

# WIDENER UNIVERSITY SCHOOL OF LAW

## TORTS

## MIDTERM EXAM

Professor Pope

Fall 2011

### GENERAL INSTRUCTIONS:

1. **Read Instructions:** You may read these instructions (the first three pages of this exam packet) **before** the official time begins.
2. **Honor Code:** While you are taking this exam, you may not discuss it with anyone.
3. **Competence:** Accepting this examination is a certification that you are capable of completing the examination. Once you have accepted the examination, you will be held responsible for completing the examination.
4. **Exam Packet:** This exam consists of **ten (10) pages**, including this cover page. Please make sure that your exam is complete.
5. **Identification:** Write your exam number in four places:
  - (1) Write it in the space provided in the upper-right hand corner of this page.
  - (2) Write your exam number on the cover of each Bluebook (or your ExamSoft file) that you use for Part Two.
  - (3) Write your exam number (**and** fill in the corresponding ovals) on the Scantron form.
  - (4) Write your exam number on the upper-right-hand corner of your envelope.
6. **Anonymity:** The exams are graded anonymously. Do **not** put your name or anything else that may identify you (except for your exam number) on the exam.
7. **Timing:** This exam must be completed within 75 minutes (10:00 to 11:15 a.m.).
8. **Scoring:** There are 48 total points on the exam, approximately 0.65 points per minute. The midterm exam comprises 15% of your course grade, 48 of the 320 total course points.
9. **Open Book:** This is an OPEN book exam. You may use **any** written materials, including, but not limited to: any required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. You may not use a computer other than in its ExamSoft mode.

- 10 **Format:** The exam consists of two parts which count toward your grade in proportion to the amount of time allocated.

**PART ONE** comprises 10 multiple choice questions worth two points each, for a **combined** total of 20 points. The suggested total completion time is **30 minutes** (3 minutes each).

**PART TWO** comprises one essay question worth 28 points. The suggested completion time is **45 minutes**.

- 11 **Grading:** All exams will receive a raw score from zero to 48. The raw score is meaningful only **relative** to the raw score of other students in the class. Your course letter grade is computed by summing the midterm, final, and quiz scores. But for informational purposes only, your midterm raw score will be converted into a scaled score and letter grade, based on the class curve. The applicable law school mandatory curve in this class permits a maximum average grade of 2.30 to 2.75. At least 10% of the students must receive grades of B+ or above, and at least 10% of the students must receive grades of D+ or below. I will post an explanatory memo and a model answer to TWEN a few weeks after the exam.

- 12 **Special Instructions:** Instructions specific to each exam section are printed immediately below.

### **SPECIAL INSTRUCTIONS FOR PART ONE:**

1. **Format:** This Part contains 10 multiple choice questions, worth two points each, for a combined total of 20 points. This part has a suggested completion time of 30 minutes. Please note that the questions vary in both length and complexity. You might answer some in 20 seconds and others in three minutes.
2. **Identification:** Write your exam number: (a) on the first page of this exam booklet. **and** (b) on the Scantron form. Please also (c) fill in the ovals corresponding to your exam number.
3. **Fill the Oval on the Scantron:** For each question, **fill in** the oval on the Scantron with a number 2 pencil corresponding to the **best** answer choice.
4. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why in a separately marked section of your Bluebook or ExamSoft file. Your objection must (i) identify the ambiguity or problem in the question and (ii) reveal what your answer would be for all possible resolutions of the ambiguity. I do **not** expect this to be necessary.

## **SPECIAL INSTRUCTIONS FOR PART TWO:**

1. **Submission:** Write your **essay** answers in your Bluebook examination booklets or ExamSoft file. **I will not** read any material which appears only on scrap paper.
2. **Legibility:** Write legibly. I will do my best to read your handwriting, but must disregard (and not give you points for) writing that is too small to read or otherwise illegible. **I am serious; write neatly.**
3. **Outlining Your Answer:** I strongly encourage you to use **at least** one-fourth of the allotted time per question to outline your answers on scrap paper **before** beginning to write in your exam booklet or ExamSoft file. Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues **will** negatively affect your grade.
4. **Answer Format:** This is important. **Use headings and subheadings.** Use short single-idea paragraphs, and leave a blank line between paragraphs. Do **not** completely fill the page with text. Leave white space between sections and paragraphs.
5. **Answer Content:** Address **all** relevant issues that arise from and are implicated by the fact pattern and that are responsive to the “call” of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, **apply** the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.
6. **Citing Cases:** You are welcome but **not** required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a complete substitute for legal analysis. For example, do **not** write: “Plaintiff should be able to recover under *A v. B.*” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?
7. **Cross-Referencing:** You may reference your own previous analysis (*e.g.* B’s claim against C is identical to A’s claim against C, because \_\_.” But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
8. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.
9. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question. Do **not** invent facts out of whole cloth.

