

## ESSAY QUESTION NO. 8

### Answer this question in booklet No. 8

Paul and David were friends and neighbors in Anytown, Alaska for several years. Early on in their friendship, Paul and David found that they shared a common love for Anytown's best pizza, served at Alaska Pizza Place. David loved the pizza at Alaska Pizza Place so much that he took a job at there as a pizza delivery person. David was well-known as one of Alaska Pizza Place's hardest working and most dedicated employees.

David was on a break one night at Alaska Pizza Place, when Paul walked into the restaurant. Happy to see his friend, David offered to treat Paul to a gourmet pizza of his choice. The two ordered a pizza to split and settled into a booth. As they waited for their meal, Paul began to tell David about the wonderful pizza that he had tried at a new rival restaurant in town. Paul even went so far as to suggest that the new restaurant served better pizza than Alaska Pizza Place. David, being the dedicated Alaska Pizza employee that he was, scoffed at the suggestion. As Paul and David received their order and started eating, however, Paul reiterated that the pizza at the new restaurant was much better and that he now had a new favorite pizza restaurant.

Paul's words were too much for David to stomach. When Paul would not take those words back, David hurled a slice of his hot pepperoni pizza at Paul's head. Paul quickly ducked out of the way, and the pizza slice hit another customer, Janet, in the back of the head. The force of the thrown pizza slice caused Janet to slip to the ground and sprain her knee.

Having failed to hit Paul with his pizza, David lunged at Paul and began punching him repeatedly in the head and chest. Paul was left with a split lip and several bruises by the time bystanders were able to subdue David. Another Alaska Pizza Place employee remarked that David had been in a foul mood for most of the day and that David's manager had had to reprimand him for fighting with a co-worker earlier that evening.

1. Paul and Janet decide to sue David. Assuming that Paul and Janet suffered no emotional distress as a result of David's behavior, discuss the claims, if any, each of them can make against David. Do not discuss damages.
2. Paul also decides to sue David's employer, Alaska Pizza Place. Discuss whether Paul will prevail in his claim or claims against Alaska Pizza Place, and explain why or why not.

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 8 \*\*\*

#### SUBJECT: TORTS

- 1. Paul and Janet decide to sue David. Assuming that Paul and Janet suffered no emotional distress as a result of David's behavior, discuss the claims, if any, each of them can make against David. Do not discuss damages. (60%)**

a. Paul's Claims Against David (30%)

i. Assault

Paul can make assault claims against David, based both on David's throwing of a pizza slice at Paul, and David's punching of Paul. Assault occurs when a person intends to cause a harmful or offensive contact with another person or intends to create in another person the immediate apprehension of such a contact, and the other person is put in immediate apprehension of the harmful or offensive contact. *Williams v. Alyeska Pipeline Service Co.*, 650 P.2d 343, 348 (Alaska 1982); *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); see also Restatement (Second) Torts § 21 (1965). The intent to cause a harmful or offensive contact is material only where the assault is committed in performance of an act not otherwise unlawful. If the intended contact is unlawful or inherently wrongful, the actor need not mean for the contact to be harmful or offensive; the only intent required is to cause the unlawful or inherently wrongful contact, or the apprehension of such contact, to occur. *Merrill v. Faltin*, 430 P.2d 913, 917 (Alaska 1967).

There can be little dispute here that David intended to throw his piece of pizza at Paul's head, and he intended to punch Paul multiple times. There can also be little dispute that the intended harm – being hit in the face by a flying slice of hot pizza and/or being hit by David's hand or fist (i.e. receiving a punch) – constitutes a harmful and/or offensive contact. Additionally, Paul certainly apprehended that the harmful and/or offensive contact of being hit by a piece of pizza was about to occur, as he responded by ducking out of the way to avoid being hit. Moreover, Paul most likely appreciated the offensive contact that was about to occur when David lunged at him and started throwing punches at him. David thus committed multiple assaults upon Paul, one when he threw his pizza slice at him and at least one when he threw punches at Paul.

ii. Battery

Paul also has a battery claim against David. Battery is the intentional unlawful touching of another person. A person is liable for battery if the person acts with 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 § 13 (1965). As with assault, the intent to cause a harmful or offensive contact is material only where the battery is committed in performance of an act not otherwise unlawful. If the intended contact is unlawful or inherently wrongful, the actor need not mean for the contact to be harmful or offensive; the only intent required is to cause the unlawful or inherently wrongful contact to occur. *Merrill v. Faltin*, 430 P.2d 913, 917 (Alaska 1967).

