

APPENDIX TWO-SAMPLE TORTS EXAM

PART TWO: FIFTY MINUTES

This question has two subparts. Your answers to the two subparts may be of unequal length.

Your client is a large chemical company in Louisiana. During the recent hurricanes, the company deliberately released a substantial amount of toxic gas. The company did not want to release the gas, but did so deliberately to avoid the risk of an explosion that might occur in the absence of power to the plant. The gas spread onto the property of the Blanches, who lived near the plant. Mr. and Mrs. Blanche suffered lung injuries from the gas that were serious but not permanently disabling. The gas also caused some paint on the property to discolor.

Mr. Blanche was so angry at the company that he came onto the plant's property and sought out Mr. Peters, the president of the company. He drew back his fist to swing it at the president. Mr. Simpson, the security guard, saw the punch coming and stepped between Mr. Blanche and the president. Mr. Blanche's punch hit the guard.

Subpart A:

Discuss the intentional torts that could be brought by and against the Blanches. Do not discuss any defenses. Do not discuss nuisance.

Subpart B

The following is an excerpt from a court of appeals decision in Louisiana:

Waltzer, J.,

The defendant chemical plant's vice-president testified at trial that rather than provide safety equipment and procedures, the company made the choice to "lose" two or three workers a year to death because the worker's compensation premium is cheaper than installing safety measures.

Those types of serious, studied, well-thought out, conscious, "management decisions" are intentional acts. The corporation via its actors, management, clearly intends for a percentage of its employees to die or suffer grave bodily harm as a result of its omission. The corporation via its actors, management, clearly intends to make the choice that it makes and clearly intends the harm that is substantially certain to follow.

Intentional acts which are the result of management decisions to avoid their responsibility to provide a reasonably safe work place

are intentional torts. Injuries resulting from such acts are therefore not covered by workers compensation law, but by tort law.

If other courts were to adopt this minority view, it would expose your client to serious liability. Your senior partner has drafted a proposed statute saying, "Intent exists for purposes of tort law and workers compensation law only if the actor desires the liability-triggering consequences of the act."

Discuss the effects of Judge Waltzer's opinion and the proposed statute on (1) the company's release of toxic gas and (2) tort law generally, assessing the advantages and disadvantages of the two proposals.

APPENDIX THREE—MODEL ANSWER AND COMMENTS TO THE SAMPLE TORTS EXAM

The relevant cases to this exam are

Leichtman, short for *Leichtman v. WLW Jacor Communications, Inc.*, 92 Ohio App. 3d 232, 634 N.E.2d 697 (1994). Leichtman involved a talk-show host who had an anti-smoking activist as an on-air guest in his studio and purposefully blew smoke in the guest's face. The court held that it would not adopt a "smoker's battery" theory, in which any smoker would be liable to anyone who came in contact with her smoke, but would hold the talk show host liable. By so doing, the court necessarily held that smoke could count as "bodily contact" and apparently allowed purpose to offend to serve as the intent element for battery even under circumstances where knowing conduct would not.

Bradley, short for *Bradley v. ASARCO*, 709 P.2d 782 (Wash. 1985), involved a smelter sending smoke and fine particulates onto the plaintiff's property. The court observed that trespass ordinarily required an invasion by a person or tangible property, but held that trespass could exist under the circumstances of the case so long as there was substantial damage to the real property.

SUBPART A.

Release of Toxic Gas

Trespass.

This ordinarily requires intentionally moving a person or substantial things onto the property of another.

Intent. The company knowingly released the gas. It seems likely that the chemical company knew from the gas's properties that the gas would disperse close to the ground. If so, the company met the requirement of intent to make contact with the land of another, which only requires substantial certainty, not purpose.

Contact. Under the traditional test for trespass, a claim for toxic gas would probably be denied, because it was not a tangible thing. However, Bradley v. ASARCO and the Reynolds Metal case, discussed in Bradley, upheld such a trespass claim if there was substantial damage to the realty.

The paint discoloring is tangible harm, although less than the harm in Reynolds.

Bradley also required reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest. Here, that could come from the defendant's knowledge of the gas's properties.

Battery

This requires the intent to make a harmful or offensive contact and a resulting harmful or offensive contact.

