invitee which per Carter v. Kinney, requires YumYum to exercise reasonable care to protect Patterson against known dangers and those revealed by inspection. Because YumYum was unaware of any prior similar crimes or crimes at this shop, and it is unlikely any inspection would reveal the masked robber waiting around the corner, YumYum is in the clear.

In order to determine whether YumYum owed a specific duty to comply with the robber, a more traditional duty analysis is required. To show whether duty is owed, the defendant must have created a risk of physical harm or must have an affirmative duty to the plaintiff created via a special relationship, undertaking, non-negligent injury, non-negligent creation of risk, statute, or, policy concerns.

Again because YumYum was unaware of any danger of robbery, it is unlikely the plaintiff will be able to show YumYum created a risk of physical harm. If the plaintiff argues YumYum created the risk by not promptly complying with the robbers demands, we can show per policy concerns, it is unreasonable to find a duty to a third party exists where an employee is under the danger and stress of an unarmed robbery. Akin to the social host responsibility outlined in Reynolds v. Hicks, where the defendants did not have a duty to a third party injured by of their social guests, Yum Yum has no duty to the plaintiff where they are injured by a third party outside YumYum's control.

In arguing for an affirmative duty, the defendant only has two viable options, special relationship and policy concerns. here is zero evidence supporting an undertaking as the YumYum employee did not try and render aid to the plaintiff. Similarly the YumYum employee did not non-negligently cause the injury to the plaintiff, that was the sole doing of the robber. Furthermore, the defendant did not nonnegligently create a risk by not complying with the robbery as there is no way to know that the robber would assault the plaintiff as a result of the Yum Yum employee's inaction. Additionally, there is no statute that exists creating a duty in this matter.

Firstly, the plaintiff will unlikely be able to show a special relationship exists with the YumYum employee. To imply a special relationship, courts look to whether a commercial relationship exists between the parties, whether the plaintiff is relying on the defendant's expertise for protection, and if the plaintiff is unable to avail themselves of ordinary protections before the incident of harm. In Farwell v. Keaton, the defendant was found liable after a social night gone wrong as the court held a special relationship existed via a joint venture when the boys went out and later got into a fatal brawl. While the plaintiff may be able to show the two parties were in a joint venture to survive the robbery,

this relationship did not exist prior to the robbery and thus no affirmative duty is created.

Finally the plaintiff will be unable to show an affirmative duty should be imposed in this context for policy reasons. In order to show that policy concerns create an affirmative duty to promptly comply, courts look to the Rowland Factors. The major considerations include the foreseeability of the harm to the plaintiff, the closeness of connection between the defendant's conduct and the injury, the moral blame, the burden of imposing a duty, and the insurance available for the risk involved. As discussed above, the foreseeability of the harm was low as the YumYum employee had little reason to think their inaction would result in the injury to Patterson. Furthermore the connection between the conduct and injury is similarly disjointed as the robber inflicted the harm not the employee. While the employee likely feels awful about the injury to the defendant, there is little moral blame in their conduct as they were under immense stress and likely feared for their own safety. Finally, while restaurants are insured against robbery, it is unknown how far that insurance stretches and whether it covers the actions of employees faced with armed robbery. Additionally, In Randi W. v. Muroc, the court held that the defendants owed a duty to include information about alleged incidents of abuse in job letters of recommendation after the man they recommended assaulted a child at their new workplace. The facts of the current matter are dissimilar to Randi W as the causal connection between the inaction of the employee and the injury to the plaintiff is far more vague than the connection between a job recommender's inaction including reports of abuse and future incidents of abuse. Therefore, the plaintiff will be unable to advance a strong argument that policy matters create the need for an affirmative duty in this case.