**STOP !**

**Do NOT turn this page  
until the proctor signals**

# PART ONE

**10 questions worth two points each = 20/48 points**

**Suggested Time = three minutes each = 30/75 minutes**

1. An ice cream truck driver was driving at a safe speed on Route 202. From the other direction a tractor trailer came around a curve and was confronted with a very slow-moving red car just in front of him. To avoid colliding with the car, the tractor trailer pulled to the left and crossed the center lane, where he bore down on the ice cream truck driver who was approaching from the opposite direction. The tractor trailer driver did not yield and there were other vehicles (including the red car) to the ice cream driver's left. The ice cream truck driver's only option was to turn to the right, onto another person's land. His truck caused damage to the landowner's property.

**Which of the following best describes the ice cream truck driver's liability to the landowner?**

- A. Ice cream truck driver is liable for nominal damages only
  - B. Ice cream truck driver is liable for damage to the land
  - C. Ice cream truck driver is liable for nothing because he reacted to an emergency situation that he did not create
  - D. Ice cream truck is liable for nothing because the incident was not his fault and he acted in a reasonable and responsible manner
- 
2. A pet owner left his dog in his yard when he went to work. The dog's constant barking greatly annoyed his neighbor. When the pet owner came home that evening he found the body of his beloved pet in the yard with blood around its nose and mouth. The pet owner was very upset because the dog had been his pet for many years. A subsequent investigation revealed that the neighbor had given the dog a treat with rat poison in it, because she could not stand the barking.
- If the pet owner brings an action against the neighbor to recover for IIED, he will likely:**
- A. Prevail, but only so long as he suffered physical injury from his distress
  - B. Prevail, if the neighbor was aware that it was very likely that the pet owner would suffer severe emotional distress
  - C. Not prevail, unless the neighbor desired to cause the pet owner severe emotional distress
  - D. Not prevail, because the neighbor did not kill the dog in the presence of the pet owner

3. A motorist was driving along a narrow, winding road when his car ran out of gas. Because the road (like many in Pennsylvania) had no shoulders, the motorist pushed his car onto the driveway of a landowner. Finding nobody at the house, the motorist started walking toward a gas station he had passed two miles back. While the motorist was gone, the landowner returned and found the car in his driveway with its front wheels in the flower garden. While the landowner had never posted any “No Trespassing” signs, he wanted the car off his property right away. The car was unlocked. So, the landowner released the parking brake, carefully pushed the car back onto the road, and reset the brake. Before the motorist could return a truck sideswiped the car, damaging it.

**Can the motorist recover against the landowner for damage to his car?**

- A. Yes, because the landowner had not posted any “No Trespassing” signs on his property
  - B. Yes, because the motorist was privileged to leave his car there
  - C. No, because the motorist damaged the landowner’s property
  - D. No, because the landowner reasonably believed that he had a right to remove the car from his property
4. A patient sought psychiatric treatment from a psychiatrist. During the treatment, the psychiatrist, unbeknownst to the patient, videotaped her. No sound recording was made of the sessions. The psychiatrist was conducting a research study, unrelated to the patient’s treatment, on “body language” and planned to use the tapes in that research project. The patient later learned that the psychiatrist had been taping their sessions and brought an action for battery.

**If the patient does not prevail, it will probably be because:**

- A. She did not suffer any physical injury as a result of the psychiatrist’s actions
- B. The psychiatrist had consent because the patient agreed to psychiatric treatment
- C. She did not suffer an offensive contact
- D. The psychiatrist intended that his actions would foster medical research

5. At the season finale of AMERICAN IDOL the judges announced both the first runner-up and the winner. As the winner prepared to make some acceptance remarks, the first runner-up loudly shouted: "That bitch won only because she slept with all the judges." The winner immediately slapped the runner-up in the face.

