

Final Exam Memo - Torts Spring 2025

This memo carefully reviews the final exam. The purpose of this memo is to provide you with information that will help you understand why you earned the grade that you earned the final exam and improve your test-taking skills for future classes. This memo is shorter than the memo I provided after your midterm exam because that memo was designed to help you prepare for the final exam.

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.

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.

As stated in the class syllabus, the final exam was worth 75% of your grade for the year, and the midterm exam was worth 25% of your grade for the year.

Fact Pattern for Parts I and II.

Parts I and II of this exam concern the following fact pattern.

You are a junior attorney at a law firm that represents two plaintiffs, Patricia Bell and Diego Ortiz. A senior associate has asked you to draft a memo evaluating their potential tort claims related to the facts below.

Loyola International Airport operates a bus shuttle that drives in a loop, carrying passengers between the economy parking garage and the airport terminals A, B, C, and D. In April 2022, a federal law requiring face coverings in all U.S. transportation hubs was still in effect as a response to the COVID pandemic. The airport supplemented the federal law with its own policy: Masks were mandatory within the airport terminals and “at all times while riding any airport shuttle.” Large red-and-white signs announcing this rule were posted both inside each bus and on the terminal walls.

One morning that month, a shuttle driven by Byron Gates — an airport employee pulled away from the economy garage with eleven passengers on board. Among them were our plaintiffs, Patricia Bell and Diego Ortiz. Bell worked as a janitor employed by the airport. Every day she would park her car in the economy garage and take the shuttle to the airport as there is no employee parking at the airport itself. At the time she boarded the bus, she was wearing her company uniform but would not clock in to start her shift until after arriving at terminal D. Ortiz was a ticketed passenger flying to visit relatives in Los Angeles.

A couple minutes into the trip, another passenger on the bus — Riley Sloan removed her mask and stuffed it into her carry-on bag. Other passengers told her to obey the rules and put her mask back on. Sloan stood up and yelled, “Grow up, people! COVID is just the flu. These rules are all just a liberal conspiracy to take away our liberty and freedom.” Several other passengers yelled at Sloan to put her mask back on and demanded that the bus driver, Gates, eject Sloan from the bus. Bell and Ortiz, who were sitting near Sloan, watched the spectacle with concern but did not say anything.

Gates replied, “Everyone should keep their masks on.” When Sloan refused to comply and the passengers again demanded that Gates kick her off the bus, he replied, “I’m driving the bus here. I’m not a security guard. If there’s still a problem once we’re back at the garage, I’ll get my manager. Anyone who wants to can get off at the next terminal and wait for the next shuttle bus.” Industry practice for shuttle-bus drivers is for drivers not to become directly involved in disputes between passengers. Under the airport’s employee manual, bus drivers confronted with “an emergency situation” must radio airport security immediately. Gates did not radio dispatch but continued driving his route.

Sloan remained unmasked for the remainder of the loop as Gates made stops at terminals A, B, C, and D. The other passengers huddled away from her, but there was not enough room for Bell and Ortiz to get more than a few feet away from Sloan. As the passengers continued to ask Sloan to put her mask on, she

pretended to have a loud coughing fit, with her mouth pointed in their direction. Bell and Ortiz both turned away from Sloan as they could feel her breath against their faces. Neither Bell nor Ortiz said anything to Sloan or Gates during the bus ride. Ortiz did not get off the shuttle at terminals A, B, or C because he thought that Sloan should be the one to get off the shuttle, not any of the innocent passengers. Bell did not get off the shuttle at terminals A, B, or C because she was afraid that this would result in her being late for work and being fired from her job. She is the sole caretaker of her four-year-old daughter and must work to support her family. Bell, Ortiz, and Sloan all disembarked at terminal D before Gates's final stop back at the garage. After returning to the garage, Gates spoke with his manager who told him that his job as a bus driver did not require him to do anything other than what he did.

When Sloan reached the TSA checkpoint inside terminal D, agents noted that she appeared feverish. A rapid COVID test administered by the airport medical staff returned a positive result, and Sloan was denied boarding. These COVID tests rarely return a positive result for a person who is not infected with COVID. The bus shuttle's total run time from the garage to terminal D was twenty minutes. This was potentially enough time for Sloan to have infected other passengers but was not significant enough of an exposure to guarantee that Sloan had infected any other passengers. COVID tests from April 2022 tended to show positive test results in infected people 5-7 days after COVID exposure. Six days after this trip in the bus shuttle, both Bell and Ortiz tested positive for COVID. The night before riding the bus, Ortiz had attended an indoor dinner party with seven friends. Three of those friends tested positive for COVID on the same day that Ortiz tested positive. Both Bell and Ortiz developed severe respiratory complications. Both were hospitalized, incurred substantial medical bills, and were forced to miss weeks of work. Ortiz now suffers from severe anxiety attacks and nightmares of being trapped on the bus and dying of respiratory failure. Bell has become deeply depressed because of her mounting medical debts.

Bell and Ortiz are now considering their legal options for redress for this harm. A senior associate has asked you to write a memo evaluating different aspects of this case.

Part I (Question 101)

Evaluate the merits of the plaintiffs' potential negligence claims against Gates (the bus driver), including any affirmative defenses that Gates might raise. Also evaluate whether Loyola International Airport can be held vicariously liable for Gates's conduct. Some aspects of each of the plaintiffs' claims will result in identical analysis. You can write out this analysis only one time but be sure to indicate that the analysis applies to both Bell and Ortiz. Other aspects of the plaintiffs' claims may require separate analysis for each plaintiff.

Prof. Doyle commentary

This question tasked students with analyzing an entire negligence cause of action for two potential plaintiffs, along with any affirmative defenses the defendant might raise. We spent most of our time this semester training to handle this exact kind of question. The first issue is whether the bus driver, Gates, owed the plaintiffs a duty of care. Without a doubt, driving a bus has its inherent risks and bus drivers owe their passengers a duty of care to drive safely. But did Gates owe his passengers a duty of care to protect them from harm caused by another passenger refusing to comply with the COVID-19 mask mandate? The most straightforward way to find the existence of a duty would be through the affirmative duty exception of special relationship.

Another issue is whether Gates exercised reasonable care. Negligence per se won't work here because our defendant didn't violate a statute, only Sloan did. But some students were able to still use the statute to stress the dangerousness of the situation, particularly since there was some ambiguity in the fact pattern over whether this incident would qualify as an emergency requiring Gates to radio security. The custom of bus drivers to not intervene in disputes between passengers is unfortunate for our plaintiffs' case, but strong student answers recognized that custom works better as a sword than a shield and that, as Learned Hand has taught us, custom often points to what constitutes reasonable care, but not always. There weren't hard numbers to use for a hand formula analysis, but thoughtful BPL analysis grappled with the magnitude of the potential harm combined with the uncertainty of this harm coming to pass.

Causation was also tricky. Starting with factual causation, like the plaintiff in *Stubbs*, our plaintiffs could have gotten sick with COVID in a variety of ways. Ortiz is in worse shape here than Bell because we know from the facts that he may have been exposed at a party the day before. With proximate cause, the defendant may try to argue that Sloan's actions were an intervening cause, but that won't work because the harm that came to pass was the harm that would have made Gates's actions negligent in the first place.

For affirmative defenses, Gates will try to argue that the plaintiffs were comparatively negligent and that they assumed the risk of catching COVID by not leaving the bus when given the opportunity. Arguments could be made for both sides here, so these defenses warranted careful attention. Because Gates was act-

ing within the scope of his employment, the airport can be held vicariously liable for his negligence. But was Bell within the scope of her employment when this injury occurred? If so, she won't be able to proceed with a negligence lawsuit against Gates or the airport and must rely on workers' compensation instead.

Strong student answers

Example 1

Negligence

Ortiz and Bell must show that Gates (1) a legal duty to the plaintiffs; (2) was in breach of the duty; (3) causation; and (4) harm.

The first issue is whether both Ortiz and Bell can establish that Gates owes them a legal duty. The most typical way of establishing duty is showing that the defendant's actions created a risk of physical harm. Here, the risk of harm that was posed to Ortiz and Bell already existed and was created by Sloan, who exposed them to covid, not Gates. Therefore, duty would have to be established through a special relationship. Starting with Ortiz the relationship between him and Gates is a commercial relationship. Presumably, as a passenger, he paid the airport to be taken to his terminal in the shuttle driven by Gates. This is significant, because the court, as stated in *Harper v. Herman*, is much more comfortable with finding a duty when the relationship between the defendant and plaintiff is commercial in nature. The relationship between Bell and Gates is also commercial because Gates is still getting paid to drive the shuttle, regardless if the passenger is an employee of the airport. Moreover, Ortiz and Bell are passengers of the bus who have almost no power to control risk created by other passengers and are vulnerable and in reliance on Gates to ensure that the passengers are safe while riding. Unlike the plaintiff in *Harper*, the plaintiffs here did not engage in the risky action themselves and had no way of avoiding it without Gates taking action. Therefore, duty is likely established for Ortiz and Bell.