Example 3

To determine if the defendant owed a duty of reasonable care, the court first acts whether defendant's actions created a risk of physical harm. If so, it will consider whether there is a policy basis for invoking no duty, otherwise, the defendant owed a duty. If the actions did not create a risk of physical harm, the court will look to the Rowland factors to determine if there was a duty, and see if one of the affirmative duty exceptions apply: special relationship, undertaking, non-negligent injury, non-negligent creation of risk, and statute. If so, the defendant owed a duty.

Here, YumYum's actions did not create a risk of physical harm. Plaintiff said that defendant was negligent by not promptly complying with the robber's demands, but Patterson was at risk of physical harm whether the defendant complied quickly or not, and therefore the risk was not created by the defendant. No affirmative action by the defendant created the risk. The court will consider whether an affirmative duty applies. The plaintiff will argue that there was a special relationship (see Section 314 of Rst) because of a commercial relationship since Patterson was a customer. Defendant can argue using Harper v. Herman, since plaintiff was an adult who was not seeking protection from the defendant and there was no prior relationship, there was no special relationship. Plaintiff may argue that there was a non-negligent creation of risk because the defendant created a risk by not immediately handing over the money and stalling. However, defendant can counter that they did nothing to create the risk, because the risk was created when the robber entered the store and the actions by the defendant alone did not create the risk.

The court will consider whether the Rowland Factors invoke a policy reason for duty. There was no foreseeability of harm to the plaintiff because even though a robbery was possible, it was not foreseeable. There is only a slight connection between defendant's conduct and the injury suffered, because the actions of the robber are independent of the actions of the cashier, though the plaintiff will argue a more direct correlation by not handing over the money sooner. There is no moral blame for defendant's conduct because the employee did what they thought was right. There is a burden on the defendant of imposing a duty, because people would be scared to do the job if they would be held liable for the actions of robbers.

The plaintiff will argue that the actions by the defendant did create a risk of physical harm because when the cashier said they did not know how to open the register, the robber hit plaintiff with the gun and said he would shoot Patterson if the cashier did not immediately open the cash register. Not promptly complying with demands may have created a risk of physical harm. Even so, there is a policy basis for not invoking a duty (see Restatement Third 7b). Like reasoned in Strauss v. Belle Realty, where the utility company did not have a duty, imposing a duty on the store could result in crushing liability. While the plaintiff will argue this is only at issue for public services, this would still expose the defendant to a proliferation of claims if people were injured in their store

due to the actions of others, even if the store acted with their best judgement. If a duty is imposed on stores when the cashiers are doing their best to curb the robbery, stores will have to incorporate more training for the employees so that they are prepared to handle unprecedented circumstances. This could result in increased prices and some stores may have to close due to the extra costs. Overall, even if the actions created a risk of physical harm, there is a policy basis for not invoking a duty.

Section 311 of Restatement Second says that defendant who "gives false information to another" is liable for harm taken "in reasonable reliance on such information." The plaintiff could argue there was a duty not to knowingly misrepresent, since the cashier told the robber they did not know how to open the cash register when they later did so. The court in Randi W discussed that the defendant had a duty not to misrepresent an employee when an employer would come to rely on those misrepresentations, which would cause harm. This is not the case here because unlike in Randi W, the robber did not rely on the misrepresentations and cause further harm. The robber said to "stop playing games" and open it immediately, showing he did not rely on the lie.

Plaintiff could argue there was a duty because the store was open to the general public, and thus under the traditional rule (Carter v. Kinney), plaintiff was an invitee and there was a duty to protect against known dangers and "those that would be revealed by inspection." However, the defendant can counter that a robber is not a known danger but an unexpected one, and definitely not one that could be revealed upon inspection.

There was no duty to exercise reasonable care.

Question 3

You are a trial court judge in the State of Loyola overseeing a negligence lawsuit. Your job is to issue a ruling on a defendant's motion for summary judgment and a plaintiff's motion for summary judgment.