**If the runner-up brings an action for battery against the winner, who will prevail?**

- A. Winner, because she was provoked by the runner-up's comment
  - B. Winner, because a reasonable person would have slapped the runner-up under the circumstances
  - C. Runner-up, because the winner intentionally caused an offensive contact
  - D. Runner-up, unless the winner's slap was a only a spur-of-the-moment response to the runner-up's comments
6. Developer owned a 15-acre tract of land that was covered with trees. His first step in development of the land for a new WALMART was removal of the trees. The developer's neighbor knew that developer planned to remove the trees from the property. The day before development was to start the neighbor went onto the land and cut down a number of the trees for firewood. The developer brought an appropriate action against the neighbor for damages.

**The developer will most likely:**

- A. Recover only nominal damages, because the value of the land was not diminished
- B. Recover nominal damages and the value (if any) of the trees removed
- C. Not recover, because removal of the trees saved him money
- D. Not recover, because the value of the land was not diminished by the removal of the trees

7. Kasey heard a strange noise one night. She took a handgun from her bed-side stand and walked around inspecting her house. Kasey's neighbor, Erie, also heard the same strange noise. He walked out of his house and onto Kasey's front lawn, thinking that the sound came from her house. He stood silently on the lawn, listening. When Kasey was near the front door, she stepped on her cat, startling both her and the cat. This caused Kasey to drop the gun. It fell onto the floor and discharged. The bullet went through the front door and hit Erie.

**If Erie sues Kasey on a battery theory, he will:**

- A. Prevail, because handguns are very dangerous
  - B. Prevail, because Kasey is legally responsible for the actions of her cat
  - C. Lose, because the firing of the gun was not a volitional act
  - D. Lose, because Erie was a trespasser
8. Chrissie was furious at her father for sending her to Rutgers Law instead of to Widener Law (where the cool professors are). Chrissie instituted proceedings to have her father committed to a psychiatric facility. Chrissie testified falsely that her father was addicted to prescription medications and that he had abused her and other family members when they were younger. The judge did not believe Chrissie, found the father competent, and dismissed the commitment petition. As a result of the legal proceedings and Chrissie's false testimony, the father suffered severe distress and anxiety.

**If the father sues Chrissie for IIED, who is likely to prevail?**

- A. Father, because Chrissie acted with knowledge of the falsity or reckless disregard as to the truth or falsity of her allegations
- B. Father, unless he did not suffer physical injury
- C. Chrissie, because the father was never actually confined or involuntarily committed
- D. Chrissie, because she acted under authority of law



9. A law student went to a new comfortable, attractive coffee shop to study Torts. But just as the law student was entering, an art student stopped her saying, "This is a place of beauty. We don't want disgusting law students here." The law student was angered by this remark and said, "Get out of my way." The art student said "No. Make me." The law student took out her full-sized umbrella, intending to frighten the art student, and swung it near her head. But the umbrella broke and a large piece flew off, striking the art student.

**If the art student sues the law student for battery, she most likely will:**

- A. Prevail, because she was struck by the umbrella
  - B. Prevail, unless she intended to provoke the law student
  - C. Not prevail, because the negligence of the umbrella manufacturer was the real cause of the injury
  - D. Not prevail, if a reasonable person would not have been angered by what the art student had said
10. Professor Pope was sitting on a bench in the Rittenhouse Square Park. Suddenly, a disheveled man approached him, grabbed Professor Pope's hands tightly, and began to pray. The man claimed that he was a faith healer and that he could "heal" Professor Pope's various problems. In actuality, the man was an outpatient at a nearby mental health facility. At trial, the jury determined that the man knew Professor Pope had not consented to having his hands grasped, but that the man truly believed he had the ability to heal Professor Pope.

**If the man asserts a defense that he was mentally disabled, this defense is:**

- A. Not valid, because he was only an outpatient and not completely committed
- B. Not valid, because he still had the requisite state of mind for battery
- C. Valid, because mentally disabled patients cannot be held responsible for their tortious actions
- D. Valid, because the man really did believe he was a faith healer

# PART TWO

**1 essay question worth 28 points (of 48 total exam points)**

**Suggested time = 45 minutes (of 75 total exam minutes)**

Dakshesh was employed as a laborer by the City of Wilmington, Delaware. On September 12, 2011, Dakshesh was sent to the Wilmington City Park and instructed to plant a row of saplings along the property line between the City Park and the neighboring property, owned by Pythia. While the city supplied the saplings, Dakshesh had to provide his own tools and materials. Dakshesh went to the City Park and began to dig holes for the saplings along what he believed was the city's side of the dividing line between the properties. He was relying on stakes that were erroneously placed by the City of Wilmington on Pythia's property.