The next issue is whether Gates breached his duty of reasonable care by failing to radio airport security immediately after Sloan refused to wear her mask. First, it was likely foreseeable to Gates that if he did not radio in security or his manager until he got back to the garage, that Sloan would have remained on the bus until the last stop and expose people to COVID. The incident took place during a global pandemic, where it was foreseeable that someone would contract covid if they did not follow necessary safety precautions. Also, Gates would have noticed that Bell and Ortiz had no room to move away from Sloan, who was actively coughing and breathing in their faces, making the harm even more foreseeable. Also, a reasonable person in Gates' position would have also recognized the urgency that the situation called for, and called for security as soon as Sloan started to pose a risk, due to the context of the pandemic. The federal statute in place also points to Gates's actions being negligent. Although Gates himself was not in violation of the statute, the fact that statutes require people to wear masks in transportation hubs further shows the high risk of contracting COVID if someone is not compliant. Gates may argue that because the custom for bus drivers is for drivers not to become directly involved in disputes between passengers, he cannot be in breach. However, the court in *TJ Hooper* made it clear that custom is not always consistent with reasonable care. Further,

radioing a security guard would not have required Gates to be 'directly involved' in the dispute. Thus, he would still have been acting according to custom if he exercised reasonable care. Lastly, the burden on Gates to use his radio to call security was incredibly low. It would have costed him no money, and did not even burden the ability for him to perform his job. This is because the security guard or his manager could have been present at the next terminal to handle the situation. In sum, Gates failed to exercise reasonable care when he did not call the airport security and breach would be proven for both Bell and Ortiz.

Causation

Here, but-for Gates failing to have Sloan escorted off the bus by security, Ortiz and Bell would not have contracted COVID and suffered serious harm due to being next to COVID-infected Sloan for 20 minutes. Gates may argue that Sloan would have gave the passengers covid even if he did have her escorted off the bus on the first stop, but this argument is weak because the longer someone is exposed to covid, the higher the probability they would contract it, especially true when Sloan started to cough in the faces Bell and Ortiz as the ride went on. Gates may also claim the exposure did not guarantee contraction of the disease factual cause would not be met. But, this is insignificant, because Stubbs established that plaintiffs only need to prove factual cause with reasonable certainty, rather than absolute certainty, due to that being an impossible task, especially when the harm stems from a 'toxic' source or disease, as is the case here. However, factual cause is not as easy to prove for Ortiz, because he attended a dinner party with friends who also tested positive for COVID the day before riding the shuttle. But, Gates is still likely a sufficient cause of the harm. Even if Ortiz contracted covid from the party, if he would have still contracted COVID on the bus as well, then Gates will still be found to be the but-for cause of the harm due to the multiple sufficient causes exception in Anderson. In sum, factual cause would probably be established for Bell and Ortiz. Gates was also the proximate cause of the harm because his actions were negligent precisely because they created a foreseeable risk of the harm that befell Bell and Ortiz. Sloan's own possible fault was not an intervening cause because the harm that befell the plaintiffs is the same type of harm that Gates' actions created a risk of, and made actions negligent in the first place. In sum, causation would be met for both plaintiffs.

Affirmative defenses

Gates may try to assert an implicit assumption of risk defense against the plaintiffs because they did not get off of the first terminal he stopped at. However, neither defendant willingly engaged in the risk of infection that they may have perceived, since they both turned away from Sloan as she coughed and breathed in their face. For Bell, she also had to stay on the bus to avoid being late to work and possibly getting fired, which would have made her unable to care for her family, suggesting she did not willingly engage in the risk like the plaintiff in Murphy. Although this was not the case for Ortiz, it would also be

hard to prove that he actually perceived the risk of harm that came to pass, which was COVID by staying on the bus. Thus, an assumption of risk defense would fail. Comparative negligence would also fail for similar reasons, as the plaintiffs did not breach the duty to themselves by taking any risky actions, and instead were just trying to get to their destinations on time.

Vicarious Liability

For the airport to be held variously liable for Gates' actions, his actions must have occurred with the scope of employment. The first element to establish scope of employment is that the conduct he was performing was of the general kind he was hired to perform. Here, Gates was driving a bus, which was his job. Even if he did not radio airport security immediately as his job required, it is foreseeable that any employee would not follow every company policy while performing their job duties. Thus, this element would be established. The next element is also satisfied because Gates' conduct took place substantially within the ordinary hours and spatial boundaries of his employment. He was driving the bus during his work hours and through the airport terminal, which is his job site. The last element requires that the defendant's conduct was motivated at least in part by the purpose of serving the employer's interests. Here, the airport may argue that Gates' negligence was self-motivated by his own laziness. However, it is more likely that Gates avoided calling for help until he got to the garage to stay on schedule and not cause any problems for his employer. This is supported by the fact that his manager approved his actions. Overall, the airport would likely be held vicariously liable.

Example 2

Worker's Compensation

Before we analyze a potential tort claim of negligence against Gates, it must first be determined whether the tort system is even the proper vehicle to remedy for Bell. As Bell was an airport employee, she must go through workers compensation rather than the tort system if her injury occurred within the scope of her employment. An action is within the scope of employment if it is (1) something the employee is employed to do, (2) it occurs within the time and spatial boundaries of work, and (3) it is in part motivated by helping the employer's interests.

Here, while the third element is clearly met because Bell's decision to remain on the bus was motivated by her desire fulfill her employer's expectation that she arrive to work on time, the other two elements present potential issues. Regarding the first element, riding a shuttle to work isn't the kind of action a janitor is paid to do. However, the airport might argue that coming to work is something an employee is employed to do and as there was no employee parking, taking the shuttle is the within employer expectations. However, regarding the third element, Bell is spatially within the airport but as a janitor, a shuttle is not the typical location of her employment; additionally, the timing of this occurs before Bell is clocked in to work. For this reason, Bell is unlikely to be found as acting within the scope of her employment and a tort claim of negligence should proceed.

Negligence

To determine if Gates can be held liable, we must make a *prima facie* case satisfying the four elements of a negligence claim: (1) duty, (2) breach, (3) causation, and (4) harm.

Duty:

For duty, first we must determine if the action created a risk of harm. While operating a motor vehicle always carries a risk of harm, the action at issue is more specifically the failure to remove Sloan from the bus. Though keeping an unmasked passenger on a bus will likely be found as creating a risk of harm through the spread of viral infection, even if it wasn't found to have created a harm, duty can still be established through an affirmative exception. Here, there is a special relationship that Gates has with Bell and Ortiz. As the bus driver, Gates is uniquely empowered to prevent the harm posed to the plaintiffs because it is only he who has the power to remove Sloan. This differs from *Harper v. Herman* in which the plaintiff was in a position where they could defend themselves and not reliant on the defendant for protection.

Breach:

If there is a duty of reasonable care owed to Bell and Ortiz, then Gates must've breached it to find him liable for negligence. One avenue to do this is an analysis of custom. The airport supplement a federal law by implementing their own

policy making masks mandatory "at all times while riding any airport shuttle". Additionally, the airport's employee manual requires bus drivers to immediately radio airport security when faced with an "emergency situation". Gates went against custom by not enforcing his employer's policy requiring masks nor radiating dispatch for security. However, Gates may also deny that removing Sloan is reasonable care as established by custom because it is also customary industry practice for shuttle-bus drivers not to get involved in disputes between passengers. In addition to custom, breach of reasonable care can be proven through foreseeability. It is uniquely foreseeable that keeping an unmasked passenger on the bus would cause the harm the plaintiff's endured: the contracting of COVID. In fact, the very purpose of the aforementioned federal law and airport policy requiring masks was created specifically to curb the spread of this virus. Lastly, while an exact calculation for each variable may be difficult, the hand formula also helps inform us to the standard of reasonable care, specifically regarding the burden variable. If it is customary for airport employees to enforce the airport's mask policy and it is customary for bus drivers to radio security in emergency situations, then the burden of requiring Gates to do so is practically nothing considering that was already what he was expected to do. For the reasons of custom, foreseeability, and the Hand Formula, Gates breached the standard of reasonable care to both Bell and Ortiz.

