

## ESSAY QUESTION NO. 5

### Answer this question in booklet No. 5

David flew to Alaska on a night flight on which he did not sleep. He arrived at the airport in Anchorage in the morning. He rented a car and drove downtown to check into his hotel. After checking into the hotel, David decided to go sightseeing because he did not want to waste any of his time in Alaska. While leaving the hotel parking lot, David missed the street sign indicating that the road was one-way only. A large truck was parked in front of the sign. David began driving down the street the wrong way. David did not notice the cars parked on both sides of the street facing the other direction. As David approached the first intersection he failed to notice that the traffic light was facing away from him.

Peter was approaching the same intersection as David, but Peter was driving on the cross street. Peter had the right of way and entered the intersection. Peter was going to pick up his wife, Jane, who was standing on the sidewalk near the corner.

David crashed into Peter in the intersection, causing Peter extensive, traumatic injuries. An ambulance took Peter to a hospital where he remained for several months and had several surgeries. Jane recognized her husband's car and fainted. She had to undergo several months of counseling in order to deal with the horror of seeing her husband in the wreckage.

William was also standing on the corner and saw the accident. He immediately ran over and reached in the car to check Peter's pulse. William saw Peter's cell phone and used it to call an ambulance. William then put the cell phone in his pocket and walked off.

Alaska has a regulation that provides that, "upon a roadway designated for one-way traffic, a vehicle must be driven only in the direction designated by a sign."

1. Discuss any cause of action that Peter could bring against David.
2. Discuss any cause of action that Jane could bring against David.
3. Discuss any cause of action that Peter could bring against William.



## GRADER'S GUIDE

### \*\*\* QUESTION NO. 5 \*\*\*

#### SUBJECT: TORTS

##### **I. Negligence Per Se – 35%**

The elements of negligence are duty, breach, proximate cause, and damages. Wickwire v. Arctic Circle Air Services, 722 P.2d 930, 932 (Alaska 1986). The doctrine of negligence per se allows a plaintiff to establish duty and breach by proving that the defendant violated a statute or regulation. Ferrell v. Baxter, 484 P.2d 250, 256-57 (Alaska 1971). Peter may be able to make out a claim for negligence per se.

A court may adopt a traffic regulation as the standard of care if the purpose of the regulation is (1) to protect the class of people that includes the plaintiff, (2) to protect the particular interest which was invaded, (3) to protect that interest against the kind of harm which resulted, and (4) to protect that interest from the particular hazard from which the harm resulted. Ferrell v. Baxter, 484 P.2d 250 263 (Alaska 1971). The unexcused violation of a regulation adopted as the standard of care is negligence in itself. Id. at 264. The supreme court generally views traffic laws as prescribing the standard of care owed by a reasonable driver. Getchell v. Lodge, 65 P.3d 50, 53 n. 9 (Alaska 2003). However, substitution of a statute or regulation for the general standard of care is only appropriate when the statute or regulation prescribes specific conduct. Bailey v. Lenord, 625 P.2d 849, 856 (Alaska 1981). A regulation which sets out a general or abstract standard of care is not sufficient. Id. If the court does not adopt the regulation as the standard of care, an unexcused violation of the regulation may nonetheless be considered as evidence of negligence. Ferrell, 484 P.2d at 264. Generally, a violation of a regulation is excused when (1) the violation was reasonable because of the actor's incapacity, (2) the actor neither knew nor should have known of the occasion for compliance, (3) the actor is unable after reasonable diligence or care to comply (4) the actor is confronted by an emergency not of his own making, and (5) compliance would involve a greater risk of harm to the actor or others. Getchell v. Lodge, 65 P.3d 50, 53 n. 9 (Alaska 2003).

The ordinance requiring a driver to drive only in the direction designated meets the four criteria set out in Ferrell. The trial court in Ferrell instructed the jury that a violation of the state regulation requiring drivers to remain in their lanes of travel was negligence. The regulation provided that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from said lane until the driver has first ascertained that such movement can be made with safety." Ferrell, 484 P.2d at 255. The supreme court upheld the trial court, concluding that the regulation met the four criteria. According to

the court, the regulation was “designed to protect the motoring public against personal and property damage and non-driving vehicle owners against property damage from collisions” caused by violations of the regulation. Id. at 265.

Peter was a member of the motoring public and the regulation was intended to protect him from collisions caused by other drivers driving the wrong way on a one-way street. David’s action of driving the wrong way invaded Peter’s interest in driving safely. Moreover, Peter suffered the kind of personal and property damage that the ordinance was designed to protect against. Finally, the ordinance was intended to prohibit drivers like David from driving the wrong way down a one-way street.

The court will have to decide whether the regulation incorporates the general duty of care. In Breitkreutz v. Baker, 514 P.2d 17, 20 - 21 (Alaska 1973), the supreme court held that a regulation which prohibited a driver from following more closely than was reasonable and prudent merely incorporated the general standard of care. The ordinance in the question is different because it contains an express and specific command: drivers must drive only the direction designated by a sign. Thus, a court should find that this regulation does not merely incorporate the general duty of care.

