

GRADER'S GUIDE

*** QUESTION NO. 1 ***

SUBJECT: TORTS

A. Pat's Claims Against Jeff and Brett (50 points).

Pat will assert claims for assault and battery and trespass to property.

1. Assault and Battery (30 points).

A person is liable to another for battery if he acts with an intent to cause a harmful or offensive contact with another, or to cause an imminent apprehension of such contact, and a harmful contact with the person directly or indirectly results. Restatement (Second) of Torts §13 at 25. The tort of assault does not require that the actor intend to cause a physical contact but only that he intends to cause apprehension of such contact and the other is thereby put in apprehension. See Williams v. Alyeska Pipeline Service Co., 650 P.2d 343, 348 (Alaska 1982); see also Restatement (Second) of Torts §21 at 37.

With respect to the required intent, an assault and battery claim turns not on the motive of the actor but on the lack of consent by the victim. Taylor v. Johnston, 985 P.2d 460, 464 (Alaska 1999). The intent to cause a harmful or offensive contact is material only where battery is committed in performance of an act not otherwise unlawful. If the act is unlawful or wrongful, intent to cause a harmful or offensive contact is immaterial; the only intent required is to cause a contact or imminent apprehension of such a contact. Merrill v. Faltin, 430 P.2d 913, 917 (Alaska 1967) (quoting Restatement (Second) of Torts §§ 18, 21 and 34 comment a); see also Lowdermilk v. Lowdermilk, 825 P.2d 874, 879 (Alaska 1992); Restatement (Second) of Torts §18 at 30, §21 at 37.

Brett would be liable to Pat for assault. Brett acted with intent to cause Pat apprehension of immediate harmful or offensive contact. A bodily contact is offensive if it offends a reasonable sense of personal dignity. Restatement (Second) of Torts §19 at 35. Being hit with a crutch clearly meets this standard. That Pat, in fact, apprehended immediate harmful or offensive contact is indicated by Pat's reaction of stepping away from Brett.

Pat also may claim that Jeff is liable for assault. Jeff told Pat, "Pat, you better listen to Brett, he means what he says." It is clear from the facts that Jeff intended to cause Pat apprehension of an imminent battery. However, the facts do not state that Jeff engaged in any threatening conduct. An assault requires some act by the actor to create a reasonable apprehension of an imminent contact by the actor; words alone are insufficient. Restatement (Second) of Torts §31 at 47. Thus, Jeff likely would not be liable to Pat for an

independent assault. Instead, Jeff may be liable as a joint tortfeasor. “One who acts in concert with others to plan or assist in the commission of a tort is liable as a tortfeasor.” Williams, 650 P.2d 343, 348 (Alaska 1982). Jeff had asked Brett to help him intimidate Pat and Jeff understood that Brett intended to threaten Pat with the crutch. Jeff aided Brett in his efforts by providing the crutch to Brett and by telling Pat that he should listen to Brett. Thus, Jeff likely would be liable to Pat for assault. In the case of joint tortfeasors, each party is liable on the basis of several liability in accordance with that party's percentage of fault. AS 09.17.080. Consequently, a portion of Pat's damages may be adjudged against Jeff.

Pat's battery claim is more difficult. While Brett lifted the crutch in a manner indicating an intent to swing at Pat, the facts also state that Brett was just bluffing and did not intend to hurt Pat or even to strike Pat. Thus, Brett did not intend to cause a harmful or offensive contact with Pat. A battery claim, however, also may arise if the actor's intent was to cause an imminent apprehension of harmful or offensive contact and a harmful contact with the person directly or indirectly resulted. Restatement (Second) of Torts §13 at 25. It is clear that Brett intended to cause Pat apprehension of imminent harmful or offensive contact and that an injury indirectly resulted. A wrongdoer is answerable for what directly and actually results from his conduct, even though he did not intend the particular injury which follows. Taylor, 985 P.2d at 465 (quoting with approval Khouri v. Koloniaris, No. CV 330880, 1997 WL 80676 (Conn.Super.Feb.10, 1997)). Moreover, Brett's act was wrongful because it was committed in the context of an assault. Thus, it is not necessary that Brett intended the contact to be harmful or offensive. Brett likely would be found liable to Pat for battery.

Finally, if Brett is liable to Pat for battery, Jeff also may be liable for battery. While the facts indicate that Jeff only intended to intimidate Pat, that limited intent does not exonerate him from the battery which followed. Williams, 650 P.2d 343, 348 (Alaska 1982).

2. Trespass (20 points).

“Trespass is an unauthorized intrusion or invasion of another's land. . . . Trespass liability may result from an actor's intentional, negligent, or ultrahazardous conduct. Parks Hiway Ent., LLC v. CEM Leasing, Inc., 995 P.2d 657, 664 (Alaska 2000) (citation omitted).

The entry by Jeff onto Pat's land, the night that Jeff was injured, was intentional and unauthorized. The lack of authority is clear from the fact that Pat previously had told Jeff that he should not enter onto Pat's property. Thus, Pat would be able to establish the elements of trespass. Nonetheless, Jeff may argue that the tort is not actionable because he did not cause damage as a result of his trespass. Jeff's argument would fail because one who intentionally

enters land of another is subject to liability even though his presence on the land causes no harm to the land. Brown Jug, Inc. v. Int'l Broth. Of Teamsters, Chauff., Warehousement & Helpers of America, Local 959, 688 P.2d 932 (Alaska 1984). In such case, the trespasser may at least be liable for nominal damages. Id. Consequently, Pat likely would prevail against Jeff for trespass.