Causation:

To satisfy the causation element, it must satisfy both factual cause and proximate cause. The test for factual causation is "but for" the defendants action. Here, it would need to be found that "but for" Gates's refusal to enforce the mask policy or radio for security, Bell and Ortiz wouldn't have contracted COVID. The issue here is that it is difficult to prove that it is Bell and Ortiz's exposure to Sloan as forced by Gates that caused them to get sick, they may have been exposed to COVID in many different ways both before and after the event in question. However, as shown in *Stubbs v. City of Rochester*, a plaintiff doesn't need to eliminate all potential causes of harm so long as they can prove the sufficient substantiality of the risk posed by the defendant. Here, while there are other ways to contract COVID, allowing Sloan to remain unmasked when Bell and Ortiz couldn't get further than a few feet away, very likely is the source of them contracting the virus, as evidenced by them, the two passengers closest to Sloan, being the ones to contract it.

Proximate cause is also likely satisfied here. The relationship between Gates's negligent action to the harm experienced by either plaintiff is just not so far removed as to break causation. While there may be arguments that not getting off the shuttle is an intervening cause, that point is better made as an affirmative defense rather than a refutation of proximate cause. What makes not enforcing a mask requirement negligent is the risk it creates regarding contracting a viral disease, and that is precisely the harm that occurred.

Affirmative Defenses

The two likely affirmative defenses that Gates can use are comparative negligence and assumption of risk.

Comparative Negligence:

For comparative negligence, a negligence cause of action must be made for the plaintiff. As always, there is a duty for a person to prevent harm to themselves. For breach, the analysis differs between Bell and Ortiz. Gates presented both with the option of getting off the shuttle and by not doing so, it can be argued they both exposed themselves to a foreseeable risk. However, in a Hand Formula analysis, the burden of getting off the bus is higher for Bell than it is for Ortiz because if Bell was late to work, then she ran the risk of her employment being terminated. This may mean that Ortiz is comparatively more responsible for their harm than Bell is. Causation is also tricky. The proximate cause analysis is similar to the one applied to Gates above, the nature of these plaintiff's potential negligence exposed them to an increased risk of getting COVID, and that's what happened. However, like it was for Gates, it's difficult to determine whether that negligence was a "but for" cause as there are other ways to contract it. Ultimately though, Comparative negligence is only a partial defense.

Assumption of risk:

This is a full defense. Here, for implicit assumption of risk it also differs between Bell and Ortiz, but both clearly didn't want to be in the same shuttle as Sloan. It can just be argued that Ortiz more willingly assumed this risk than Bell. Bell only stayed on the bus out of fear of losing her job, whereas Ortiz stayed on principle. Despite this, neither voluntary assumes the risk of COVID by simply being on a bus.

Vicarious Liability

For vicarious liability, an employer can be held liable if their employee was negligent within the scope of their employment. The scope of employment test above is the same here. Driving the bus is what Gates is paid to do, he is doing it for his employer's interests, and it is within the typical time and spatial boundaries of employment, so vicarious liability is met.

Example 3

Issue: is Bell barred from bringing a negligence cause of action?

Workers compensation bars bringing claims, besides intentional torts, for harm that occurs during the scope of employment. Here, Bell would not be barred from bringing a negligence cause of action because she was not within the scope of her employment. Despite being in her uniform and on her way to work, Bell had not yet clocked in. Although one might argue she was serving the interests of her employer at least in part because she was on her way to work, this is far different than the plaintiff in Christensen who was found to be serving the interests of her employer because one of her responsibilities was to see and be seen. Unlike Christensen, Bell was not serving one of her responsibilities at the time of the incidents.

Issue: Gates' duty to Bell and Ortiz

Although there is generally no duty to control the conduct of a third party, which would likely eliminate finding substantial grounds for duty on Gates' failure to remove Sloan, there can still be grounds for Gates' duty. Gates' action was that he failed to radio airport security immediately when Sloan refused to put her mask on. Gates' action didn't create a risk of physical harm. However, a risk was already there because when Sloan took her mask off during the shuttle ride she created a risk of harm of spreading COVID, later coughing as well. Since Gates actions didn't negligently create this risk, we could assert a duty over him to mitigate further harm under a theory of non-negligent creation of risk. Alternatively, special relationship could be a theory of duty. Although we don't know whether the plaintiff's paid for the shuttle ride and created a commercial aspect of the relationship, we might argue that under the circumstances there was a power imbalance and the plaintiffs were deprived of normal opportunities of self protection. Indeed, the plaintiffs didn't have a chance to move away from Sloan because there was no space. Gates would likely argue that he said anyone could get off at the next terminal, yet this was after Sloan had her mask off and there was a risk of transmission; it shouldn't be dispositive that Sloan didn't cough until later. Further, the plaintiff's needed to reach their destination, for Bell, work, and for Ortiz, his flight. As the shuttle driver, Gates had a greater power than the plaintiffs to control the situation. Under special relationship the shuttle may also qualify as a common carrier because it is transporting people and Gates would have a duty to passengers. Another ground for duty could be undertaking because Gates said everyone should keep their masks on after the risk to the plaintiffs was created. The strongest of these theories would likely be special relationship and thus Gates would have a duty to mitigate risk of harm to the plaintiffs. The foreseeability of harm to Gates here was immense because of the potential nexus of transmission just prior to entering an international airport. No policy bases for invoking no duty would apply. The strongest argument would be crushing liability because there was a quasi public service, but there is only two plaintiffs.

Issue: Gates' breach to Bell and Ortiz

Here, reasonable care would have been to radio airport security immediately and remove Sloan.

Reasonable prudence is common prudence, but not always. TJ Hooper. Here, it was industry practice for shuttle drivers essentially to not act as security guards. Gates would argue he acted reasonably because he has no duty to personally remove Sloan. However, Gates' employee manual requires drivers to radio security immediately when confronted with an emergency situation. The situation at hand constituted an emergency because COVID is dangerous and many people's lives were at stake, including the plaintiffs, by being in this confined space with a potential carrier. Indeed, considering Gates expertise as a shuttle driver, a reasonable shuttle driver in his position would've taken action by calling security and removing Sloan, particularly when passengers exclaim their peril as was the case here. Indeed, despite it being industry practice to not become directly involved, in situations like this where there is such a great risk of physical harm to a number of people such common prudence wouldn't be reasonable prudence and should not be followed. This is similar to how the TJ Hooper should have had radios equipped in the ship. Reasonable care is taking precautions against foreseeable risks. Although it was 2022, the risk of COVID transmission was still high, especially with Sloan not wearing a mask and coughing in a confined space. Thus, it would be foreseeable that there could be transmission to the plaintiffs. Reasonable care is also informed by the Hand Formula. Here, the burden of calling security would be extremely low and would have been mandated by Gates employee manual. That burden even when combined with the burden of stopping the bus would not be large, it would just take a few minutes of time if Gates was stern. In comparison, the probability of harm was high because this was a confined space and the magnitude of harm was high because COVID is dangerous. Negligence per se would not work because although there is a statute mandating masks in transportation hubs which would protect against this type of harm and plaintiffs were in the class of victims, Gates did not violate the statute himself. For the above reasons, Gates breached his duty to mitigate further risk to plaintiffs.

Issue: causation to Bell and Ortiz

Here, but for Gates not calling security and removing Sloan the risk of transmission would have been less and Sloan wouldn't have had as much chance to cough on the plaintiffs. Gates would argue he was not the but for cause because Ortiz was potentially already infected. Alternatively, Gates would argue that even if he called the security, they might not have gotten there in time to prevent transmission. However, it is more likely than not that if Gates had exercised reasonable care the harm wouldn't have occurred. There would be proximate cause because Gates negligence was not too attenuated in time and space to plaintiffs harm: COVID takes time to develop like radiation poisoning. Gates would argue Sloan coughing was an intervening cause, however, this would fail because his negligence is directly related to the plaintiffs getting sick. Further,

proximate cause is a question of policy, and we shouldn't allow bus drivers to get away on proximate cause when harm is as foreseeable as it was here.

Issue: harm to Bell and Ortiz

Here, both plaintiffs suffered a legally cognizable physical injury in respiratory complications, pain and suffering, including loss of enjoyment, and missed work.

