

## GRADER'S GUIDE

### \*\*\* QUESTION: ESSAY QUESTION NO. 3 \*\*\*

#### SUBJECT: TORTS

#### QUESTION NO. 1 (30 Points)

##### Battery

John potentially has a battery claim against the guard. Battery is the intentional unlawful touching of another person. A person is liable for battery if the person acts with the intent to cause harmful or offensive contact, or the imminent apprehension of such a contact, and the contact occurs. *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); see also *Restatement (Second) Torts* § 21 (1965).

The guard acted with the intent to cause contact, i.e., he intended to grab John's scarf and pull John into the bookstore. The guard did not touch John's body; instead, the guard grabbed John's scarf and pulled him by it. However, an offensive contact can be committed through an indirect touching of the victim's clothing or articles of property connected to the victim's body. The *Restatement (Second) of Torts* § 18 Cmt. C (1965) explains this concept:

Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his [or her] body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability [are] actionable as an offensive contact with [the victim's] person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person.

Cited in *Butts v. State*, 53 P.3d 609, 613 (Alaska App. 2002). Here, the scarf was intimately connected with John's body; grabbing John by his scarf constituted an offensive contact.

##### Assault

John also has an assault claim against the guard. Assault occurs when a person acts intending to cause a harmful or offensive contact with

the person of the other or a third person, or an imminent apprehension of such a contact, and the other person is thereby put in such imminent apprehension. *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); see also *Restatement (Second) Torts* § 21 (1965).

Here, the guard pointed his gun at John, and John imminently apprehended a harmful contact in the form of a shot fired from the gun. John has a valid claim for assault.

### **False Imprisonment**

John will consider bringing a false imprisonment claim. In order to prevail on a false imprisonment claim, the plaintiff must prove that the defendant acted with the intent to confine the plaintiff or a third party within boundaries fixed by the defendant, the act indirectly or directly resulted in a confinement of the plaintiff, and the plaintiff was conscious of or physically harmed by the confinement. *Zok v. State*, 903 P.2d 574 (Alaska 1995).

Here, the guard acted with the intent to confine John within boundaries fixed by the guard when the guard placed John in the room and then asked another employee to prevent John from leaving. The guard's act of placing John in the room with an employee watching the exit did result in confinement. However, the fact pattern indicates that John did not try to leave the room; he just stood inside the room without trying to leave. The fact pattern also indicates that John did not hear the guard speak to the other employee, so John did not know that he would be prevented from leaving. Of course, John was lead to the room under gunpoint, so perhaps he knew it would be futile to try to leave (although the facts do not discuss this). Overall, there is some ambiguity as to John's consciousness of his confinement. There is no indication that the confinement harmed John.

## **QUESTION NO. 2 (40 Points)**

### **Assault**

Sally potentially has an assault claim against the guard. Assault occurs when a person acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and the other person is thereby put in such imminent apprehension. *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); see also *Restatement (Second) Torts* § 21 (1965).

In this case, the guard aimed his gun at John. Sally, however, was standing next to John, and she feared that the guard would shoot her. Even though the guard did not intend to put Sally in imminent apprehension of being shot, he is still liable to Sally because he intended to put John in imminent apprehension of a harmful contact. This is known as the doctrine of transferred intent:

### § 32. Character of Intent Necessary

- (1) To make the actor liable for an assault, the actor must have intended to inflict a harmful or offensive contact upon the other or to have put the other in apprehension of such contact.
- (2) If an act is done with the intention of affecting a third person in the manner stated in Subsection (1), but puts another in apprehension of a harmful or offensive contact, the actor is subject to liability to such other as fully as though he intended to so affect him.

Because the guard intended to put John in imminent apprehension but also placed Sally in such apprehension, the guard is liable for assault against Sally.

### **Negligence**

Sally may bring a negligence claim against the guard. In fact, Sally can bring the negligence claim on two separate theories: (1) negligence for drawing the gun and pointing it at someone standing next to Sally; and (2) negligence for leaving Sally unconscious by the dumpster.