Known for its beautiful sunset views, Mount Cardozo is a popular tourist destination within the state of Loyola. Located at the base of the mountain, the Overlook Hotel promises its guests unbeatable sightseeing and photo opportunities, guaranteeing every guest a room with a balcony and a view. One night at sunset, a hotel guest, Sofia Hernandez, stepped out onto her hotel room's fourth-floor balcony to take a photograph of the sunset over Mount Cardozo. Leaning over the balcony to get a better angle for her photograph, Hernandez fell over the edge of the balcony, landed on the sidewalk below, and suffered serious personal injuries.

Hernandez sued the Overlook Hotel for negligence. The discovery process has revealed the following information.

The local building code requires hotel balcony railings that are at least 30 inches above the ground to be at least 36 inches high and to be able to withstand a force of 200 pounds in any direction. The hotel's railing design meets these code specifications exactly. The railings are 36 inches high and have been tested to be able to withstand a force of 200 pounds in any direction. The building code also requires gaps between railing balusters (upright vertical supports) to be small enough to prevent a 4-inch sphere from passing through. The hotel's railing design does not meet these code specifications. The balusters are far enough apart that a 5-inch sphere can pass through. There was no warning sign on the railing cautioning guests about the risk of falling over the edge.

The plaintiff's expert witness, an experienced architect familiar with hotels across the state, testified that some hotels in high-rise or scenic areas install railings at least 42 inches high and use sturdier materials, due to the increased likelihood of guests piling onto the balcony and leaning out to get better views or to take photos. The expert witness estimated that 25% of the hotels in scenic areas took these precautions and that 25% of hotels with balconies included warning stickers on the railings that said, "Do not leave children unattended near balcony. Do not climb on balcony. Severe risk of bodily injury."

Both parties agree that the hotel had the legal duty to exercise reasonable care to protect Hernandez against both known dangers and those that would be revealed by inspection. The only legal issue in dispute is whether the defendant breached their duty of care to the plaintiff.

The defendant has filed a motion for summary judgment, contending that the hotel is not negligent as a matter of law. The plaintiff has also filed a motion for summary judgment, contending that the hotel is negligent as a matter of law.

How do you rule on these motions? Be sure to explain the legal reasoning behind your rulings. Because both motions address the same legal issue, you

should feel free to write one ruling that addresses the merits of both motions rather than write two separate rulings that include duplicative analysis of the same issues.

Prof. Doyle Commentary

This question was a straightforward issue-spotter question that asked you to analyze whether the defendant had exercised reasonable care. As a trial court judge, students were free to deny both motions, deny the defendant's motion and grant the plaintiff's motion, or deny the plaintiff's motion and grant the defendant's motion. In terms of writing a persuasive argument, I think that the fact pattern made denying both motions the simplest and easiest approach, because there were some facts that helped the plaintiff's arguments and some facts that helped the defendant's arguments, meaning that a reasonable jury might rule either way. But that conclusion was not required. Students wrote strong answers for each of the three possible conclusions.

The fact pattern gave students the opportunity to use each of the various methods for proving reasonable care under the circumstances that we discussed in class: foreseeability, the reasonable person standard, custom, statute, and the hand formula. Given the facts, it was necessary to consider whether this was an instance of negligence per se. It was not. The hotel violated a provision of the building code regarding the width of balcony balusters, but that provision was not designed to protect against the particular harm that the plaintiff suffered.

Given the hotel's advertisement of beautiful views and balconies with every room, the risk of someone falling was certainly foreseeable. But the fact that this harm was foreseeable does not necessarily mean that the defendant was negligent. Foreseeability, custom, statute, the reasonable person standard, and the hand formula are all meant to help us understand what would constitute reasonable care under the circumstances. The foreseeability of this harm should be used to determine the proper precaution the defendant should have taken. The defendant here did take precautions (building balcony railings in compliance with the building codes). The question is whether those precautions fell short of what reasonable precautions would have been.