Issue: negligent infliction of emotional distress

Negligent infliction of emotional distress requires plaintiff's severe reasonable emotional distress. Here, both plaintiff's had emotional distress. Issue: Gates affirmative defenses Explicit assumption of risk would not apply here because there was no agreement or promise. Gates would likely argue implicit assumption of risk because the plaintiffs knowingly encountered that Sloan was a risk but didn't get off the bus. However, this was not a viable alternative because each plaintiff needed to reach their destination in a timely manner. Gates would likely raise comparative negligence against both plaintiffs, which would be more affective against Ortiz.

Issue: vicarious liability

Here, Loyola airport would be vicariously liable for Gates because he was acting within his scope of employment. Gates was within the ordinary spatial and time bounds of employment because he was on the job driving. For the same reason, Gates was carrying out his responsibilities as an employee by attempting to transport passengers in a timely manner and his conduct was approved by his manager. Gates was serving the interests of his employer by transporting their customers to and from

Part II (Question 102)

Evaluate the merits of the plaintiffs' potential intentional tort claims against Sloan for battery, assault, and intentional infliction of emotional distress. Also evaluate any affirmative defenses that Sloan might raise. Some aspects of each of the plaintiffs' claims will result in identical analysis. You can write out this analysis only one time but be sure to indicate that the analysis applies to both Bell and Ortiz. Other aspects of the plaintiffs' claims may require separate analysis for each plaintiff.

Prof. Doyle commentary

This question required students to evaluate the merits of three different intentional tort claims, along with any affirmative defenses. The battery and assault claims turn on a question of whether Sloan committed a harmful or offensive touch when her breath or particles in the air from her fake coughing made contact with the plaintiffs. It's a bit of an unconventional case of battery, but strong student answers drew upon the cases we read that show how courts have a rather expansive view of what counts as a touch. The intent requirement can be met not by proving that Sloan intended to infect anyone with COVID but by proving that she had desire/purpose knowledge with substantial certainty that her fake coughing would be a harmful or offensive touch. The assault claim also requires the plaintiff to have apprehended the imminent harmful or offensive touch, which can be argued based on the plaintiffs turning away from Sloan during her fake coughing fit. For intentional infliction of emotional distress, I'm sure every student in the class said to themselves "Outrageous!" upon reading the fact pattern describing Sloan's actions. A trickier question was whether this extreme and outrageous conduct intentionally or recklessly caused severe emotional distress. Would passengers who didn't contract COVID have a viable IIED claim against Sloan? For defenses, Sloan may raise a consent defense. This defense would be similar to Gates's assumption of risk defense, but there are some important differences that make it much less viable. For battery and assault, Sloan would need to argue that the plaintiffs consented to the harmful or offensive contact itself. Strong student answers distinguished the nature of the plaintiffs' inaction on the bus in this case with the plaintiff's inaction in *O'Brien*. Sloan may also raise the First Amendment as an affirmative defense against the intentional infliction of emotional distress claim as she was speaking on political matters of public concern. Strong answers distinguished her behavior from the behavior of the protestors in *Phelps*, whose actions were protected under the First Amendment.

Strong student answers

Example 1

Battery

Battery requires that the defendant intend to harmfully or offensively touch the plaintiff without consent. Intent may be proven through showing that the defendant had the desire or purpose to cause the harmful or offensive touch, or knowingly act with substantial certainty that the harmful or offensive touch would result. It is not required that the defendant directly lay their hands on the plaintiff, indirect harmful or offensive touch may be allowed, like in *Garratt v. Dailley*, where pulling a chair out from under the plaintiff was an indirect touch which resulted in the plaintiff's harm.

Here, Sloan's harmful touch may be found in the plaintiffs being able to feel Sloan's breath against their faces. Bell and Ortiz turned away as they could feel their breath, indicating lack of consent. Sloan's intent may be demonstrated in her choosing to pretend to have a coughing fit and pointing her mouth in the plaintiffs' direction. While Sloan has not literally stated that her choice in doing this was intentional, intent may be inferred from her conflict with the other passengers: the passengers repeatedly asked Sloan to put her mask on, and Sloan pretending to have a coughing fit was an act in defiance of their requests. Therefore, Bell and Ortiz have strong claims for battery, and Sloan may not escape liability for their COVID exposure.

Consent

Sloan may raise an affirmative defense of consent, but it is likely going to lose. She may point to the plaintiffs' failure to confront Sloan or failure to disembark from the shuttle as consenting to remaining within Sloan's line of fire. She may use *O'Brien v. Cunard*, where the plaintiff's failure to object constituted consent. However, the plaintiffs may rebut that in *O'Brien*, the plaintiff's behavior demonstrated outward manifestations of consent, like presenting her arm to the doctor. Here, the plaintiffs, in fact, attempted to move away from Sloan and turned their faces from her. Such behavior amounts to outward manifestations of their lack of consent, rather than affirmative consent. Therefore, Sloan's affirmative defense of consent lacks merit.

Assault

Assault requires that the defendant intend to inflict upon the plaintiff, or to put the plaintiff in reasonable fear or apprehension of, imminent harmful or offensive touching. Assault requires that the plaintiff be aware at the time of the result because the law of assault was created to protect individuals from the fear of touch, not the touch itself. The fear of imminent harmful or offensive touch must be honest and reasonable.

Here, Sloan pretending to have a coughing fit in the plaintiffs' direction demonstrates intent because of the reasons stated above: she was acting in defi-

ance of the passengers' repeated requests. The plaintiffs' fear of imminent harmful touching may be demonstrated in their attempt to move away from Sloan and turning their faces away: fearing that more of her coughs would come, they attempted to minimize their impact. A reasonable person in their circumstances would have felt such fear considering the densely packed space on the shuttle and Sloan's behavior on the bus being threatening: remaining unmasked and pretending to have a coughing fit. Therefore, Bell and Ortiz have strong claims for assault. To hold Sloan not liable for assault is to fail to protect the plaintiffs' from their fear of Sloan's coughing fit continuing to touch their faces.

IIED

An IIED claim requires (1) extreme or outrageous conduct by the defendant (2) intentionally or recklessly (3) resulting in the plaintiff's severe emotional distress. The first element has no bright-line rule: it must be the case that a jury could point to the defendant's conduct and exclaim "Outrageous!" Recklessness may be found if a defendant consciously disregards the risk of their conduct causing the plaintiff's severe emotional distress. Additionally, Section 2 of the Third Restatement provides that recklessness may be shown if "(a) the person knows of the risk of harm created by the conduct..., and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk." Such a claim is only cognizable if plaintiff suffers severe emotional distress, which must be clear on the face of the plaintiff's allegations and medical reports.

Here, both plaintiffs may point to Sloan's act of pretending to have a coughing fit and pointing their mouth in their direction as outrageous. Considering tort law's goal of deterrence, it may be found that such conduct was outrageous in order to deter Sloan from exhibiting such behavior in the future. Intent through desire or knowledge with substantial certainty may not be met considering no facts point to Sloan wanting to cause emotional distress. However, Sloan was likely able to observe Bell and Ortiz turning their faces away from Sloan as she was engaged in her farcical coughing fit, and continuing to keep up the coughing fit could indicate she consciously disregard the possibility that the plaintiffs would suffer severe emotional distress as a result, especially considering that the burden of ending her coughing fit is so slight compared to the risk coughing in a victim's face in an enclosed space poses of distressing that victim, especially in light of the COVID pandemic.

Regarding the element of severe emotional distress, Ortiz has a better claim than Bell. Ortiz suffers from severe anxiety attacks and nightmares of being trapped on the bus and dying of respiratory failure. Ortiz's resulting emotional distress is clearly linked to Sloan's outrageous conduct. Had Sloan not engaged in such outrageous conduct, Ortiz may not have felt trapped on the bus. Ortiz's harm is like the harm suffered by the plaintiff in Gammon, where the plaintiff had dreams related to the severed limb. Bell, on the other hand, only suffers from depression because of mounting medical debts. While her debt is

the result of the incident, such emotional harm may not be found severe enough to amount to a meritorious claim for IIED considering how less it is connected to Sloan's outrageous conduct than Ortiz's emotional distress. Therefore, Ortiz has a stronger claim for IIED than Sloan.

First Amendment

Sloan may advance an affirmative defense that her actions are protected by the First Amendment.

In *Snyder v. Phelps*, even though the defendant's behavior met the elements of an IIED claim, the conduct was speech related to public concern in a public place. Here, Sloan may attempt to argue that her farcical coughing fit was in protest of the other passengers' demands that she wear her mask. Such protest is a matter of public concern: rules related to COVID prevention are a liberal conspiracy to take away liberty and freedom. However, this argument will fail because a farcical coughing fit will not be analogous to the speech in *Snyder*. The defendants in *Snyder* had police permission and they were a considerable distance from the plaintiff. Here, Sloan had no such permission and was a mere few feet away from the other passengers on the shuttle. Therefore, Sloan's affirmative defense of First Amendment protection will fail.