The facts show that David’s conduct caused the accident. “As a general rule, Alaska follows the "substantial factor test" of causation.” Vincent by Staton v. Fairbanks Memorial Hosp., 862 P.2d 847, 851 (Alaska 1993). “Normally, in order to satisfy the substantial factor test it must be shown both that the accident would not have happened 'but for' the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it.” State v. Abbott, 498 P.2d 712, 727 (Alaska 1972). The facts indicate that the accident would not have happened but for David’s driving the wrong way. Peter had the right of way and entered the intersection. David entered the intersection when he did not have the right of way because he failed to notice that the traffic light was facing away from him.

The facts also indicate that Peter suffered damages, for the accident caused extensive, traumatic injuries. Peter had to stay at the hospital for several months and had several injuries.

As noted above, a violation of a regulation is excused when the actor neither knew nor should have known of the occasion for compliance. David will want to argue that he neither knew nor should have known that the road was a one-way road because a large truck was blocking the sign. Thus, David would argue that he did not know that he had to comply with the sign because he did not see the sign. However, the fact that David failed to notice the parked cars and the traffic light indicate that he should have known that he was on a one-way street.

## **II. Negligence – 25%**

Assuming that the regulation at issue does not provide a specific enough standard for negligence per se, Peter will have to establish that David breached some duty, causing Peter's injuries. In the absence of a statute, regulation, contract, undertaking, the parties' preexisting relationship, or existing case law, the Supreme Court of Alaska uses a multifactor test to determine whether someone owes a duty. D. S. W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 555 (Alaska 1981); McGrew v. State, 106 P.3d 319 (Alaska 2005). Peter will not have to rely on D.S.W., however, for the supreme court has long applied the reasonable person standard to automobile drivers. Ferrell, 484 P.2d at 264-65.

Applying the reasonable person standard indicates that David breached his duty. David should have realized that he was going the wrong way down a one-way street. There were parked cars on both sides of the street facing the other direction. David also failed to notice that the traffic light at the intersection was facing the wrong direction. Moreover, it is foreseeable that someone will approach an intersection with a one-way street looking only for cross-traffic coming from the correct direction and will fail to notice traffic coming down the street in the wrong direction. A reasonable person in David's position would have realized driving the wrong way down a one-way street could cause an accident.

Peter may have an additional claim based on the general duty of care. David was up all night because he flew to Alaska on a night flight and did not sleep on the flight. Nonetheless, David went sightseeing because he did not want to waste any of his time in Alaska. A reasonable person would realize that driving while tired could cause an accident. Although the facts do not specify that David was tired, they indicate that he was up all night and was missing obvious clues about the direction of travel on the road. A jury could infer that he was tired from the facts presented. Thus, a person in David's situation should have realized that driving was not a reasonable activity.

As discussed above, the facts indicate that the accident would not have happened but for David's driving the wrong way. Peter had the right of way and entered the intersection. David entered the intersection when he did not have the right of way because he failed to notice that the traffic light was facing away from him. Moreover, David drove the wrong way and missed the fact that the light was facing away from him because he was too tired to be driving.

As also discussed above, the facts indicate that Peter suffered damages, for the accident caused extensive, traumatic injuries. Peter had to stay at the hospital for several months and had several injuries.

### **III. Jane's Claim - Negligent Infliction of Emotional Distress - 20%**

Ordinarily a person must suffer a physical injury to recover for the negligent infliction of emotional distress. Allstate Insurance Co. v. Teel, 100 P.3d 2, 5 (Alaska 2004). However, a bystander may recover without a physical injury if he (1) was located near the scene of the accident, (2) had shock resulting from the sensory and contemporaneous observance of the accident, and (3) had a close relationship with the victim. Id.

Jane can probably satisfy all three requirements. Jane was located near the scene because she was standing on the sidewalk near the corner. Jane fainted at the scene when she saw the accident. She also required counseling in order to deal with the horror of seeing her husband in the wreckage. Finally, Jane was Peter's wife, so she presumably had a close relationship with him.

### **IV. Conversion - 20%**

Peter may have a claim for conversion against William based on William's walking off with the cell phone. Conversion has three elements: (1) the plaintiff must have a possessory interest in the property; (2) the defendant intentionally interfered with the plaintiff's possession; and (3) the defendant's actions were the legal cause of the plaintiff's loss of property. K & K Recycling, Inc. v. Alaska Gold Co., 80 P.3d 702, 717 (Alaska 2003). The facts are clear that Peter would be able to prove the first and third elements. Peter had a possessory interest in the cell phone because it was his. William's actions were also the legal cause of Peter's loss of the cell phone. Peter would, of course, still have the phone if William had not taken it. However, the facts are ambiguous with respect to the second element, for William may or may not have intentionally interfered with Peter's interest in the phone. According to the facts, William put the cell phone in his pocket and walked away. It is possible that William consciously put the cell phone in his pocket with the intent to keep it. But it also possible that he absent mindedly or unconsciously put the phone in his pocket. Thus, Peter's claim hinges upon the question of what was William's intent when he put the cell phone in his pocket.