

ESSAY QUESTION NO. 6

Answer the question in booklet No. 6

The state Department of Roads maintains the road between Alaskaville and Baranofana. There is one bridge on this road that is also owned and maintained by the state. There is a warning sign on the road listing the maximum weight the bridge can hold. The bridge is old and has recently failed all standard strength testing. The state engineer wrote a report to the department in January 2013 outlining the strength test results. The report also stated that the bridge is no longer safe and requires replacement. The department did not close the bridge to traffic after receiving this report.

Dave is a truck driver who owns and operates his own truck and trailer that he uses to haul freight throughout Alaska. In June 2013, Dave was driving on the road. Dave knew his truck and trailer exceeded the maximum weight for the bridge, but he had driven over this bridge many times with loads over the maximum weight with no problem. As he drove over the bridge, it collapsed and Dave's truck fell into the shallow river below.

Pam was driving down the road behind Dave. She was unable to stop her car as the bridge collapsed and also drove into the creek below. Pam's car was damaged from the fall into the creek. Pam also broke her arm in the crash and was trapped in her car. Seth, an employee of the state rescue team, was called to the bridge to get Pam out of her car. Seth told Pam that "a broken arm is not that bad," as he got her out of the car. Seth then hit her hard in the back and told her to "just start walking" as he brought her back to the road.

Pam filed a lawsuit against the state and Dave within the appropriate statute of limitations period.

1. Pam filed a negligence claim against the state based on the collapse of the bridge. What arguments will the state raise against liability and damages?
2. Does Pam have a viable claim for battery against the state based on Seth's conduct? Why or why not?

GRADERS' GUIDE
***** QUESTION NO. 6 *****
TORTS

1. Pam filed a negligence claim against the state based on the collapse of the bridge. What arguments will the state raise against liability and damages? (70%)

A. Defense to Liability (35%)

The answer to this question should begin with a brief description of the elements one must establish for a negligence claim: (1) a duty owed by the defendant, (2) a breach of that duty, (3) a showing that the breach of the duty caused damages, and (4) damages. *Wickwire v. Arctic Circle Air Services*, 722 P.2d 930, 932 (Alaska 1986). The focus of this answer should not be solely on the elements of negligence. Rather, the examinee should set out the elements for negligence in order to discuss the defenses the state will proceed on in defending the claim against liability.

In this case the State has a duty to exercise reasonable care to maintain the road and bridge in a safe condition. *See State v. Guin*, 555 P.2d 530, 535 (Alaska 1972) (affirming the trial court's ruling that the State had a duty to exercise reasonable care in maintaining the Chena Hot Springs Road and noting that the State has a duty to exercise reasonable care to maintain Alaska's roads in a safe condition). No apparent defense exists for the state in this respect. The department maintains the road between the two towns as well as the bridge that collapsed. Some examinees may provide an analysis of whether a duty exists under *D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alaska 1981).¹

Given the state's duty to maintain the bridge, it will have little success in arguing that it did not breach its duty in this case. The bridge had failed standard strength testing. The state's own engineer reported that the bridge was unsafe and required replacement several months before its ultimate collapse.² Despite this, the state did not close the road and continued to let

¹ Under *D.S.W.* the factors used in determining whether a duty exists include: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) 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 (7) the availability, cost and prevalence of insurance for the risk involved. *D.S.W.*, 628 P.2d at 555, citing *Peter W. v. San Francisco Unified School District*, 131 Cal.Rptr. 854 (Cal.App.1976).

² Examinees may discuss the application of discretionary function immunity as a defense for the state and should receive credit for this. Under AS 9.50.250(a)(1), a tort action may not be brought against the state if it is based "upon the exercise or performance or the failure to

traffic go across the bridge. These facts suggest that the state did breach its duty to maintain the bridge as it was aware of a known danger related to the bridge and failed to replace it after receiving the engineer's report. The state's best defense against liability will rest on arguments related to causation.