Example 2

Battery

Sloan's is liable for battery if her intentional act results in offensive or harmful contact. Here, Sloan is liable because she violated the plaintiff's freedom from offensive or harm contact.

Intentional Act

Here, Sloan committed an act with desire and purpose of the consequence or Sloan knowingly committed the act with substantial certainty of the consequence.

Sloan took off her mask against regulations and purposely coughed in the direction of other people. While Sloan will likely say she did not intend to give anyone covid, that is not the consequence of her action. The consequence is the offensive or harmful contact of her breath (and therefore germs) on the plaintiff's faces.

Here, even if the jury to makes the factual determination Sloan did not have the desire to breathe on others, it is likely she knowingly acted with substantial certainty. Like Garratt, we look to see what Sloan knew at the time of her action. She knew that covid was going around (even if it was just "the flu"). She acted with certainty not just because she was aware her breath could touch the faces of those nearby, but that her knowing choice to take off a mask and cough in the direction of the plaintiffs was substantially certain to result in this contact.

Harmful and Offensive Contact

Here, Sloan's breath in itself was not harmful, but because of the germs it contained, the contact caused extensive harm to both plaintiffs. If this contact had taken place minutes later, in the airport, Sloan would have been breaking a federal regulation requiring masks to prevent this kind of contact. This contact was foreseeably harmful.

Furthermore, the contact was offensive. Per Alcorn, if a reasonable person would find the contact offensive, the plaintiff is entitled to recover for any dignitary harm. The difference between purposely spitting in someone's face and purposely coughing spit particles in the direction of someone's face is not large, especially when both are motivated by malice. Additionally, reasonable people would (and did) find this contact offensive. The entire bus continually asked Sloan to put on a mask (and reduce the offensiveness of the resulting contact) and leaned away from her to avoid the harm her breath's contact might cause.

Sloan's intentional act of taking off her mask and coughing resulted in her breath making offensive and harmful contact with both of the plaintiffs.

Assault

Sloan is liable for assault if her intentional act inflicted upon or put the plaintiffs in reasonable apprehension of imminent offensive or harmful contact. Here she likely violated the plaintiff's freedom from fear of offensive or harmful contact.

The imminence component of assault requires a plaintiff to have awareness of apprehension before contact. Harmful and offensive contact is interpreted the same as explained above for battery.

The requirement for intent is substantially similar to the above, except the intended consequence was to put the plaintiffs in apprehension of Sloan's breath (and therefore germs) on their faces. Sloan likely acted with the desire to put the plaintiffs in fear of her breath, because she faked the coughing fit. Furthermore, her knowing choice to take off a mask and cough in the direction of the plaintiffs was substantially certain to result in their fear of her breath on their faces. She was intentionally making fun of the people around her who feared her unmasked breath and was exploiting that fear by coughing.

The plaintiff's apprehension of being breathed on by a person not wearing a mask was reasonable. Others on the bus huddled away from Sloan's breath and the bus had signs up requiring people to wear a mask to prevent against this harm. Since Sloan was not wearing a mask, the plaintiffs were in fear of the harm her unfiltered breath would cause. Furthermore, the plaintiffs both had awareness of their apprehension, because they leaned away from Sloan and tried to move far away from her in the bus.

Sloan's intentional act of taking off her mask and coughing resulted in the plaintiffs apprehension of her breath making imminent offensive and harmful contact with them bot

IIED

Sloan's extreme and outrageous conduct intentionally or recklessly caused severe emotional distress.

Sloan's conduct was extreme and outrageous because reasonable people found it to be so. While no one shouted "outrageous!" many people vocally objected to Sloan's conduct. Unlike Wishnatsky, this bus full of people are not particularly sensitive to evil spirits, but instead reacting to a person fragrantly flaunting a breach of regulation imposed for other's safety.

Sloan intentionally exploited the fear of her fellow passengers by coughing.

Ortiz is in severe emotional distress because of Sloan's conduct. Like Womack, due to Sloan's conduct Ortiz has severe emotional distress. She suffers from anxiety attacks and nightmares of being trapped in a bus and dying of respiratory failure. This is clearly due to Sloan's offensive conduct on the bus.

Bell, however, is deeply depressed because of the medical debts. Proximately, medical debts are a natural and probable consequence of Sloan's conduct.

However, to meet the requirement of IIED the conduct must have caused the emotional distress. If bodily harm had resulted from the distress Bell might be able to recover damages. However, the bodily harm resulted instead from the harmful contact, not the offensive conduct.

Defenses

Consent

Explicit consent for battery is an inferred agreement that the plaintiff consents to the defendant/s contact. Here, neither plaintiff consented to the contact even though they remained on the bus.

For Bell, she likely had no choice whether or not to remain because she did not want to lose her job. In O'Brien, the alternative (quarantine) was worse than the contact (vaccine) so courts were more likely find consent because most people would take that choice. Here, however, the contact was not required in order to avoid the worse alternative. Furthermore, silence does not equal consent to the contact.

While Ortiz had more of a choice to get off the bus, she still leaned away. Even in O'Brien, if the plaintiff had moved away instead of extending an arm, the plaintiff likely would not have been found to consent to the contact.

Implicit Consent: Here, neither plaintiff implicitly consented to the conduct. This was not within the bounds of riding the bus; what was expected was wearing a masks as evidenced by the signs posted requiring such activity. Like in Hackbart, it was outside of the bounds of expected behavior.

1st Amendment: Sloan could claim her outrageous conduct was a form of public protest. However, the form, content, and context is likely not enough to be a public matter of public concern to allow for this protection.

Necessity: Sloan could argue she could not breathe and had to take off mask. However, this does not mean she had to cough at the plaintiffs.

Example 3

Battery:

Intent requires that the defendant have the desire or purpose to produce consequence, and that they have knowledge with substantial certainty that the consequence will occur. To prove battery, the defendant's intentional conduct must result in harmful or offensive touching. We can consider something connected to the body and functionality of the plaintiff in battery. Here, intent is tricky. It's fuzzy whether or not Sloan intended to spread her germs. Both Bell and Ortiz can argue when she fake coughed, she knew she was spreading her bodily fluids and germs into the air, and that would reach both parties. She may not have known she had COVID, because she was tested later at the airport but, she knew she was spreading part of her body, into the air, and onto the people she was in direct contact with. Therefore, she intended to be mean and spread not only her beliefs, but her bacteria onto others. This is evident because she pointed in their direction, and they could feel her breath.

What is ambiguous is what counts as touch. Here we ask: is the spreading of small molecules onto another touch? The answer will depend greatly on judge and jury. *Piccard v. Barry Pontiac* informs us that touching a camera counts as battery. This is more connected to bodies than a camera: it's the germs from one person onto another. But under *Garatt v. Daily*, we may have to ask whether or not she really intended to spread her germs, or just intended to be a jerk. Battery seems like a tough win, because this case goes against the normal conception of what we know to be touch.

Assault:

This is tough for the same reasons as above, but assault may prove a stronger case. Assault requires the defendant's intentional conduct inflict upon, or place the plaintiff in reasonable fear or apprehension of risk of imminent harmful or offensive contact. Assuming we meet the threshold for touch, analyzing assault becomes easier. For instance, both parties felt Sloan breathe and she pointed her finger at them before they turned away. Sloan knew that those wary of disease would be afraid of contracting it. She coughed to put both parties in a reasonable fear of contracting disease. Her germs, if counted as touch, were the consequence she was aiming to place them in fear of. Indeed, when she pointed her finger and began to cough, that was indicative of imminence. This is similar to *Piccard v. Barry Pontiac*, where the lunge indicated imminence.

If we flip assault onto the reason law provides a remedy in the first place, it's easier to understand.

Torts protects those by establishing freedom from imminent fear of harmful or offensive touching. Here, both parties were entitled, by law, to not be in risk of germs because of the mask mandate. Sloan disobeyed the mandate, and intended to be rude. Sloan can argue, under *Wishnatsky v. Huey*, that the parties are unduly sensitive, but that seems like a weak argument. A reasonable person would think it's offensive because of the fact that our laws and policy indicated

favor in wearing a mask. Objectively, the two parties were reasonable in their finding of offense and harm. By understanding COVID as the "flu", Sloan knew if she had any germs, she could harm someone by coughing close to them. Perhaps the reason the principle exists in the first place indicates that both parties should be entitled to an assault claim against the wrongdoer.

