

## EXAMINERS' ANALYSIS OF QUESTION NO. 10

As set forth in the call of the question, Pauline Plaintiff has asserted two causes of action: (1) assault and (2) battery. The applicant should articulate the elements of each claim and then analyze and conclude whether these claims should be dismissed.

### **1. Assault**

To recover civil damages for assault, a plaintiff must show an "intentional unlawful offer of corporal injury to another person by force, or a force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *VanVorous v Burmeister*, 262 Mich App 467, 482-483 (2004), quoting *Espinoza v Thomas*, 189 Mich App 110, 119 (1991). In other words, Dan Defendant can be liable for assault if (1) he acts intending to cause a harmful or offensive contact with the person of Pauline, or an imminent apprehension of such a contact, and (2) Pauline is thereby put in imminent apprehension of such contact. *Mitchell v Daly*, 133 Mich App 414, 426 (1984). Here, the proper analysis is that Dan Defendant's motion should be granted with respect to the assault claim because it is undisputed, based upon the facts, that Pauline Plaintiff was never put in an imminent apprehension of a harmful or offensive contact. Instead, the facts show that she was unaware that Dan Defendant was approaching her from behind and was intending on placing his hands on her shoulders. As a result, Pauline Plaintiff will not be successful in her assault claim against Dan. See *Russell v Bronson Heating and Cooling*, 345 F Supp 2d 761, 796-797 (ED Mich, 2004) (Applying Michigan law).

### **2. Battery**

Battery is defined as "the willful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Smith v Stolberg*, 231 Mich App 256, 260 (1998), quoting *Espinoza v Thomas*, 189 Mich App at 119. Thus, to prevail on her battery claim, Pauline Plaintiff must show that there was a (1) willful and harmful or offensive touching of her

which (2) resulted from an act intended to cause such contact. Here, the most reasonable conclusion is that Pauline can establish a battery claim.

As to the first portion of the test, the facts show that Dan Defendant's touching of Pauline Plaintiff was offensive to her. Pauline had previously told Dan that he should not try to massage her shoulders, and clearly she was offended by his doing so despite her warnings. The second part of the test is more debatable, though the most reasonable conclusion is that the offensive touching resulted from "an act intended to cause such contact." The facts show that Dan Defendant intended to cause a harmful or offensive contact with Pauline Plaintiff because he had rubbed her shoulders before and she told him never to do it again. A reasonable person would therefore have known that trying to rub Pauline's shoulders again would be offensive to her. See *Restatement of Torts 2nd* §18, pp 32-33. A weaker argument could be made that there is a question of fact, as Dan Defendant stated that he placed his hands on Pauline Plaintiff's shoulders in an attempt to ease her stress at work, not for the purpose of bringing about a harmful or offensive contact or an apprehension of such contact to her. An applicant should get points for either conclusion, as the point of the question is to recognize and discuss Dan's intent in making the contact.