

ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Steve was driving a small car down a road in Anchorage. Joe was driving behind Steve in his large pickup which had a snow plow on the front. The snow plow was manufactured by Snow Blades, Inc. Joe had the snow plow blade raised as high as he could so that it was several feet off of the ground. The road was icy.

Anchorage has an ordinance requiring snow plow blades to be no more than 18 inches off of the road while the vehicle is traveling on a public road. The city assembly adopted the ordinance because a plow blade in a raised position will cause more serious injuries in a collision because it will be more likely to penetrate the passenger compartment of a car in a collision.

Joe pulled up behind Steve at a stop light. Joe was scanning the parking lots looking for opportunities for work plowing snow, so he almost hit the back of Steve's car. Joe would have hit Steve's car if his plow had been lowered. However, because he had it raised so high, it cleared the back of Steve's car. Joe was about to back up little so that his blade would not be suspended over Steve's car when he heard a loud crack. The hydraulic system holding up his snow plow blade failed and the blade crashed down on the back of Steve's car. The blade smashed the back of the car in and caused the front end of the car to bounce up and down suddenly. Joe got out of his truck to check on Steve and the damage to Steve's car.

Steve injured his head when the car bounced as a result of the falling plow blade. Steve became very angry, and though injured, he was not incapacitated. He grabbed a tire iron from his car and got out to confront Joe. Steve began screaming at Joe and waving the tire iron. Steve's behavior intimidated Joe who backed up against the side of his truck. Steve then began swinging the tire iron on either side of Joe's head, striking the truck. Steve did not hit Joe although he came very close. Steve broke a window and put several large dents in Joe's truck.

Joe was so terrified by the experience that he began having anxiety attacks during the day and nightmares when he slept. He needed six months of psychological counseling to alleviate the problems.

The snow plow's hydraulic system failed because a seal on one of the hydraulic cylinders had a microscopic crack in it. The seal cracked during the manufacturing process and was so small that it was not detectable during the reasonable inspection processes that Snow Blades, Inc. used before shipping its snow plows. Snow Blades, Inc. inspects the plows carefully because it knows that its consumers do not inspect them before buying them. That the

crack occurred at all was a fluke, for Snow Blades, Inc. uses exceptional care in manufacturing its snow plows.

1. Discuss the claims that Steve could bring to recover damages.
2. Discuss the claims that Joe could bring against Steve to recover damages.

GRADER'S GUIDE

*** QUESTION NO. 2 ***

SUBJECT: TORTS

I. Steve's Claims

A. Product's Liability – 15%

Steve may have a product's liability claim against Snow Blades, Inc. based on a manufacturing defect. Nothing in the facts indicates that the cracked seal resulted from a design defect or that there was a failure to warn.

"A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992). A litigant may also recover for property damage caused by a defective product. *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1176-78 (Alaska 1993). "A product may be defective because of a manufacturing defect, a defective design, or a failure to contain adequate warnings." *Shanks*, 835 P.2d at 1194.

Snow Blades, Inc. placed the snow plow on the market because it manufactured the snow plow and then sold it. Snow Blades, Inc. also knew that its consumers would use the snow plow without inspecting it. That is why it inspected the snow plows before selling them. The snow plow had a defect in it when it left Snow Blades, Inc., for it had a microscopic crack in a hydraulic seal. This defect caused Steve to suffer damages. When the seal failed, the plow blade crashed down on Steve's car, smashing in the back of the car in. The falling plow blade also injured Steve when it caused the car to bounce.

B. Negligence – 35%

Steve may have a claim for negligence against Joe.

1. Common Law Negligence

The elements of negligence are duty, breach, proximate cause, and damages. *Wickwire v. Arctic Circle Air Services*, 722 P.2d 930, 932 (Alaska 1986).

a) Duty

In the absence of a statute, regulation, contract, undertaking, pre-existing 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). Steve 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.

b) Breach

Applying the reasonable person standard indicates that Joe may have breached his duty of care two ways. First, he may have breached his duty by driving with the blade raised high, for it is foreseeable that a truck with its plow blade raised high could end up with the blade overhanging a stopped car, especially given the potential for sliding on icy road. It is also foreseeable that a hydraulic system could break, allowing the blade to crash down. Thus, a jury could conclude that a reasonable person would have taken care to drive with the blade lower to the ground. On the other hand, a jury might conclude that the cracked seal was not so foreseeable that a reasonable person would have taken precautions against its occurrence. Joe also arguably breached his duty by following too closely given the conditions on the road. A reasonable person would have left enough room between the vehicles so that he could stop soon enough that his plow blade would not overhang the car in front.

c) Causation

The facts also show that Joe's conduct caused the accident. "As a general rule, Alaska follows the 'substantial factor test' of causation." *Vincent by Stanton 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 occurred but for Joe's conduct. The blade would not have overhung Steve's car had Joe not had it raised to its highest position. Similarly, had he not been following so closely, then he could have stopped before the blade overhung Steve's car. The facts suggest that Joe's driving would have caused an accident even if he had the blade in a lower position, for the blade would have impacted Steve's car had it been lower.

d) Damages

The facts also indicate that Steve suffered damages, because he hurt his head and the blade smashed his car's back in.

2. Negligence Per Se

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).

A court may adopt a traffic regulation as the standard 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. 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 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.

Here, the ordinance prescribes specific conduct. It requires a driver travelling on public roads to have the blade no more than 18 inches off of the ground. The ordinance may not, however, meet all four of the foundational criteria. The ordinance meets the first three criteria but not necessarily the fourth.