Intentional Infliction of Emotional Distress:

This is the strongest case because we don't have to dig into the philosophy of what is considered touch. We assess whether the defendant's outrageous and extreme conduct resulted in the extreme emotional distress of the plaintiff. Here, Sloan repeatedly disobeyed a mandate, and the driver of the shuttle. She heard the concern of the rest of the shuttle and consciously ignored. She then ranted about the disease being a conspiracy, and a form of control from the government; even though no one was controlling her here. This was extreme and outrageous conduct, as experienced by everyone else on the shuttle. Sloan may consider it to be normal conduct, given she believes her freedoms to be violated by a liberal world order. However, 11 others on the shuttle were wearing a mask. In comparison to the 11's conduct, hers sticks out, helping to make the case it was outrageous. She was also in violation of a mandate, which makes it feel more extreme. Finally, both parties developed extreme emotional distress. Bell was already working to support her daughter, and is now burdened by immense debt, and that sort of stress and depressive fact weighs immeasurably on the mind. Ortiz has deep fears about contracting the disease again, and of being on a bus trapped with someone again. They have a good claim for intentional infliction of emotional distress.

Consent:

Sloan will argue they both consented to her conduct. This is not a strong claim. She will argue that in choosing to stay on the shuttle, they consented to her lack of mask wearing and fake coughing fits. Through the circumstances, as established by O'brien v. Cunard, she will argue it appeared they consented because they were close to her, and they chose to stay aboard the shuttle. However, we know how narratives can drive our legal theories. Here, both parties can assert that they tried to get as far away from her as they could, and they turned away from her, trying to evade the risk of contracting her germs. Likewise, they did not have reasonable choices. Bell needed to get to work, and to NOT be in risk of being fired. She needed to get to terminal D, and should not have had to wait.

Ortiz believed he was right, but also had a flight to get to, and who would want to be left outside of a terminal that is not their destinations. Indeed, her actions were not circumstantial to riding an airport shuttle. They were against the rules, and had nothing to do with her getting on a plane. Her wearing a mask or not, effectively did nothing. Like in Hackbart v. Cincinnati Bengals, the intentional conduct had no purpose and it did not align with the plaintiff's expectations. In that case, there was no reason to continue fighting and it was against the conference rules. Here, both parties had no reason to believe someone

would not only refuse to wear a mask, but also launch coughing fits in their faces. It is established neither party consented to Sloan's behavior.

First Amendment Defense:

Here, Sloan may have a defense for intentional infliction of emotional distress. In determining what conduct is protected by the First Amendment we consider: the subject matter: public or private, and the location: public or private. The more public both are, the stronger the defense. *Snyder v. Phelps* established that deeply unsettling, offensive hate speech can be protected, even when it pertains to a veteran funeral. If the court is more sympathetic to the restrictions on freedom a mask mandate imposes, this could be a complete bar for the claim. Sloan will say the conduct was an act of political concern and protest, and that it was not directed at either party. To Sloan, it is public. A court would likely agree on that count. She will say public transit at an airport is not private, but a common carrier, even though only people who work there or buy plane tickets make it past security and to the terminals. However, in *Snyder*, the "protesters" complied with the legal advice of the police. Here, Sloan disobeyed a mask mandate. That may be a strong enough barrier to her protest defense.

In *Snyder*, no laws were violated. In this case, a law was violated. The quasi-private nature of the shuttle and airport, coupled with her civil disobedience could prove a barrier.

Necessity:

Sloan could attempt to raise a necessity defense. That she needed to protest these freedoms, and that her personal bodily autonomy needed to be protected. However, torts values life, and she put other's lives in danger to protect her own opinion.

Part III (Question 103)

You are a law clerk for Justice Clark on the Supreme Court of the state of Loyola. She has asked you to write the first draft of part of a legal opinion for a case that concerns a defendant's liability for negligently exposing a plaintiff to a toxin that has not yet resulted in a physical injury but has resulted in a plaintiff incurring costs for medical treatment to detect early signs of illness caused by this toxin.

For over a decade, the Holmes Chemical Corporation discharged into the Stubbs River a solvent byproduct called Riskitol that has been linked to kidney cancer, heart disease, and various neurological disorders. Despite internal health and safety reports warning that their waste treatment system was inadequate to safely process and neutralize the chemical, Holmes Chemical's management chose not to upgrade the treatment system due to cost concerns. The Loyola Department of Health and Environmental Safety has since confirmed that the levels of Riskitol in the river were over ten times the state-mandated safety limits.

The Stubbs River is the primary source of drinking water for the plaintiffs, who consumed this water daily for years, unaware of the contamination. Although no plaintiff has developed a diagnosable illness yet, medical experts have testified that the plaintiffs now face a significantly increased risk of serious disease due to their prolonged exposure. Some of the plaintiffs have already tested positive for Riskitolrelated biomarkers, which signal the need for regular medical monitoring, including periodic blood tests and imaging, to detect early signs of illness. Early detection of some illnesses could allow plaintiffs to receive medical treatment that can cure the disease or limit its severity. Early detection of other illnesses would not significantly affect treatment but could lead to more accurate predictions of the disease's severity.

The plaintiffs sued Holmes Chemical for negligence. The trial court granted Holmes Chemical's motion to dismiss, finding that under existing Loyola tort law, liability for negligently exposing a plaintiff to a toxic substance requires a showing of physical harm, not merely the increased risk of physical harm. The Loyola Court of Appeals affirmed.

The case is now before the Loyola Supreme Court. Justice Clark thinks that the court should adopt a new legal rule that allows for a defendant to be held liable for negligently exposing a plaintiff to a toxic substance if that exposure has resulted in an increased risk of physical harm that requires medical monitoring treatment — at least under some circumstances. Justice Clark needs your help to figure out what those circumstances should be. She is sensitive to the unfairness of a rule that forces plaintiffs to pay for their own medical monitoring after a defendant has tortiously exposed them to a toxin. But the Justice is also concerned about the unfairness of an open-ended rule that would make defendants broadly liable not just for harm but for merely exposing plaintiffs to risk of harm.

Your job is to draft

- 1) a legal rule,
- 2) an explanation of this rule, and
- 3) a persuasive argument for this rule.

The legal rule should precisely articulate the conditions under which a defendant can be held liable for negligently exposing a plaintiff to a toxic substance if that exposure has not resulted in a physical harm but has resulted in an increased risk of physical harm that requires medical monitoring treatment. With regard to formatting and writing style, Justice Clark has instructed you to use the Restatements as a guide (see Appendix B for examples).

The explanation following your rule should provide greater detail, clarifying aspects of the rule and addressing questions that a legal reader may have. Make sure that your rule and explanation together provide answers to the following questions:

- What is a plaintiff required to prove?
- How can a defendant prevail?
- What can the plaintiff recover?
- How does this litigation affect any future claims the plaintiff might wish to bring against the defendant?

For your persuasive argument in support of this rule, Justice Clark wants you to write the first draft of the part of the legal opinion that — after announcing the rule — justifies the rule. Her hope is that your arguments will convince the other justices on the court that this is the right rule to adopt. Be sure to articulate how this rule best serves the values and goals of tort law, fits within our common law tradition, and is a fair and just rule. Don't forget to address counterarguments, as some justices may be tempted to adopt alternative rules.

Prof. Doyle Commentary

This was a policy question that took the form of writing a legal rule for a state supreme court case, explaining that rule, and writing a persuasive argument for why it should be adopted. Strong answers addressed the call of the question, making sure that their rule and explanation included what the plaintiff needed to prove, how the defendant could prevail, what the plaintiff could recover, and how this litigation would affect the plaintiff's ability to bring subsequent claims.

Liability for medical monitoring following toxic exposure is not a hypothetical issue but is one that courts across the country have grappled with in recent decades. About half the states in the United States recognize a medical monitoring cause of action and about half do not. In the interest of fairness to plaintiffs, it can seem appropriate for defendants to be forced to pay for medical expenses that plaintiffs would not have had to endure but for the defendant negligently exposing the plaintiff to a toxic substance. But in the interest of fairness to the defendants, there needs to be some limit on this rule so that defendants aren't paying for all the medical expenses for every person who has had any amount of toxic exposure. Who should be able to recover and who should not? What should they be able to recover in this litigation? How should this affect any future claims a plaintiff might want to bring if the toxic exposure manifests as a serious disease? Strong answers articulated and defended the answers to these questions, made logical sense, were good legal rules in keeping with torts' common law tradition, and accomplished Justice Clark's goals of striking a balance between fairness to the plaintiff and fairness to the defendant.

