

CHAPTER 2 (BASIC BRIEFING: DEVELOPING AN INITIAL STRATEGY FOR MANAGING CASES)

Practice Exercises:

A. Read the following case [*Leichtman v. WLW Jacor Communications, Inc.*, reprinted in part beginning on or near p. 27 of the main text] and answer the questions that follow:

1. Is this an edited or unedited case? How do you know?

This is an edited case. I know it's been changed from the original because there are ellipses (. . .) in several places, indicating that something has been omitted.

2. In what geographic region was this case decided? How do you know?

This case was decided in the Midwest. I know because the citation to the case shows that the Court of Appeals of Ohio decided the case.

3. What was the general view of smoking as a health issue at the time this opinion was written? How do you know?

I don't know for sure what the general view of smoking was as a health issue, but I can pretty much guess that around 1994 people were very much aware of the connection between lung cancer and smoking. I think restaurants were beginning to have separate smoking areas, some states were mandating separate smoking areas, and "Thank You for Not Smoking" signs were commonly found. From my own memory, I know that the Surgeon General's warning had long been on cigarette packages, that litigation against major tobacco companies was pending, and that people were no longer uncomfortable asking others not to smoke in their presence.

4. On a separate sheet of paper write a brief for this case.

Each student's brief will be slightly different and should accompany the answers to this assignment if they are turning them in.

5. What was the most difficult part of writing that brief for you? What made writing that part of the brief difficult?

Again, each student's answer will be different. A typical answer might be that writing the procedural history was difficult for me to write, but would have been a lot easier if I'd read the end of the case first. Another student might write that it was difficult to write the fact statement because it took too long.

B. Read the sample brief (below) that I wrote for this case. How does this brief compare to yours? How are they different? Are the differences meaningful or superficial? Are there things you would do differently if you had the opportunity to do your brief again?

TORTS – Battery (p. 42)¹

Leichtman v. WLW Jacor Communications, Inc.
Ct. of Appeals of Ohio (1994)

Π: Leichtman (antismoking advocate)

Δ: WLW Jacor Comm. (radio co.) (& Furman? & Cunningham?)

PH: (1) Π filed complaint based in battery;

(2) Δ filed motion to dismiss that trial court granted;

(3) This court (ct. of app.) reversed dismissal on the battery claim.

F: Π, an antismoking advocate, appeared on Δ’s radio talk show to discuss smoking and one of the company’s other talk show hosts blew cigar smoke repeatedly in his face.

Q: Does the Π have a claim for battery based on these facts? In other words, can being “hit” with smoke ever constitute a battery?

H: Yes. Smoke is tangible enough to constitute an offensive contact.

Rule: Contact which is “offensive” to a “reasonable sense of personal dignity” is offensive contact.

R: Smoke (as “particulate matter”) can make contact and, here, blowing smoke in Π’s face could be sufficiently offensive to be a battery. The amount of damages can be negligible (even \$1) and still be a battery.

My thoughts: Note that the company itself would not be liable for an employee’s intentional tort (outside the scope of employment), but the other host might be if he encouraged or incited the act. Note also that this court didn’t reach the question of whether smoking around someone would always constitute a battery.

A student might write that his or her brief was different in that the student stated the rule more narrowly, but understood what I did and that both statements led to the same place. Or a student might notice that my fact statement is very short. Or a student might notice

¹ To save time, it’s easiest to use abbreviations to designate the various subsections of a brief. The Greek Pi sign (Π) and the Delta sign (Δ) are often used to designate Plaintiff and Defendant. In my brief, “PH” stands for Procedural History (legal facts – how the case got to this court); “F” for Facts (conflict facts between the parties); “Q” for issue or question (what the court looked at that’s relevant to this course); “H” for holding (what the court decided about that question); and “R” for rationale. You can make up your own abbreviations – whatever works for you.

that I put much more energy into my own thoughts than he or she did. Or a student might note that the briefs are substantially the same.

If you are evaluating a student's brief, it is helpful to see if they are doing "too much" when they brief, or if they are focusing on minutia rather than the larger principles, or if they are focusing on issues that are too large, not focusing enough on the stepping stone ideas that give us examples from which to draw the larger meaning from the case.