The first criterion requires the ordinance to protect the class of people that includes the plaintiff. The ordinance protects passengers in other cars travelling on the road. Steve is a member of that class.

The second criterion requires the ordinance to protect the particular interest that was invaded. The interest protected by the ordinance is the interest in not being injured as the result of the impact of a snow plow blade with the passenger compartment of the car. Steve was injured when Joe's snow plow blade impacted back of his car. The facts are not clear as to whether the back of the car was part of the passenger compartment, so the ordinance might or might not meet this criterion.

The third criterion requires the ordinance to protect that interest against the kind of harm that resulted. Steve suffered a physical injury, the type of harm that the ordinance was intended to protect against.

The fourth criterion requires the ordinance to protect that interest from the particular hazard from which the harm resulted. The ordinance might not meet this criterion. The ordinance was intended to protect people from the hazard created by the plow blade impacting the passenger compartment of a car during a collision. The raised blade is more likely to penetrate the passenger compartment and injure the car's occupants. In the present case, however, Joe did not collide with Steve. Rather, the plow blade caused the injuries when it fell on the back of Steve's car. A court could conclude that a falling blade was not the particular hazard against which the ordinance was intended to protect.

II Joe's Claims Against Steve

A. Assault – 15%

The tort of assault has three elements: intent to cause fear of harmful or offensive contact, conduct that causes an imminent apprehension of harmful or offensive contact, and damages. *Merrill v. Feltin*, 430 P.2d 913, 917 (Alaska 1967); *Lowdermilk v. Lowdermilk*, 825 P.2d 874, 879 (Alaska 1992). The facts support the conclusion that Steve assaulted Joe. Steve became very angry and grabbed a tire iron. He began screaming at Joe and waving the tire iron. His behavior intimidated Joe sufficiently that Joe backed up against his truck. Steve then began swinging the tire iron, striking the truck. Steve's conduct supports the inference that he intended to cause Joe fear, and Steve's conduct appears to have caused Joe to believe that he was going to be struck, for he was intimidated by Steve's behavior. Moreover, Joe was so terrified by Steve's conduct that he suffered a psychological injury. He had to go to counseling for

six months to alleviate the nightmares and anxiety attacks that he suffered as a result of Steve's conduct.

B. Intentional Infliction of Emotional Distress – 15%

“To plead a claim for [intentional infliction of emotional distress], a plaintiff must allege these necessary elements: (1) the conduct is extreme and outrageous, (2) the conduct is intentional or reckless, (3) the conduct causes emotional distress, and (4) the distress is severe.” *McGrew v. State, Dept. of Health and Social Services*, 106 P.3d 319, 324 (Alaska 2005).

Arguably, Steve's conduct was outrageous. He began screaming and swinging a tire iron. Ultimately, he essentially pinned Joe up against his truck while swinging the tire iron so that he was striking the truck on either side of Joe's head. Moreover, he was striking the truck hard enough to cause dents and to break a window. Given the potential for serious injury, a jury could conclude that Steve's swinging of the tire was extreme and outrageous.

As noted above, Steve's conduct supports the inference that it was intentional. Steve began by screaming and waving the tire iron. He then escalated the assault by backing Joe up against the truck and striking the truck on either side of Joe's head.

Steve's conduct caused Joe to suffer emotional distress, for he had nightmares and anxiety attacks as a result of the assault. A jury could reasonably find that Joe's distress was severe because it required six months of psychological counseling to treat.

C. Conversion and Trespass to Chattels – 10%

Joe will be able to establish either the tort of conversion or trespass to chattels. 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). Trespass to chattels is essentially conversion but to a lesser degree. *Id.* A person commits trespass to chattels when the person intentionally dispossesses another of a chattel or intentionally uses or interferes with a chattel in another's possession. *Id.* at n. 26. Destruction of a chattel is conversion rather than trespass. *Mitchell v. Heinrichs*, 27 P.3d 309, 311 n.1 (Alaska 2001).

Joe had a possessory interest in his truck. Steve intentionally interfered with that interest when he struck the truck with the tire iron, causing large dents and breaking a window. As indicated above, the facts support an inference that Steve's conduct was intentional. He struck the truck repeatedly,

continuing to strike the truck after causing the first bit of damage. The facts do not indicate that Steve damaged the truck sufficiently to cause its destruction. Thus, a jury would more likely conclude that he committed a trespass to chattel rather than a conversion.

D. Punitive Damages – 10%

The finder of fact may award punitive damages if the plaintiff proves by clear and convincing evidence that the defendant's conduct was either outrageous, including acts done with malice or bad motive, or that it evidenced reckless indifference to the interest of another person. AS 09.17.020(b); *Ross Laboratories v. Thies*, 725 P.2d 1076, 1081 (Alaska 1986).

As noted above, Steve's conduct was arguably outrageous. He began screaming and swinging a tire iron. Ultimately, he essentially pinned Joe up against his truck while swinging the tire iron so that he was striking the truck on either side of Joe's head. Moreover, he was striking the truck hard enough to cause dents and to break a window. Given the potential for serious injury, a jury could conclude that Steve's swinging of the tire was outrageous.

A jury could also conclude that Steve's conduct evidenced a reckless disregard for Joe's interests. "Reckless indifference to the interests of others" means a "conscious disregard" of the risk that one's conduct will injure the interests of the others. The facts suggest that Steve's conduct was more egregious than merely consciously disregarding the risk that he would injure Joe's interest, for as noted above, the facts support the inference that Steve's conduct was intentional. Steve continued his assault even after Joe backed away and he continued striking the car after he caused the first dent. These facts support the inference that Steve actually had the conscious objective of injuring Joe's interests.