Strong student answers

Example 1

Rule

An actor is subject to liability for the medical examinations costs of their negligent discharge of toxins, if the negligent discharge has caused (1) an increased risk of physical harm directly caused by the specific toxins; (2) which requires extensive medical monitoring treatment, (3) when the costs of the treatment cannot be collaterally sourced from other means outside of the plaintiff's own funds such as insurance or worker's compensation.

Explanation

Plaintiffs need to prove that the actor in question negligently discharged toxins. This requires to establish a negligence claim of duty, breach, causation, and harm. The plaintiff must show the defendant owed a duty of reasonable care of discharging the toxins properly. The plaintiff can prove breach by using any of the allowed reasonable care factors such as foreseeability, reasonable person standard, statutes, customs and BPL. To prove causation, the plaintiff must show the negligence release of toxins was the "but-for" cause of their increased risk of physical harm that required extensive monitoring, and proximate cause must show that the negligent conduct of the defendant was foreseeable to create the risk of incurring increased risk physical harm that required additional monitoring. Harm must be proven by showing monetary costs that won't be covered by either insurance or worker's compensation. Unlike the current law, this negligence claim won't require proof of physical harm.

The defendant would prevail if the plaintiff failed to prove any of the above elements. Additionally, the affirmative defenses of implicit assumption of risk and comparative negligence are allowed. Express assumption of risk won't be allowed, because liability waivers to discharge toxins negligently would be against the great interest of the state of Loyola. Under the totality of the circumstances such waivers would affect the public interest adversely because these businesses have higher bargaining power, such waivers would likely be contracts of adhesion, and the public would be put at risk of the chemical companies carelessness in handling these toxins.

A plaintiff may recover any incurred costs of medical monitoring which was directly caused by the need to monitor for the possibility of only the diseases which the toxin creates. No testing for other conditions will be charged upon the defendants, even if it would help the monitoring of the increased risk of physical harm created by the toxin. The defendant will be held liable only for the costs of medical monitoring which would have to be covered by the plaintiff's own funds. If the plaintiff is found to be comparatively negligent, the cost they can recover would be calculated as: (costs of the medical monitoring) - (what the insurance and worker's compensation will cover + their percentage of fault).

This litigation won't preclude the plaintiff from suing the defendant if the risk of physical harm materializes after the medical monitoring and it is proven that the toxins caused the specific harm which materialized. Both plaintiff and defendant's are free to appeal any decisions of this litigation in court as they are allowed to for other negligence claims.

Persuasive Argument

Tort law is concerned with two main goals: (1) making the plaintiff whole and (2) deterring the defendant and the population at large from engaging in the same negligent conduct. Both of these goals will be adequately served under this law.

Plaintiff's that were exposed to toxins by negligent defendant's are not whole even when their risk of physical harm hasn't materialized. In a country without universal healthcare, the costs of extensive medical monitoring would create an extreme burden on plaintiff's who have no means to pay for those costs. Such burdens, if the plaintiff proves their claim under the law, would be the cause of the defendant and thus they should be theirs to repay. Defendant's might argue that incurring costs for harm that hasn't materialized yet wouldn't be fair and it would go against the purposes of compensatory damages, the truth is that a plaintiff has incurred harm even before their body develops a tumor due. Imagine receiving a letter in the mail informing you that you have been exposed to such dangerous toxins that you might be at risk of cancer, and in the next paragraph the same people who exposed you to those dangers tell you that the cost to monitor that risk they created is now yours to pay. Allowing this would go against everything that the state of Loyola stands for. It would be unfair to allow a plaintiff to incur such costs and thus there they are not whole at the time they are exposed to such risks. Additionally, the rule has safeguards in place to protect defendant's from incurring costs. First off, unlike the collateral source rule, the defendant will be able to bring in evidence of insurance and worker's comp funding to lower their costs owed to the plaintiff. This rule is advantageous for defendant's because it provides for cost off setting which to reduce burden on their business. Additionally, affirmative defenses are available for defendants which could help reduce the burden of paying excessive costs.

Such a rule would have a great deterring effect. With the current law, defendant's are likely to not be deterred from negligently discharging toxins because plaintiffs need to prove current physical harm. This is simply a burden too high on plaintiff and it actually leads to more deaths. The burden is too high because it requires extensive research, which would make litigation too costly for plaintiffs, and the passage of time. Time needs to pass in order for the disease caused by the toxin to actually materialize in a tumor and then allow for a valid claim under the current law, this can create problems for litigation as the evidence needed might not be available anymore and the statute of limitations for such a claim would've already passed. While plaintiffs would be allowed to seek compensation for past medical monitoring if they have a physical harm under the

current law, such compensation would come too late for the plaintiff to be adequately made whole given that they would already be sick. Furthermore, allowing for this passage of time would result in more deaths, as plaintiffs might be unable to afford the needed monitoring and thus the manifestation of the physical harm might go unnoticed until it was too late. All of these consequences of the current rule, make it so that plaintiffs will be discouraged from pursuing their claims and de facto won't help deter the negligent conduct that's at the root of the problem. The overall of the law that is proposed, would provide for better deterrence as it solves the burden problems and allows for more litigation.

Alternatives to torts and to this type of litigation are accounted within the rule itself. A defendant will never be held liable for the costs created by their risk if that cost can be covered by insurance or worker's compensation. This rule wouldn't be unfair to insurance companies or worker's compensation funds. Insurance exists exactly for this purpose and we all pay into it as a safety net for people who are affected by terrible harm such as this one. Many insurance companies would be able to afford to pay for the medical expenses of these plaintiffs and whether their claims will be allowed is a question of the extent of their insurance coverage.

These sort of extremely hazardous activities are usually covered by strict liability, and one might argue that adding such law will overburden the courts. While it does allow for more forms of litigation, toxin spills are a rare occurrence and the presence of this avenue of litigation thus won't overburden the court due to its rarity.

Thus, this new avenue of litigation would lead to less deaths, less overall costs once the physical harm materializes, and follows the tort law principles of making plaintiffs whole and deterring defendants.

Example 2

Dear Justice Clark,

The following is my drafted legal rule to this issue:

One who negligently exposes another to a toxic substance is liable for any resulting physical harm, including an increased risk of physical harm if that risk requires medical monitoring treatment.

This rule broadly holds liable any defendant who negligently exposes a plaintiff to a toxic substance, even if it only results in an increased risk of physical harm. However, the rule limits the risk to risk that requires medical monitoring treatment. To meet this rule, a plaintiff would have to prove through a preponderance of evidence (1) that the defendant negligently exposed them to a toxic substance, (2) that the exposure resulted in an increased risk of physical harm, and (3) that the risk requires medical monitoring treatment (as confirmed by a doctor). A defendant could prevail if they could defeat the claim of negligence (i.e. duty, breach, causation, or harm). Relatedly, they could prevail if they could prove that their exposure did not cause the increased risk (causation), or that the risk is not so great as to require medical monitoring treatment. A plaintiff with a successful claim should be able to recover all compensatory damages, mainly medical bills but also damages for pain and suffering, as well as punitive damages that follow the Gore guideposts. Further, a claim under this rule should not bar any future litigation regarding actual physical harm that may develop, as that harm would be separate from the increased risk.

While at first blush this rule may seem overly broad or unfair to the defendant, it is consistent with the principles of tort law already in place. Firstly, the distinction between physical harm and increased risk of physical harm is pedantic and unfair to plaintiffs. If a plaintiff is exposed to a toxic substance and develops cancer from it, they are able (rightfully so) to recover from the person/entity that exposed them to that substance. This harkens the fundamental values of tort law: making a plaintiff whole again after they have suffered harm, deterring such harmful conduct from occurring again, and punishing the defendant who caused the harm. While the second two values are controversial, the first is undeniably a core principle of tort law. We, as a society, want to restore a plaintiff as much as possible for the harm they have suffered. We want there to be a sense of fairness and justice in our society, meaning that our legal system will allow us to recover for harm caused by another. This is for ideals of morality as well as to practically prevent people from feeling the need to resort to self-help methods. In other words, if our society will not take care of us, then we will have to take care of ourselves, and that is not the kind of anarchy we want to live in. Just as we are able to recover for a toxic substance causing us to develop cancer, we should likewise be able to recover for developing an increased risk of physical harm. An increased risk that necessitates medical monitoring treatment should be considered a harm in and of itself. Developing such risk incurs time for treatment (time likely taken off of work), money for medical bills, physical pain from treatment, fear, anxiety, and other noneconomic detriments. It is a

harm to have an increased risk of disease that requires treatment, even if not the disease itself yet. So, there should not be a distinction between increased risk and physical harm when it comes to legal recovery. Both are harms and both deserve redress.