The defendant can use the statute as a shield to protect against liability. But we know that statues and customs are more effective as swords than as shields. Custom is a bit of a weird one here. Does 25% of similar hotels taking a precaution qualify as a custom? Even if it's questionable whether the precaution is customary, does it still point to what the defendant ought to have done? What to make of these warning signs? They warn about some kind of danger and harm, but not exactly the danger and harm that the plaintiff experienced. Hand formula analysis will change significantly based upon whether the proper precaution was a warning sign or a reconstruction of all the hotel balconies, as these impose different burdens on the defendant.

Strong student answers

Example 1

Issue: To rule on defendant and plaintiff's motion for summary judgment as a trial court judge. There is no negligence per se case because the only statute broken is the gap between balusters as the code requires a gap of a 4-inch sphere but the hotel has a gap of 5 inches. This is a clear violation of the code but it doesn't meet the requirements of Section 14. As the code is meant to protect accident victims in the class our victim is in, which is people falling off balcony's, it doesn't meet the second requirement. Second requirement is protect against the type of accident the actors conduct causes, this refers more to how the actor falls. In our case Sofia Hernandez fell OVER the railing of the balcony onto the sidewalk below, but as the code is meant to protect actors that may fall off the balcony its protecting the type of incidents where they fall through the gap not over the balcony because the gap has nothing to do with how the victim fell off the balcony in this case. No negligence per se and doesn't help defendant in statutes for reasonable care.

To measure whether the hotel breached their duty of reasonable care we must look at 5 factors of foreseeability, reasonable person, customs, statutes, and the hand formula. It is very foreseeable that people can fall off hotel balconies but the hotel took precautions by following the code and putting 36 inch high railings, the defendant may argue that if it is so foreseeable there shouldn't be any balconies but this is not a custom of our society, there is a foreseeable danger but that doesn't justify taking away all hotels balconies.

Like in The T.J. Hooper radios in boats weren't necessarily a custom yet, but having radios was seen as a standard that boats should have. Here, our expert witness tells us that 25% of hotels have warning stickers and 25% of scenic view hotels have 42 inch high railings with sturdier materials. As it seems customary for hotels to have higher than code railings and signs stating the risk of harm these both seem necessary after hearing the incident that happened in this case, however the warning sign in our case will most likely not make a difference in the outcome as the Plaintiff most likely knew the risk she was taking leaning over the balcony and seeing the sign would not have changed a thing. When it comes to the 42 inch railings its hard to measure whether this "custom" should be considered reasonable care or not without knowing more facts. Relevant facts would include whether the higher inch railings would block the scenic view the hotels customers stay their for or whether there have been other similar accidents at the Overlook Hotel. Without these facts its hard to measure whether the the higher railings should be considered reasonable care or not as well as without knowing if raising the railing would have stopped the victim from falling.

The statute (as mentioned above) doesn't protect this type of accident but accidents that occur from falling through gaps in the railing. This factor does not help the plaintiff.

With the hand formula we measure whether the burden to take precautions for this harm outweigh the probability and magnitude of the harm. Many facts are missing to measure the likelihood of the harm but we know the magnitude of the harm is extremely severe as falling off a balcony can lead to severe health problems. The burdens the hotel may take is completely closing off the balconies which is a significant change but a less significant change is to heightened their railings to follow the somewhat custom of 42 inch railings. The burden doesn't seem significant but what we don't know is whether the higher railing would create a significant burden by blocking the scenic view and significantly hurting the hotels business. As there are precautions that can be taken the burden to the defendant is unknown making it hard to measure against the magnitude and likelihood.

Reasonable person objective standard measures what any reasonable person would believe to be reasonable care. The balcony code was most likely made on what is believed to be a reasonable standard for railings at scenic views. I believe the defendant followed a reasonable person standard as they followed the code for height. It is also reasonable for a hotel with beautiful views to not have a super high railing blocking the view guests came to see

It may be brought up that Overlook Hotel had a duty to inspect and warn invitees of possible harm. Even though the defendants didn't have signs on the balcony it is inherently obvious that there is risk of harm when you have a balcony and any reasonable person can understand that.

