

**FEBRUARY 2013 MICHIGAN BAR EXAMINATION  
EXAMINERS' ANALYSES**

**EXAMINERS' ANALYSIS OF QUESTION NO. 1**

**A. General Principles:** "To recover civil damages for assault, plaintiff must show an 'intentional unlawful offer of corporal injury to another person by force, or 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 *Espanola v Thomas*, 189 Mich App 110, 119 (1991), citing *Tinkler v Richter*, 295 Mich 396, 401 (1940), and Prosser, Prosser & Keeton, Torts (5<sup>th</sup> ed.), § 9, p 39. To recover for battery, plaintiff must demonstrate a "willful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *VanVorous, supra*, at 482-483, citing *Thomas, supra*, at 119, in turn citing *Tinkler* and Prosser. An assault is distinguished from a battery in that an assault does not result in the physical injury of another, while a battery does. *Mitchell v Daly*, 133 Mich App 414, 423 n 6 (1984).

**B. James v Smith:** James can successfully sue Smith for assault, but not battery. With regard to the assault claim, James will be successful because (1) Smith intentionally threw a stick at James, (2) James saw the stick thrown at him and had a well-founded apprehension that an imminent contact would occur (that apprehension likely caused him to duck), and (3) Smith clearly had the present ability to accomplish the contact because he threw the stick but simply missed hitting James. Finally, James can likely prove some form of emotional harm by being put in fear of injury when the big stick was thrown at him at close range. *Wise v Daniel*, 221 Mich 229, 234 (1922).

The missing element for the battery claim is that James was not hit by the stick, or stated differently, Smith did not create a harmful or offensive touching of James. For this reason, the battery claim would be unsuccessful.

**C. King v Smith:** King is in the opposite position of James, as King cannot successfully maintain an assault claim but he can succeed on a battery claim. With regard to the assault, the facts reveal that King was not looking when Smith turned and threw the stick at James. In fact, he never saw the stick coming towards him before he was hit by the stick. Thus, there are no facts to support the element that King had an apprehension of imminent contact with the stick.

However, King was hit by the stick, so the harmful or offensive touching element of a battery is satisfied. Additionally, it does not matter that the intended victim of the stick throwing was James, as opposed to King. It is well-settled that a person can be liable in tort for a battery against one person even though the intention was to batter another. "If an act is done with the intention of affecting a third person in the manner described in Subsection (1) [which details a battery that is intended but more severe in harm], but causes a harmful bodily contact to another, the actor is liable to such other as fully as though he intended to affect him." Restatement of Torts 2d, § 16(2). See, also, *Talmage v Smith*, 101 Mich 370, 373-374 (1894). The fact that the stick ricocheted off the branch does not preclude King from maintaining the battery claim as he intentionally set in motion the object in an attempt to hit James. Finally, the facts reveal that King's head was cut by the stick, thus allowing him to at least recover damages for that physical injury.