Intent. Here, the company knowingly released the gas. For the reasons discussed under trespass, it seems likely that the company had the substantial certainty that the gas would move to the property of another where it would make contact with a person. The conclusion in the trespass context from Bradley is reinforced by battery cases such as Leichtman.

Moreover, the company is likely to have known of the injurious properties of the chemical. If so, the company had the substantial certainty that the chemical would make contact with the person of another and cause harm thereby.

Contact. The gas made contact in the manner expected. Although it is possible to argue that gas cannot make a contact, Bradley and Reynolds reject this in trespass, and Leichtman rejects it in battery.

A difference between this case and Leichtman is that Leichtman involved purposeful contact on the part of the defendant, whereas this case only involves knowing contact. That suggests denying liability for battery.

On the other hand, this case seems to involve much more serious harm than Leichtman. It doesn't make sense to reject a claim for bodily injury when the contact is sufficient to support a claim for trespass.

Blanche Actions

Trespass.

Blanche did not have permission to come onto the property, and even if he did he surely exceeded his permission by the punch, making him a trespasser ab initio.

Battery and Assault

Blanche intended to make harmful or offensive contact with the company president, and he actually hit the security guard. This is a battery; transferred intent (the "or another" in the Restatement) makes him liable even though he hit a person he did not intend to hit.

The guard has an assault claim because "he saw the punch coming." In addition, if the president apprehended the punch, he has a claim against Blanche for assault even though the guard saved him from the battery.

Outrage/IIED

A punch seems a relatively civilized response to invasion of one's person and property by a toxic gas, not an outrageous or extreme act. Nor is there evidence of intent to cause severe emotional distress or recklessness to the possibility of it. Finally, there isn't any evidence of severe emotional distress. Leaving this out would not be a significant omission on an exam.

SUBPART B

1. Judge Waltzer's opinion would ensure that the company could not escape liability for the release of toxic gas by arguing lack of intent. It is possible, although not likely on these facts, that the remoteness of harm from the individual plaintiffs would allow the company to say that it did not really intend to make harmful contacts with the Blanches or their property.

If the judge believes it sufficient that someone intends an act that is substantially certain to cause harm, the opinion would alter tort law by making liable those who began process that, although not likely to cause harm to any individual, are substantially certain to cause harm to some individual. Under this test, setting into motion any sufficiently large project, such as a dam, a major building, a highway, a space program, would create tort liability. Virtually any sufficiently large enterprise is virtually certain to cause some harmful or offensive contacts, even if all agree that the risk to any individual is minimal, acceptable, and accepted by those who incur the risk. Imposing intentional tort liability on those who are create accepted risks seems wrong.

Perhaps Judge Waltzer means only to impose intentional tort liability on those who are making decisions that lead to harmful or offensive contact when those decisions also fail to provide a reasonably safe work place. As so limited, the decision is more reasonable.

2. The statute would let the company escape liability, because it acted intentionally, not purposefully. It would also allow anyone who could persuade a jury that they didn't want a particular bad result to escape from liability for intentional torts. Thus, you could escape liability for setting off a bomb, if you didn't want people to suffer contact.

APPENDIX FOUR—RUBRIC FOR THE MODEL TORTS EXAM

RUBRIC FOR TORTS MIDTERM

Basic application of well-known legal rules is 2.3-2.7.	
Trespass by Blanche	
Assault by Blanche on Guard Explanation of liability for unintended result and unintended victim.	
Battery by Blanche on Guard	
Assault on President	
More Difficult Analysis Requiring Case Comparison. 2.7-3.3	
Trespass by Company “Contact”: comparison with Bradley, Reynolds; less harm to person but more to property. Comparison with Leichtman: more harm, but not purposeful	
Battery by Company “Contact.” Comparison with Leichtman on contact and intent. Comparison with Bradley and Reynolds and the trespass rules.	
Most Difficult Analysis: Synthesis: Understanding and Applying Rules without Case Help. 3.3 up.	
Judge’s rule: intent where non-specific harm will follow? Or is lack of reasonable care also a requirement	
Statute “Substantial certainty” alternative eliminated from intent rule	
Losing Points	
Missing issues or erroneous statements of law are generally covered where the law would correctly be applied.	
Erroneous reading of facts	

COMMENTS ON RUBRIC
FIRST-LEVEL—BASIC APPLICATION OF BLACKLETTER RULES.