Both motions of summary judgment are denied. Case should be sent to the jury to decide as a matter of fact whether the Overlook Hotel having 42 inch railings is too great of a burden of precaution because it blocks the scenic view that brings in their customers or if it wouldn't block the views then that should be reasonable care.

Example 2

I would deny both motions for summary judgement and have the case be decided by a jury.

Negligence per se requires that the defendant violated a statute designed to prevent this type of harm and that the plaintiff is within the class of persons the statute is intended to protect. Here, the defendant was compliant with the railing statute, which can indicate their exercise of reasonable care, but can't support a negligence per se argument against the defendant. However, defendant did violate the baluster statute. Yet this statute doesn't appear to be designed to prevent people from falling off the balcony like the harm plaintiff suffered. Indeed, it seems to be designed to prevent children's toys from slipping through the balusters, falling down, and hitting pedestrians below. This is not the type of harm plaintiff suffered. Further, it seems to be intended to protect the pedestrians below, so plaintiff would not be within the class of persons the statute is intended to protect because she was not a pedestrian below but a guest in her balcony. This is similar to Rushnik, where the plaintiff wasn't within the class of person because the statute was intended to protect people who could be hurt by thieves of cars with keys in the ignition, not the thieves themselves. Indeed, it is even questionable whether the latter statute is really about safety as I explained it to be, or whether it is to prevent children from losing their toys; the former seems more generous to the legislators of the building code, so that is what we will assume. On negligence per se grounds, there is nothing to establish the defendant failed to exercise reasonable care.

Reasonable prudence is common prudence, but not always. (TJ Hooper) Here, doesn't seem to be an established custom of having higher rails of warning stickers in balconies. Less than half of all hotels exercise these precautions. As for the first, while defendant didn't comply with having higher rails with sturdier materials, their rails were of adequate height and materials and in compliance with the local building code. Further, those hotels that have those further precautions appear to have done so in concern of dangers associated with there being too many guests on a balcony leaning out to take photos at the same time. Here, only the plaintiff was on the balcony: nobody was "piling" out. However, this precaution does seem sensible in general, and likely would have prevented the harm in this case. As in the TJ Hooper, radios on boats was not an established custom yet. Here, this issue should be decided by a jury, as they are better suited to determining whether their community values align with requiring higher rails and imposing liability where that practice is not complied with. The jury should decide whether the practice of higher railings is preferable. Although the defendant didn't have signs up warning guests of the risk of falling over the edge, this doesn't seem like a standard of reasonable care that would have even prevented the harm. Although it may seem harsh, the plaintiff was a grown woman, able to afford a hotel room: she should know not to lean on balcony railings, or at least exercise caution in doing so. This is similar to the facts in Harper v. Herman, where the court attested to the fact that the plaintiff

should have known the dangers of water. Indeed, the plaintiff here should have known the dangers of balconies. Thus, a sign was not necessary to prevent this harm. The hotels that did have these signs appear to have them centrally for the purpose of protecting children, not adults.

This decision shouldn't be decided as a matter of law. There is no bright line rule to be drawn here. There is nothing here that establishes a clear and obvious outcome that would be justified in either direction, and I as a judge who has a certain background and biases am not the best person to decide on the matter. A jury should hear this case. This would be much preferable, and would invoke the values of the community, hopefully of Mount Cardozo specifically. They would be in a position to decide whether their esteemed Overlook Hotel should be liable or not. If I had to lean in one direction, I would likely grant the defendant's motion for summary judgement, but I prefer having the issue decided by a jury. In my view, the hotel exercised reasonable care by having their railings as tall and as sturdy as they did, and to have done more to prevent plaintiffs conduct fell beyond the scope of defendant's duty. It was not foreseeable that a grown woman would fall off the balcony for a photo. The strongest argument I could see to rule in favor of the plaintiff's motion is in considering the Hand formula. The burden of having slightly higher railings would be low, and the magnitude of harm of falling off of a balcony is quite high, so B<. Yet, to rule in favor of plaintiff on this argument doesn't seem appropriate. Building codes don't require higher railings.