The facts do not indicate whether Jeff and Brett stepped onto Pat's property the night that Pat suffered injury. To the extent that examinees discuss a possible trespass on that night, the analysis would be the same as the foregoing.

B. Jeff's claims against Pat (50 points).

Jeff will assert that Pat is liable for negligently causing Jeff's injury. No facts indicate a basis for any intentional tort by Pat.

The tort of negligence consists of four separate and distinct elements: (1) duty, (2) breach of duty, (3) causation, and (4) harm. Parks Hiway, 995 P.2d at 667 (citations omitted). The issue is whether Pat negligently caused Jeff injury by leaving open holes on his property (i.e. by failing adequately to warn or to make the condition safe).

To answer this question, examinees should consider whether Pat owed any duty to Jeff. This is the most difficult issue presented by the facts. The question of whether a person owes a duty is a question of law for the court. City of Seward v. Afognak Logging, 31 P.3d 780, 783 (Alaska 2001). If Pat owed a duty, it is easy to conclude that Pat breached his duty because he failed to post any warnings or to make the condition safe by covering the holes.

In Alaska, landowner liability is no longer predicated upon the common law classifications of the status of the person entering upon the land (i.e., trespasser, invitee, licensee). Webb v. City and Borough of Sitka 561 P.2d 731, 733 (Alaska 1977) (*superseded by statute on other grounds*). Instead, the rule adopted in Alaska is: "A landowner . . . must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk."

Thus, while Jeff was a trespasser, this fact is not determinative of Pat's duty under Alaska law. Nonetheless, the status of a plaintiff does bear on the foreseeability of the plaintiff's presence on the property and determines, in part, (a) the likelihood of injury to him, and (b) the extent to which the landowner must take action to avoid the risk of injury to a person. Id. at 734.

Jeff would have a strong argument that open holes on property present a significant likelihood of injury to others, including to Pat's neighbors. Reasonable minds might conclude the condition is a dangerous one. A

landowner's duty includes the duty "to use due care to guard against unreasonable risks created by dangerous conditions." Afognak Logging, 31 P.3d at 784 (Alaska 2001). That Jeff was a trespasser is relevant to the extent that a private property owner may not be expected to foresee the presence on his property of a trespasser. At the same time, Jeff was an adjoining property owner. While the likelihood of injury factor may go either way, examinees should at least recognize that Jeff's status as a trespasser is relevant to the issue of Pat's duty.

Jeff's injury was not serious (a sprained ankle); although, deep, open holes present the possibility of a serious injury. With regard to dangerous conditions, the Alaska Supreme Court has established that a property owner must use due care to guard against unreasonable risks created by dangerous conditions. Again, whether an open hole on residential property is a "dangerous" condition is arguable. If not a dangerous condition, Pat has a reasonable argument that his fence post holes did not genuinely present a risk of serious injury, such as death or serious bodily harm. On this fact, Pat's argument is reasonably persuasive.

Jeff's argument that Pat owed a duty is supported by the fact that the burden on Pat to avoid the risk was minimal. Pat simply could have covered the holes and likely could have used the lumber stacked near the holes to do so. Certainly, if Jeff were an invitee, the foreseeability of injury resulting from the risk would be distinct and a court likely would place a duty on Pat to act reasonably to minimize the risk. A court would be less inclined to conclude that Pat had a duty to protect a trespasser. In addition, the burden on Jeff to avoid the risk was not onerous. Jeff could have taken a flashlight or waited to inspect Pat's work until the next day. Considering all of the circumstances, a court could go either way on the legal question of whether Pat owed a duty to Jeff.

In analyzing the issue of duty, it is possible that examinees will review the seven factors identified by the Alaska Supreme Court in D. S. W. v. Fairbanks North Star Borough School Dist. for determining the existence of an actionable duty in situations not governed by settled law. These are:

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Afognak Logging, 31 P.3d at 784 (citing D. S. W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 555 (Alaska 1981)). An analysis of these factors is not inappropriate given that the rule described above considers all of the circumstances and the three factors identified are included in the D.S.W. factors.

Finally, examinees should recognize that Jeff's negligence also would be in issue; that is, the degree to which Jeff's lack of care contributed to his injuries. In Alaska, contributory negligence is not a complete defense to tort recovery, but merely reduces the plaintiff's recovery in proportion to the plaintiff's comparative fault. Joseph v. State, 26 P.3d 459, 472 (Alaska 2001) (citing AS 09.17.060). Failure to discover a hazard can constitute comparative negligence. Gillum v. L & J Enterprises, Inc., 29 P.3d 266, 270 (Alaska 2001). Pat would argue that Jeff had a duty to use reasonable care to discover the hazards on Pat's property. Jeff arguably should have walked with due care given that he was passing onto another's property; it was getting dark; and Jeff had noticed that construction materials were located on the property. If Jeff's negligence were found to have contributed to Jeff's injury, his recovery of damages would be reduced according to the percentage of his fault.