Here, David's punching of Paul in the head and chest merges from an assault into a battery when the intended contact is accomplished. Because punching a person is an unlawful act in itself, it does not matter whether David himself considered the punching harmful or offensive. The key is that David meant to punch Paul. Furthermore, David was successful in punching Paul. The harmful and offensive contact – or in the alternative, unlawful contact – intended by David was completed, meeting the elements of a battery.

b. Janet's Claims Against David (30%)

Janet can also make a battery claim against David. The elements of Janet's claim are the same as those discussed with respect to Paul's battery claim. Here, David accomplished a harmful and/or offensive contact with Janet when the piece of pizza that he intentionally threw contacted Janet. Under tort law, it does not matter that David intended for the pizza slice to hit Paul. The 'intent' element of a battery is satisfied as long as the tortfeasor intended a harmful and/or offensive contact with someone, whether with the person actually contacted or a third person. This is generally known as the doctrine of transferred intent. As provided in the Restatement (Second) Torts:

An actor is subject to liability to another for battery if:

- (a) He 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
- (b) A harmful contact with the person of the other directly or indirectly results.

*Id.* at § 13; *see also* 6 Am. Jur. 2d Assault and Battery § 99 ("The tort of battery or of assault and battery may be committed, although the person struck or hit by the defendant is not the one whom he intended to strike or hit.").

Because David intended a harmful and/or offensive conduct with someone – namely, he intended to throw a hot pizza slice at David – and because he completed that intended harmful and/or offensive contact with Janet, David is liable to Janet for battery.

Notably, David is probably not liable to Janet for assault. Although Janet could prove that David intended a harmful and/or offensive contact, she likely cannot prove under the facts given that she anticipated the harmful and/or offensive contact before it occurred. As with battery, the tort of assault is

subject to the doctrine of transferred intent. See Restatement (Second) Torts § 32 (1965). In other words, for purposes of the intent element, it does not matter that David did not mean to hit Janet with his pizza slice or to create an apprehension in Janet that she would be so hit, as long as he intended to hit someone or create that apprehension in someone. The fact that the thrown pizza slice hit Janet in the back of the head, however, indicates that Janet probably did not see the slice of pizza as it was coming toward her. If Janet did not anticipate being hit by the pizza slice prior to the contact, she was not assaulted.

Janet may also potentially be able to assert a negligence claim against David. The tort of negligence consists of four separate and distinct elements: (1) duty, (2) breach of duty, (3) causation, and (4) harm. *Parks Hiway Ent., LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 667 (Alaska 2000) (internal citations omitted). Here, Janet may be able to establish that David owed bystanders in the pizza place a duty not to endanger them through his violent conduct. In other words, David arguably had a duty not to conduct himself in a manner that would endanger others. If Janet can establish that David owed such a duty to her, she is also likely to establish that David breached that duty by throwing a hot pizza slice in her general direction. Finally, according to the facts provided in the question, the force of David's thrown pizza slice caused harm to Janet – her fall and resulting sprained knee. Regardless, any negligence claim would be asserted in addition to Janet's battery claim.

**2. Paul also decides to sue David's employer, Alaska Pizza Place. Discuss whether Paul will prevail in his claim or claims against Alaska Pizza Place, and explain why or why not. (40%)**

**a. Respondeat Superior (25%)**

Under Alaska law, the acts of an employee are attributable to the employer if the employee's acts fall within his or her scope of employment. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 346 (Alaska 1990); *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986). This is known as the doctrine of respondeat superior. *Id.*

Whether an employee like David was acting within the scope of his employment "is a fact-specific issue requiring case-by-case determination." *Taranto v. North Slope Borough*, 909 P.2d 354, 359 (Alaska 1996). The Alaska Supreme Court has held that several factors can be applied in determining the question, including those factors provided in sections 228 and 229 of the Restatement (Second) of Agency. See *Ondrusek v. Murphy*, 120 P.3d 1053 (Alaska 2005) (discussing and utilizing both sections in applying the doctrine of respondeat superior). According to section 228:

1. Conduct of a servant is within the scope of employment if, but only if:
  - a. it is of the kind he is employed to perform;

- b. it occurs substantially within the authorized time and space limits;
  - c. it is actuated, at least in part, by a purpose to serve the master;  
and
  - d. if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
2. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little attenuated by a purpose to serve the master.

Further, section 229 of the Restatement (Second) of Agency provides in pertinent part:

In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

- a. whether or not the act is one commonly done by such servants;
- b. the time, place, and purpose of the act;
- c. the previous relations between the master and the servant;
- d. the extent to which the business of the master is apportioned between different servants;
- e. whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to another servant;
- f. whether or not the master has reason to expect that such an act will be done;
- g. the similarity in quality of the act done to the act authorized;
- h. whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
- i. the extent of departure from the normal method of accomplishing an authorized result; and
- j. whether or not the act is seriously criminal.