After he had dug several holes, Pythia came out of her house and advised Dakshesh that he was digging on her property. She ordered him to leave. Dakshesh became enraged and swung his shovel at Pythia, narrowly missing her head. Frightened that Dakshesh would strike her, Pythia jumped backwards. But she tripped and broke her ankle. She then got up and went inside.

Hobbling, a few minutes later, Pythia returned from her house holding her Beretta 92FS semiautomatic pistol. Pointing the gun at Dakshesh, who was still packing up his equipment, Pythia shouted, "Get the fuck off my property now, asshole!" Dakshesh was pretty scared and immediately jumped in his truck and drove away.

**Identify and assess all the intentional tort causes of action:**

- 1. that Pythia might reasonably assert against Dakshesh**
- 2. that Dakshesh might reasonably assert against Pythia**

## Pope – Torts: Fall 2011 Midterm Exam Scoring Sheet

### Multiple Choice Questions (2 points each)

Question	Correct	Distractors	Question	Correct	Distractors
1	B	C (6), D (4) A (2)	6	B	A (4), D (1)
2	B	C (11), D (8), A (5)	7	C	D (6), A (1)
3	B	D (12)	8	A	B (3), C (2)
4	C	B (6), D (3), A (2)	9	A	B (2)
5	C	none	10	B	D (3)

### Score Distribution

Mean = 16 of 20  
Highest = 20 of 20

### Explanations

- Q1** The driver swerved to avoid an accident. He had a private necessity privilege to trespass land but must still pay actual damages. There are no facts to support a public necessity privilege.
- Q2** A, C, and D are too demanding. Intent for IIED can be satisfied not only by subjective desire but also by either recklessness or defendant's knowledge to substantial certainty that her conduct will cause SED.
- Q3** Defendant's defense of land privilege was negated by plaintiff's private necessity privilege.
- Q4** B is wrong because the taping was outside the scope of plaintiff's consent. D is wrong because noble motives do not matter. A is too demanding.
- Q5** N/A
- Q6** B is better than A, because you need not actually determine the value of any trespass to land. B says that "if" there is any such value, then that is recoverable too.
- Q7** The facts do not support a defendant's reasonable belief of danger the supports shooting someone outside the house. Moreover, the defendant clearly did not "intend" to shoot. It was a non-volitional accident.
- Q8** B is too demanding. Physical injury is not required.
- Q9** B is wrong because "provoked" intentional torts are still intentional torts.
- Q10** Even if the defendant thought he was a "faith healer," the jury found he knew his conduct would be offensive.

### Essay Question (28 points)

NOTE: This problem was adapted from and materially amends essay question 4 on the February 2011 New York State bar exam.

<b>PYTHIA v. DAKSHESH</b>			
<b>Trespass to Land</b>			
<b>Voluntariness</b>	D made a deliberate and voluntary choice to go to the land that happened to be P's. He went there to do his job. His mistake (even though blameless) does not negate this intent.	<b>1</b>	
<b>Entry</b>	D actually did enter on P's land (both himself and his equipment). Plus, he remained on the land after he was asked to leave.	<b>1</b>	
<b>Damages</b>	While P need not demonstrate damages, she can recover for the costs to fill the holes that D dug on her land. (Some students argued trespass to chattel and conversion for the holes. But land is not a chattel.)	$\frac{1}{2}$	