Secondly, the realities of toxic substance exposure is that there is almost always a power imbalance involved. As with the case at bar, the defendant will likely be a large corporation/entity that has much more power over the situation than the plaintiff (likely a common person who lives in the area). In these types of situations, the defendant has the power over preventing the exposure, warning of the exposure, and compensating for the exposure, while the plaintiff is at their whim. The plaintiff could try to avoid the toxic substance, but this would require knowing about it in the first place, which the plaintiffs here did not. Even if they did know about it, it may not always be feasible to avoid, if say, for example, there was no other drinking source available here. It is unjust and impractical (if not impossible) for the plaintiffs in this position to protect themselves against such harm. As such, this issue should follow the rule laid out above for the same reasons that justify strict liability for products. In products liability, manufacturing companies are held strictly liable for harm their products cause because we believe that is fair and just for large entities to have to pay out to unassuming consumers (*Escola v. Coca Cola*). There, companies are greatly advantaged by a power imbalance, have the means to compensate plaintiffs, and should be deterred from/punished for causing harm on a large market-wide scale. Similarly, here, companies that expose the public to toxic substances should be held liable out of fairness and justice. They are the ones with the power not to harm and the means to compensate when they do cause harm.

Some may argue that this is unfair to defendants because there is no harm actually committed, and harm is one of the basic elements of negligence. But, again, an increased risk of physical harm is, and should be treated legally, as a harm in and of itself. The fact is that people should have the right to safe, non-toxic environments, and the law should protect that right whether the resulting harm is disease or merely the increased risk of disease. Either way, the plaintiff has suffered and the defendant should be held responsible. Furthermore, this rule is not unjust to defendants in that it is not strict liability. A successful claim still requires proving the defendant was negligent and that the plaintiff's increased risk requires medical treatment. These are limits to the rule that account for fairness to the defendant.

Finally, I implore the Justices of the Supreme Court of Loyola to envision the type of world they want for themselves and their loved ones. If they don't want to be exposed to toxic substances, whether or not they cause physical harm or an increased risk of physical harm, then we need to adopt this rule and hold companies responsible. It is what is right and just,

Example 3

Rule

Modeling after the language of Section 322 of the Second Restatement, the legal rule should state: "If an actor knows or has reason to know that by his negligent conduct he has exposed another to a toxic substance for a prolonged period of time, and that such exposure substantially increases the other's risk of serious physical illness, the actor is liable for the medical costs incurred in prevention of such illness."

Rule Explanation

Under this rule, the plaintiff bears the burden to prove (1) the defendant's negligent conduct, (2) that such negligent conduct resulted in the plaintiff's exposure to a toxic substance, (3) that the plaintiff has been exposed to the toxic substance for a prolonged period of time, (4) that the plaintiff's exposure to the toxic substance substantially increased his risk of serious physical illness, and (5) that the plaintiff has incurred medical costs in prevention or treatment of such illness. The plaintiff may recover the medical costs incurred in prevention of the illness, not the costs of procedures involving early detection. The defendant may prevail by defeating the plaintiff's *prima facie* case: (1) that they exercised reasonable care, (2) that their conduct did not expose plaintiff to a toxic substance, (3) that the plaintiff has not been exposed to the substance for a prolonged period of time, (4) that the plaintiff's exposure to the toxic substance did not substantially increase his risk of serious physical illness, or (5) that the plaintiff has not incurred medical costs in prevention such illness.

"Toxic Substance"

The meaning of "toxic substance" may either use existing legislation which has legally defined substances as toxic, or else new substances must be considered on a case-by-case basis. Medical experts must demonstrate from the known body of medical knowledge that the substance has a verifiable link to serious physical illness if a person is exposed to it. The state of Loyola may use each case as precedent to establish that a certain substance will be considered a "toxic substance" as a matter of law.

"Prolonged Period of Time"

The meaning of "prolonged period of time" is flexible in that it is inversely functional of the "substantially increased the risk" requirement: if exposure requires a long period of time before substantially increasing the risk of a serious physical illness, then the period of time will be shorter to reflect the illness; if exposure requires a short period of time before substantially increasing the risk of a serious physical illness, then the period of time will be longer to reflect the illness. The contours of such "periods of time" must be considered on a case-by-case basis.

"Substantially Increased the Risk"

The meaning of "substantially increased the risk" turns on the likelihood a plaintiff would have contracted the illness without the exposure. What a "substantial increase" is will have to turn on medical experts and therefore also requires determination on a case-by-case basis.

"Serious Physical Illness"

The meaning of "serious physical illness" must be narrowly tailored to illnesses with (1) a long period of time before an illness is contracted, (2) severe or fatal consequences if contracted, and (3) the costs of treatment and prevention of the illness are medically known to be high.

What this Rule Achieves

Corrective Justice

Once the plaintiff has met their burden of proof, the rule allows recovery for wrongdoing from negligent corporations before the plaintiff suffers serious physical illness. If the State of Loyola cares about repairing a tortfeasor's wrongdoing, it is unnecessary to require that victims must suffer once wrongdoing has already been shown.

Fairness

The burden on the plaintiff is very high such that recovery for wrongdoing is narrowly tailored to clear and convincing evidence of the wrongdoer's moral responsibility. It is clear that the State of Loyola cares about defendants paying exactly for what they are morally responsible since it adopts a pure comparative negligence regime. Thus, this rule will ensure that the defendants are clearly responsible before they are forced to pay for medical costs incurred in prevention before treatment.

Compensation

Before this rule is adopted, plaintiffs' medical costs in prevention of treatment are likely shouldered by their insurance companies. Since the law does not allow litigation until insured parties actually contract a serious physical illness, the State of Loyola currently exists in a world where insurance companies may actually prefer their insured parties to suffer such that they may litigate and recover the costs of treatment. Additionally, insurance premiums will continue to increase for potential plaintiffs without the companies being able to recoup the costs of payouts. This rule will allow insurance companies to recover the costs incurred by their customers in prevention of illness.

Deterrence

Once the case law has been established regarding recovery in toxic exposure before the contraction of a serious physical illness, corporations will be deterred from engaging in risky behavior regarding toxic substances while hoping that anyone exposed never actually falls ill. With existing law, corporations are incentivized not to bear the costs of safety precautions because such precautions, for them, have yet to be proven necessary. This rule demonstrates that safety measures when working with toxic substances are always necessary.

Distributive Justice

Distributive justice ensures that those who are the most in control of risk prevention ought to bear cost of harms that result from failure to prevent such risks. This is why strict liability exists for activity that is so risky that even reasonable care is insufficient to deter the conduct. However, in a case such as the one before the Loyola Supreme Court, where reasonable care would have prevented the plaintiffs' exposure to the toxic substance, it is necessary to require that the corporation in control of the toxic substance will bear the cost of reducing the risk of exposure. It is unfair that plaintiffs must actually suffer harm before the parties in control of the risk will be liable for the harm.

What this Rule Sacrifices

Administrative Feasibility

A myriad of terms in this rule will require a great deal of litigation before their meanings are clear. All such terms will likely have to be decided by the Loyola Supreme Court to decide their meanings as a matter of law, including what counts as a "serious physical illness" unless the state legislature decides it for us. If the State of Loyola values the lives of plaintiffs before they suffer serious physical illness that could have been prevented, then it must bear the cost of an unforeseeably large amount of claims to be filed.

Efficiency

Efficiency seeks to balance the costs of safety and economically beneficial behavior: the costs of safety measures may outweigh the benefit of engaging in risky behavior. Given that no plaintiffs have actually contracted a serious physical illness, it is possible that none of those plaintiffs would actually contract it. This means that engaging in risky behavior which never actually leads to serious physical illness may be more beneficial than the cost of mitigating the risks it may pose. Forcing defendants to pay before an illness means discouraging economically beneficial behavior that may not actually cause serious harm. This is especially problematic considering that the plaintiffs in the case before the Court have incurred medical costs for early detection, rather than any preventative treatment.

How this Case Will Affect Future Claims by the Plaintiff

If the Supreme Court of Loyola adopts this rule, then the plaintiffs must first receive preventative treatment before suing Holmes Chemical Corporation for damages. They may not recover for any costs incurred for early detection, as this would be considered an overreach of this rule.