In terms of the general negligence claim, Sally will need to establish: (1) a duty of care; (2) breach of the duty; (3) causation; and (4) harm. *Silvers v. Silvers*, 909 P.2d 786 (Alaska 2000).

There is a duty for those carrying guns to use them in a manner that does not threaten or endanger other persons. The guard breached this duty when he pulled the gun on John with Sally standing nearby.

In terms of causation, “causation” in negligence cases encompasses a two-part test of legal causation: (1) plaintiff must show that the accident would not have happened “but for” the defendant’s negligence; and (2) the negligent act must have been so important in bringing about the injury that a reasonable person would regard it as a cause and attach responsibility to it. *Maddox v. River & Sea Marine, Inc.*, 923 P.2d 1033 (Alaska 1996).

Here, “but for” the guard’s act of pulling the gun on John with Sally standing nearby, Sally’s accident would not have occurred. Further, a reasonable person would certainly view the guard’s act as being so important a factor in bringing about the injury that the reasonable person would regard it as a cause and attach responsibility to it.

It is clear that Sally was harmed. She has a severe brain injury, and she suffered emotional damage as well, evidenced by her visits to the psychologist.

Sally’s traditional negligence case is strong. However, she has an additional theory for negligence based on the fact that he saw her lying on the ground next to the dumpster, yet he left her there to take John into the store. Normally, a person does not have a duty to protect another from harm or to come to another’s aid if he/she is in danger. *Joseph v. State*, 26 P.3d 459 (Alaska 2001). However, where a person causes the need for help, that person has a duty:

#### § 322. Duty to Aid Another Harmed by Actor’s Conduct

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

*Restatement (Second) of Torts* § 322 (1965). Here, the guard aimed his gun at Sally, which caused her to throw herself on the ground and hit her head on the dumpster. The guard saw her fall, but he was more concerned with getting John in the bookstore. Because the guard caused the harm to Sally, he breached his duty by leaving her unconscious by the dumpster.

As for causation, “but for” the guard’s act of leaving Sally next to the dumpster unconscious, Sally would more likely than not have received prompt medical attention that would have reduced the severity of her injury. The question of proximate cause is more difficult – a reasonable person might regard the failure to attend to Sally promptly as a less important factor in bringing about her injury than the initial fall itself. However, an act or omission need not be *the* single producing cause of an injury to be proximate cause, but need only be *a* producing cause. See *Bakke v. State*, 744 P.2d 655, 656 (Alaska 1987).

The fact pattern establishes that Sally suffered damages – she has a severe brain injury and she suffered emotional trauma requiring treatment from a psychologist.

### **Invasion of Privacy**

Alaska has recognized the tort of invasion of privacy. *See, e.g., Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989); *Wal-Mart, Inc. v. Stewart*, 990 P.2d 626 (Alaska 1999). Alaska has specifically adopted *Restatement (Second) of Torts* § 652B, which provides:

*Intrusion upon Seclusion.* One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

In order to prevail on an invasion of privacy claim, the plaintiff must show that the defendant intentionally intruded upon the solitude, seclusion, or private affairs or concerns of the person. In addition, the plaintiff must prove that a reasonable person would find the intrusion to be highly offensive. In *Luedtke*, 768 P.2d at 1137, the court defined “offensive intrusion” as requiring either an unreasonable manner of intrusion or intrusion for unwarranted purposes.

Here, the guard convinced the doctor to let him watch Sally’s examination. This certainly qualifies as an intentional intrusion upon Sally’s privacy. The next question is whether the intrusion was “highly offensive to a reasonable person.” Here, the intrusion was certainly for unwarranted purposes – while the guard felt badly about Sally’s fall, he simply had no right to watch the examination. Sally will likely prevail on her invasion of privacy claim.

### **QUESTION NO. 3 (30 Points)**

#### **Respondeat Superior**

Under Alaska law, the acts of an employee are attributable to the employer, so long as the acts performed by the employee fall within the scope of his or her employment. *See, e.g., Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986). If Sally can successfully pursue respondeat superior, she can hold the store responsible for the guard’s torts.