<b>Necessity Justification</b>	D has no public necessity or justification privilege. There was no emergency situation to which he had to react.	--	
<b>Assault</b>			
<b>Intent</b>	D was angered by P's remarks. D apparently wanted either revenge or to scare P away.	2	
	In any case, D knew with substantial certainty that swinging a shovel would put a reasonable person in apprehension of imminent contact. (A general intent argument is prudent because of the thin basis from which to infer specific intent.)	1/2	
<b>Apprehension I- HOC</b>	P had apprehension of imminent HC as demonstrated by her jumping backwards.	2	
	P's apprehension was reasonable given the size and distance of the shovel.	1/2	
<b>Battery</b>			
<b>Intent</b>	There is nothing to indicate D's intent to cause a HOC. But the intent for the assault can transfer since it was caused by the <b>same</b> shovel swing as above. (Some students argued an intended battery and transferred that intent to the assault. That is acceptable, as it is equally consistent with the facts.)	2	
<b>HOC</b>	The shovel swing caused P to fall and break her ankle.	2	

<b>DAKSHESH v. PYTHIA</b>			
<b>Assault</b>			
<b>Intent</b>	P wanted to scare D off her property because she was angry both about the trespass and about her ankle. Her words confirm that she wanted him to be afraid and to leave. (It is not sufficient to just restate the facts. You must explain why/how these facts support the inference about P's motive and desire.)	2	
	P knew with substantial certainty that pointing a gun would cause IHOC.	1/2	
<b>Apprehension I-HOC</b>	D was scared. He immediately jumped in his truck and drove away without his equipment.	2	
	A reasonable person would be in apprehension of imminent HOC if an angry person pointed a gun at them while shouting profanities.	1/2	
<b>Defense of land</b>			
<b>Basis</b>	D was on P's land. P asked nicely. But D turned mean.	2	
<b>Scope</b>	P only threatened force. So this was proportionate, calibrated force.	2	
	On the other hand, D was <b>already</b> packing up, so even that amount of force was inappropriate. Of course, P may (reasonably) not have recognized that he was packing up and preparing to leave.	2	
<b>Trespass to chattel</b>			
<b>Intent</b>	While there is no evidence on direct intent, the same gun pointing that constitutes an assault also deprived D of his equipment. The intent can transfer. (This is a key reason why D would not allege conversion. It is also unclear that the deprivation would be substantial enough to constitute conversion in any case.)	2	
	But if the assault was privileged (defense land), then intent cannot transfer. It is unclear that the privilege applies directly because causing trespass to chattel it does not further the privilege.	2	
<b>Deprivation</b>	By scaring D away, P caused D to abandon his equipment. He was deprived of it until (presumably) it was later recovered.	1 1/2	
<b>TOTAL</b>		<b>28</b>	

**Score Distribution**

Mean = 16.625 of 28

Highest = 22.5 of 28

**Pope: Torts Midterm Exam Grades (Fall 2011)**

<b>ID</b>	<b>MC (20)</b>	<b>ESSAY (28)</b>	<b>TOTAL (48)</b>	<b>GRADE</b>
296809	12	14	26	D+
313693	14	18	32	B-
625042	14	12	26	D+
627918	18	15.5	33.5	B
662330	14	19	33	B-
668831	14	14.5	28.5	C
684320	16	16.5	32.5	B-
689231	16	19.5	35.5	B+
701951	16	17	33	B-
702573	12	14	26	D+
703988	20	18.5	38.5	A
704148	18	17	35	B+
704671	14	20	34	B
704679	14	21	35	B+
704868	16	17	33	B-
704962	18	17.5	35.5	B+
704973	16	11.5	27.5	C-
708710	18	14.5	32.5	B-
723379	18	18	36	B+
724050	14	22.5	36.5	A-
754838	18	17.5	35.5	B+
764762	12	13	25	D+
764928	20	16.5	36.5	A-
766485	14	13	27	C-
769159	18	10	28	C
803945	16	17.5	33.5	B
807856	14	21.5	35.5	B+
824021	16	18	34	B
824733	14	17	31	C+
828555	18	12	30	C+
829998	20	15.5	35.5	B+
843384	18	19.5	37.5	A-
843800	16	19	35	B+
864941	16	15	31	C+
866873	16	12	28	C
883522	18	21	39	A
883540	16	19.5	35.5	B+
883874	14	20	34	B
884849	18	16.5	34.5	B
942026	14	13.5	27.5	C-
<b>AVERAGE</b>	<b>16</b>	<b>16.625</b>	<b>32.35</b>	<b>B-</b>

The Student Handbook requires that “the mean grade in each section of a first year required . . . must fall within the 2.300 to 2.750 range.” It also requires that “at least 10% of the students must receive grades of B+ or above, and at least 10% of the students must receive grades of D+ or below.”