The state will claim that, regardless of the condition of the bridge, it was Dave who caused the bridge to collapse. "Alaska follows the "substantial factor test" of causation, which generally requires the plaintiff to show 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 individuals would regard it as a cause and attach responsibility to it." *Winschel v. Brown*, 171 P.3d 142, 148 (Alaska 2007), citing *Vincent by Staton v. Fairbanks Mem'l Hosp.*, 862 P.2d 847, 851 (Alaska 1993). "[P]roximate cause usually involve[s] questions of fact within the province of the jury; proximate cause becomes a matter of law only where reasonable minds cannot differ." *Id.* (citations omitted).

Because the facts are unclear as to whether Pam had started to cross the bridge before it collapsed, and because Dave had driven over the bridge before without incident, an examinee may also note that the State may argue that the weight of Pam's car may have contributed to the collapse of the bridge.

An examinee may also frame an argument for the state regarding causation in terms of superseding causation. "Superseding cause is a variant of the doctrine of proximate cause." *Griffith v. Taylor*, 12 p.3d 1163, 1168 (Alaska 2000). "[T]he doctrine of superseding cause will relieve a negligent actor of liability only in exceptional cases." *Id.*, citing *Williford v. L.J. Carr Invs., Inc.*, 783 P.2d 235, 237 (Alaska 1989) (citing *Dura Corp. v. Harned*, 703 P.2d 396, 403 (Alaska 1985)). "[A]n action of a third person which intervenes to injure the plaintiff will shield a negligent defendant only where after the event and looking back from the harm to the actor's negligent conduct, it appears ... *highly extraordinary* that it should have brought about the harm." *Id.*

The state will make arguments related to causation by focusing on Dave's actions. The state will rely on Dave's driving of the truck over the bridge with a load that it was never designed to hold (and perhaps argue that Pam's

exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state..." "Discretionary" acts or functions for which the state has immunity from tort liability are only those acts or functions occurring at the planning level, as opposed to the operational level; a planning decision is one that involves policy formation, whereas an operational decision involves policy execution or implementation. *State, Dept. of Transp. and Public Facilities v. Sanders*, 944 P.2d 453, 456 (Alaska 1997). Under the facts in this question, the state was aware of the danger associated with the bridge and failed to do anything about it prior to its collapse. On its face, this does not appear to involve a policy decision that would enjoy immunity. Rather, the failure to maintain the bridge while knowing that it was unsafe is more akin to an operational decision involving policy execution.

car may have been on the bridge at the same time as Dave's). The state will point out that a sign clearly gave warning of the maximum load that the bridge could handle. Further, the state will argue that Dave was aware of the maximum load for the bridge as well as the weight of his own truck and trailer. An examinee may also argue that Dave's conduct was a superseding cause that shields the state entirely from liability. Any answer should highlight arguments about causation as the primary defense the state will raise regarding liability.

B. Defense to Damages (35%)

If Pam is successful in proving that the state breached its duty to maintain the bridge and that the breach of this duty caused the collapse of the bridge, she would also be able to prove damages. The collapse of the bridge caused Pam to drive into the river. The collapse led to damages for Pam: her broken arm and her damaged car. In its defense, the state will seek to apportion fault to Dave (and perhaps to Pam) in order to diminish or eliminate the state's share of damages.

Under AS 9.17.060, if Pam is found to be partly at fault for the bridge collapse, her recovery of damages is not barred; the amount of her damages would be reduced proportionately by her contributory fault.

Alaska Statute 9.17.080 sets out the process for apportioning damages:

(a) In all actions involving fault of more than one person, including third-party defendants and persons who have settled or otherwise been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages...

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.

Fault can only be allocated under the statute in actions involving the fault of more than one person. *Asher v. Alkan Shelter LLC*, 212 P.3d 772, 784 (Alaska 2009) (abrogated on other grounds). “To apportion fault to a party under AS 09.17.080, that party's conduct must be a legal cause of the plaintiff's harm.” *Ennen v. Integon Indem. Corp.*, 268 P.3d 277, 289 (Alaska 2012) (citations omitted). “Thus, legal causation is a prerequisite for allocation of fault to” another party. *Id.* If more than one party is causally connected to the plaintiff's harm, “the [factfinder] must ‘consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.’” *Domke v. Alyeska Pipeline Service Co., Inc.*, 137 P.3d 295, 306 (Alaska 2006) (citing AS 9.17.080(b)).