In this case, the bookstore hired the employee to act as a security guard. It is not clear from the fact pattern whether patrolling the outside

of the store was part of the guard's duties. However, the guard appeared to be acting to protect the store's interests when he pulled the gun and pulled John inside the store (the guard indicated that he believed John and Sally were taking books from the dumpster: "We sell books, we don't give them away . . . ."). The guard pulled a gun that he carried in the course of his job duties and with the store's knowledge, as evidenced by the earlier incident involving the gun. The fact that John used the bookstore's resources (the room where he placed John and the guard to watch the exit of the room) further indicates that the guard was acting in the scope of his employment. However, the act of following Sally to the hospital and watching the examination took place entirely outside of the bookstore, and such an act could not arguably be part of the guard's scope of employment.

A court might find that the guard was acting in the scope of his employment with respect to the events taking place directly outside and inside of the bookstore, but it likely would determine that the act of following Sally to the hospital and watching her examination was not within the scope of the guard's employment. .

### **Sally's Negligence Claim.**

Sally may bring a negligence claim against the store for retaining the guard. In a negligence case, the plaintiff must establish: (1) a duty of care; (2) breach of the duty; (3) causation; and (4) harm. *Silvers v. Silvers*, 909 P.2d 786 (Alaska 2000).

It is clear that a bookstore has a duty to its patrons, but whether the bookstore has a duty to walkers using the public alley behind the bookstore is less clear. In determining whether an actionable duty of care exists when facts under consideration are not covered by a statute, regulation, contract, or case law, the court applies the following factors:

- (1) foreseeability of harm to the plaintiff;
- (2) degree of certainty that plaintiff suffered an injury;
- (3) closeness of connection between defendant's conduct and plaintiff's injury;
- (4) moral blame attached to defendant's conduct;
- (5) policy of preventing future harm;
- (6) extent of burden to defendant and consequences to community of imposing a duty of care; and
- (7) availability, cost, and prevalence of insurance for risk involved.

*Karen L. v. State Dept. of Health and Social Services, Div. of Family and Youth Services*, 953 P.2d 871 (Alaska 1998).

In terms of the factors above, the foreseeability of harm to walkers from a security guard is not very high. It is very certain that Sally suffered an injury. The connection between the bookstore's conduct (retaining a guard who demonstrated a propensity to pull his gun and possibly overreact to situations) and Sally's injury is quite close. In terms of moral blame, the bookstore only had one previous problem with the guard, but it was a serious one, involving a gun. While the facts indicate that the situation involved violence between patrons, the facts also state that the bookstore warned the guard not to use his gun unless it was truly necessary, yet the bookstore let the guard keep his gun; the bookstore's moral culpability is quite high. The policy of protecting persons in and around the bookstore is an important policy. In terms of the extent of the burden, the bookstore, in reality, likely needs use the same judgment it already uses with respect to its patrons, i.e., if there is a problem employee, get rid of that employee. Finally, there probably is insurance to protect the bookstore against suits from persons injured from the bookstore's employees. Overall, the factors lean in favor of finding a duty.

Once Sally has established a duty, the next question is whether the bookstore breached that duty. Here, the guard had previously pulled a gun on a patron in a bookstore. With that information in mind, the bookstore likely did breach its duty to Sally by retaining the guard.

"Causation" in negligence cases encompasses a two-part test of legal causation: (1) plaintiff must show that the accident would not have happened "but for" the defendant's negligence; and (2) the negligent act must have been so important in bringing about the injury that a reasonable person would regard it as a cause and attach responsibility to it. *Maddox v. River & Sea Marine, Inc.*, 923 P.2d 1033 (Alaska 1996).

In this case, "but for" the store's act of retaining the guard after the first gun incident, the guard would not have injured Sally. In terms of the proximate cause issue, the question is whether a reasonable person would regard the bookstore's decision to retain the guard as a cause of Sally's harm and attach responsibility to the bookstore's act of doing so. Considering the fact that the guard previously drew his gun on a customer, the decision to retain him (and let him keep his gun) increases the bookstore's responsibility in this situation for bringing about the accident.

Overall, Sally's negligence claim against the bookstore is a good one.