Example 3

The ruling of this court is to deny both motions as summary judgement is not appropriate here. The jury should decide if the defendant was or was not negligent because It would not be proper to set a brightline rule as to what is reasonable care under the circumstances concerning proper railings at hotels because there are too many situations exceptions could be made to any bright-line rule set. similar to Baltimore, it would likely result in issues of deciding when any brightline rule applied or an exception is warrented based on surrounding circumstances. Instead, the flexible standard like decision of a jury is best. Reasonable care is what a person of ordinary prudence would practice to avoid injury to themselves or others under the circumstances. It can be shown by appealing to the foreseeability of a harm, what a reasonable person would do, custom, statutes, and the hand formula.

Here, a reasonable fact finder could find the hotel did practice reasonable care by having the railing that they currently did. Their railing met the height and force requirement that are set forth by law. the Height of 36 inches and force of 200 pounds, given they are reflected in the codes, could be taken to be indicative of custom. Furthermore, the additional height is used only by 25% of hotels, which could be considered not reflecting what is customarily done and reinforcing that having the heigh defendant did was in line with custom. A jury could consider the above and reasonably decided that the defendant, by complying with the law in these regards and complying with what is customary, was practicing reasonable care under the circumstances. They may also consider the plaintiff's falling an extraordinary situation and not foreseeable. Like the boy swinging the wire and getting shocked in Adams was not foreseeable, and that the safety measures taken there were reasonable care as they accounted for what was foreseeable, given what did occur there was not likely to happen, the jury could decide the plaintiff's falling here also was not foreseeable and that the railing height and strength was sufficient precaution to constitute reasonable care for what was foreseeable, a railing breaking. Supporting this, the jury could reasonably decide that a reasonable person would not account for people leaning so far over ledges they fall, and therefore what was in place was reasonable care.

However, the Jury could also reasonably decide that defendant failed to exercise reasonable care by not having the higher railing and not having signs. They could decide the current fence and no signs was not reasonable care. Supporting their decision, the jury could reasonably decide that the burden of having signs was out weighed by the probability of loss and magnitude of harm, and therefore signs were needed for reasonable care as it would have been more efficient. They could find that the inexpensive precaution of a sign would be less costly than the risk of someone falling and the significant harm that results. Furthermore, given other hotels have such signs, while not required, it is shown that it is a feasible precaution to take. Also, a jury could reasonably decide that while only 25% of hotels had higher fences and signs indicates doing so was not

customary, simply because something is not customary does not mean it is not reasonable care. Like in TJ Hooper having a radio was not customary but still was needed to practice reasonable care, a jury could find that having the higher fence and signs was needed to be reasonable care. Furthermore, a reasonable jury could find that this harm, someone falling from the balcony, was foreseeable and that reasonable care then would be to have a higher fence and signs. They could find it a foreseeable harm because others have railings to protect from it and given building codes require it shows that the risk is foreseeable. Similar to Braun, in which summary judgement was precluded given a jury could find negligence because it was reasonable the defendant could have foreseen the harm of someone contacting their power line, the jury could reasonably find the defendant could for-see the harm here and therefore should have had higher railings and signs, even if they were not required or customary, like signs were not required in that case.

Further supporting that the jury should decide, this was not an instance of negligence perse, which would be decided as a matter of law. While defendant's railing did violate a code in that the space between bars was an inch too far, the purpose of that code is not to prevent people from falling over, but instead from passing through. Negligence perse requires the harm to have occured to be one which the statute was designed to protect. That code was not designed to protect people from falling over the railing, which was the harm that happened here, and therefore the defendant is not negligent perse.

In line with the above, the motions are denied.