Of the total harm attributable to the defendants – not the claimant- the court shall enter judgment against each defendant only for the defendant's own percentage of the total fault. AS 9.17.080(a)(2), (c) & (d). *See also Sowinski v. Walker*, 198 P.3d 1134, 1150 (Alaska 2008).

The state will maintain that Dave (and perhaps Pam) caused the bridge collapse, in part or in whole, and are at fault in this case. While Pam may allege that the bridge was unsafe, the state will argue that the bridge, even at its best, was still safe only up to the maximum weight posted on the sign. The state will argue that Dave's reckless actions caused the bridge to collapse. Dave knew that his truck and trailer exceeded the maximum weight limit of the bridge. Dave's choice to drive across the bridge despite this knowledge would lead to a finding of some amount of fault against Dave. The state will argue that even if it is at fault because the bridge was unsafe, it was Dave's negligent actions that led to the bridge collapse and, therefore, he should bear the majority of fault in this matter. The State can also argue that Pam's inability to stop before going into the creek indicates that she was probably driving negligently in following too close to Dave and/or that the weight of her car contributed to the bridge's collapse, and therefore that her award of damages should be reduced proportionate to her fault.

2. Does Pam have a viable claim for battery against the state based on Seth's conduct? Why or why not? (30%)

This answer should first involve a discussion of the elements of a battery claim and whether or not Seth's actions constitute a battery. “Battery occurs when an actor intends to cause harmful or offensive contact with another and an offensive contact results.” *Maddox v. Hardy*, 187 P.3d 486, 498 (Alaska 2008) (citing Restatement (Second) of Torts § 18 (1965)). Seth's shove to Pam's back during the rescue did not appear to aid in the rescue effort. The fact that Seth actually made contact with Pam could suffice for meeting the elements of battery.

The question, however, requires an analysis of a potential battery claim against the state and not individually against Seth. Even though Seth is a state employee, the state will be able to assert sovereign immunity for claims related to his actions under AS 9.50.250(3):

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim...However, an action may not be brought if the claim...

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights...

Sovereign immunity precludes all claims made against the state directly based on or arising from the intentional torts listed in the statute above. One should note, however, that sovereign immunity does not apply to negligence claims and would not be one of the defenses for the state in Pam's negligence action discussed above in Question One. Examinees may attempt to answer this question in terms of the doctrine of *respondeat superior* – under which an employer would be liable for the negligent acts or omissions of its employees that occur within the course and scope of employment. *Parnell v. Peak Oil Field*, 174 P.3d 757, 768 (Alaska 2007) (citations omitted). However, the application of sovereign immunity serves as a complete bar to liability for any direct tort claim against the state for battery regardless of any analysis under *respondeat superior*. Pam is unable to make a direct claim against the state for battery based on Seth's conduct while he was acting as a state employee.

An examinee may point out that Pam could potentially make a claim based on Seth's alleged battery against the state if she can "assert a theory of liability based on a government duty that (1) is distinct from the duty breached in committing the intentional tort and (2) would have existed and could have been breached even if the assailant had not been a government employee." *B.R. v. State, Dept. of Corrections*, 144 P.3d 431, 434 (Alaska 2006), citing *Sheridan v. United States*, 487 U.S. 392, 406-408 (1988). This would require more than simply pleading that the state engaged in negligent hiring, training or supervising of Seth. *Id.* at 435. The facts in the question do not reveal any other independent duty that the state may have breached that does not involve Seth's status as a state employee.

Answers may also point out that AS 9.65.090(a) and (b) provide immunity for negligent acts as to those individuals and organizations that render emergency care or aid. However, Seth was a state employee working for the state rescue team. Seth's employment created a preexisting duty to provide emergency services to people like Pam. A person who already has a preexisting

obligation to render aid is not a beneficiary of the immunity provided in AS 9.65.060. *Lee v. State*, 490 P.2d 1206 (Alaska 1971). As such, Seth could not enjoy the benefits of the statute – even if he could prove his conduct was only negligent – because he is a state employee who has a duty to provide emergency aid.