Although some of the above factors weigh in favor of finding David's tortious acts to be within his scope of employment, or sufficiently similar to acts authorized under his scope of employment, Paul's respondeat superior claim against Alaska Pizza Place will probably fail. Although David was certainly in his place of employment when he committed the acts at issue, and while David committed the acts during his shift rather than during a day off or before or after hours, David's acts likely fall too far outside of his authorized duties as a pizza delivery person to hold his employer responsible. After all, nothing conceivably within the scope of a pizza delivery person's duties is at all similar to the acts of throwing pizza at another person and/or physically attacking another person. Indeed, David's acts of assault and battery are arguably intentional criminal acts, taking his conduct far beyond those acts that might normally fall within a delivery person's – or anyone's – scope of employment. See Restatement (Second) of Agency § 229 (2)(j).

One might argue that David was acting on behalf of, or in furtherance of, Alaska Pizza Place when he assaulted and battered Paul for talking up the competition; however, regardless of David's motive, there is little chance that Alaska Pizza Place received any benefit from David's show of violence. David may have believed he was promoting the interests of Alaska Pizza Place, but in truth, David's actions probably damaged his employer's interests.

Additionally, one might argue that David's manager at Alaska Pizza Place should have expected David's violent outburst, given that he had reprimanded David earlier in the day for fighting with a colleague. The question does not provide the context and facts surrounding David's earlier fight with his co-worker; however, such a fight probably does not provide enough notice to Alaska Pizza Place to render David's intentional torts of assault and battery within or sufficiently close to his scope of employment. The employer has a strong argument that one fight with a co-worker – particularly where the employee in question was known for his hard work and dedication – is a far cry from committing intentional torts on a customer. The facts together likely do not support such extension of liability to the employer under a theory of respondeat superior.

b. Negligent Supervision/Retention (15%)

David may have an argument that Alaska Pizza Place was negligent in retaining David as an employee after the fight with his co-worker or in negligently supervising David. In a negligence case, the plaintiff must establish: (1) a duty of care; (2) a breach of the duty; (3) causation; and (4) harm. *Silvers v. Silvers*, 909 P.2d 786 (Alaska 2000).

Alaska Pizza Place clearly owed a duty of care to its patron, Paul, but the extent of that duty may depend on several factors, including but not limited to the foreseeability of David's conduct and the subsequent harm to Paul, the policy of preventing future harm, and the extent of the burden to the defendant and the consequences to the community created by imposition of a given duty. See e.g., *Karen L. v. State Dep't of Health and Social Services, Div. of Family and Youth Services*, 953 P.2d 871 (Alaska 1998); *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981). While one generally does not owe a duty to another to control the conduct of a third party, *R.E. v. State*, 878 P.2d 1341, 1348 (Alaska 1994); Restatement (Second) of Torts § 314 (1965), Alaska Pizza Place arguably had a "special relationship" with David that allowed it some control over David's behavior, particularly while he was in the workplace.

Whether Alaska Pizza Place breached any duty owed to Paul likely depends most on ability of Alaska Pizza Place – and David's supervisor in particular – to foresee David's conduct and the harm that resulted to Paul. On one hand,

Paul may argue that David had just been in a fight earlier in evening, and that David's supervisor should have predicted that he could act out toward customers – particularly during this day when he had exhibited such a foul temper. Paul can suggest that David's earlier fight should have moved David's supervisor to fire David, discipline him more severely, send him home, or supervise him more closely. Paul would thus argue that Alaska Pizza Place was negligent in keeping David on the job or in failing to appropriately supervise him.

On the other hand, Alaska Pizza Place could argue that David's isolated fight with his co-worker did not put them on notice that David was likely to physically attack a customer. The facts of the question indicate that David's supervisor did not ignore the fight – rather, he handled it by reprimanding David. Additionally, the facts indicate that David was otherwise known as Alaska Pizza Place's hardest working and most dedicated employee. Alaska Pizza Place would thus argue that despite David's one fight, it was reasonable to continue retaining him. The pizza place would further assert that David's manager afforded David an appropriate level of supervision. The question does not provide enough detail to fully resolve the dispute, but examinees should recognize the arguments supporting and detracting from Paul's claim that Alaska Pizza Place breached a duty owed to him.

If Paul can establish that Alaska Pizza Place had a duty to control David's conduct in question and that the pizza place breached that duty, he will probably also meet the causation and harm elements. Paul's harm is clear – he suffered physical injuries at the hands of David. A legal cause of harm is an act or failure to act which is a substantial factor in bringing about the harm. See Alaska Pattern Instruction 3.06 on Legal Cause; *Sharp v. Fairbanks North Star Borough*, 569 P.2d 178, 181 (Alaska 1977); *State v. Abbott*, 498 P.2d 712, 727 (Alaska 1972). An act or failure to act is a substantial factor in bringing about harm if it is more likely true than not true that: (1) the act or failure to act was so important in bringing about the harm that a reasonable person would regard it as a cause and attach responsibility to it; and (2) the harm would not have occurred by for the act or failure to act. Assuming Paul can establish that Alaska Pizza Place should have fired David prior to his altercation with Paul or should have better supervised David when that altercation took place, he likely can also demonstrate that the pizza place's actions – or failure to act – constituted a legal cause of the injuries that he suffered.