The determinant of the maximum grade within this range is how difficult the most difficult issues is. On the midterm, the issues were fairly easy to spot.

The determinants of performance within this area are:

1. The number of issues spotted.

Although some issues are harder than others, I don't give extra points for spotting a "hard" issue instead of an easy one. Often, the lesson for exam-takers is to be meticulous, because they can miss some points just by being careful.

2. The depth of analysis of each issue.
 - a. State the relevant parts of the rule

No extra credit is given for stating irrelevant parts of the rule. This avoids rewarding people merely for reciting rules.

- b. Putting forward the facts relevant to each issue.

Moreover, because this part of the exam tests the application of rules to situations that fit the purpose of the rules, there is no need to engage in policy analysis, and no extra credit is awarded for such analysis.

SECOND-LEVEL—APPLICATION OF COMPLEX LEGAL RULES WHERE CASES OR OTHER AUTHORITIES HELP TO INTERPRET THE RULE

Grades within this area are determined by the two factors:

1. The difficulty of the issues.
 - a. Applying legal rules from cases discussed extensively in class, even when those cases are novel, will result only in the low end of the grade. [My comments: the class discussion means that students' being able to repeat this doesn't show that students have learned how to apply things on their own.]
 - b. Application of legal principles discussed in class to different areas of the law is more complex.
2. The acuity with which the interpretive and policy arguments are put forward.

THIRD-LEVEL—HARD PROBLEMS

Grades within this area are determined by use of precedents from other areas, the quality of the comparison to the cases expressed, and the use of principled arguments.

COMMENTS ON PERFORMANCE UNDER THE RUBRIC

A rubric like this assumes a hierarchy of skills.

In practice, students who had difficulty performing at the first level, as evidenced by poor analysis a number of issue, never did well on the second level. (There were a few students who entirely missed torts on the first part of the exam. From discussions, this appears to have been an oversight.)

Students who did not perform at the second level never did well on the third level.

Relatively few students could read an unfamiliar legal rule, even one as simple as this one.

All students who were able to read the rules could understand the relation of the rules to existing law. Recalling existing law appears not to be difficult.

POST-GRADING COMMENTS

A rubric is a device to provide some standards for grading. It also puts into the grading context something we've talked about in class and had in the written material: that good lawyers do more than just apply rules they've learned in law school.

The exact division of the grades is based on my experience in grading at Western. A job that competently handles all the pure issue-spotting and easy analysis but does only that will get a middling grade of 2.3 to 2.7. Candidly, the issue-spotting part of this test was a little easy, because most of the torts were about as subtle as a punch in the face. But, having taken my position, I went ahead and graded generously in that respect.

What do grades like this mean in the real world? If you do that well as an average in all your courses here, you'll pass the bar, although your chances of passing it the first time are mixed. I think that's because some of the more advanced skills in case- and rule-reading are tested on the performance part of the California bar.

Doing better than those sorts of middling grades requires being able to do more things, like comparing cases to facts or being able to read rules. Seeing the *Bradley* issue was pretty darn easy, given all the time we spent on it in class. Merely mentioning *Bradley* or trespass was worth almost nothing; I wanted some analysis. The battery was a little bit harder, because this wasn't quite as similar to *Leichtman* as it was to *Bradley*.

I was a little disappointed that people didn't do better in using precedents from different torts. In the book, I had as an exercise that you "[d]escribe the parallels between *Bradley* and *Leichtman*". and suggested that "[y]ou may want to go over your analysis of *Leichtman* in light of *Bradley's* more detailed treatment of a very similar issue." If you'd done that, some of the work on the exam would have been a slam dunk.

I don't have the detailed MCQ results yet, but I'm hoping that people did well on the three questions that were pretty much straight from our class questions. (If you didn't notice that three of them were drawn straight from class, you need to pay more attention to class!)

Problems:

Using trespass to chattels. What's a chattel? If you didn't know, you should have asked or looked it up.

Foreseeability in trespass. There is some language about foreseeability in the *Borland* decision on foreseeability, but what it requires is "reasonable foreseeability that the act done could result *in an invasion of plaintiff's possessory interest*" (emphasis added). That's quite different from foreseeability that the gas will go on the plaintiff's land. The *Bradley* case itself had knowledge. That's likely present here, for the same reason that it was in *Bradley*.