FEBRUARY 2019 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

With respect to Bob's battery claim, an applicant should first set out the elements for a battery, and then analyze the facts presented to conclude that Bob could not succeed on this claim against John.

A battery is the willful and harmful or offensive touching of another person resulting from an act intended to cause such a contact. *Tinkler v Richter*, 295 Mich 396, 401 (1940); *Espinoza v Thomas*, 189 Mich App 110, 119 (1991). See also Prosser & Keeton, Torts (5th ed), § 9, p 39. Here, the facts establish that John engaged in a willful act, as he intentionally shot an arrow towards Bob. Additionally, the touching was harmful, as Bob's injury was severe. However, where the battery claim fails is the lack of evidence that John intended for that harmful contact to occur. The facts show the opposite, as John never intended to harm Bob, or even hit him—he just intended to hit the apple. Although the apple was located on Bob's head, there was simply no intent to cause a harmful contact with Bob. Additionally, John could also argue that Bob consented to the contact, as he consented to John shooting an arrow at an apple atop his head. If Bob consented, he cannot prevail on his battery claim, whether viewed as a missing element or a defense. *Espinoza*, 189 Mich App at 119 ("Protection of the interest in freedom from unintentional and unpermitted contacts with the plaintiff's person extends to . . . anything which is attached to [his body] and practically identified with it."); *Hollerud v Malamis*, 20 Mich App 748, 763 (1969) (recognizing consent by the plaintiff generally precludes a battery claim).

With respect to Gloria's claim of negligent infliction of emotional distress, the elements of this claim are:

> (1) serious injury threatened or inflicted on a person, not the plaintiff, of a nature to cause severe mental disturbance to the plaintiff, (2) shock by the plaintiff from witnessing the event that results in the plaintiff's actual physical harm, (3) close relationship between the plaintiff and the injured person (parent, child, husband, or wife), and (4) presence of the plaintiff at the location of the accident at the time the accident occurred or, if not presence, at least shock "fairly contemporaneous" with the accident. [*Hesse v Ashland Oil Inc.*, 466 Mich 21, 34 (2002) (KELLY, M., dissenting), citing *Wargelin v Sisters of Mercy Health Corp.*, 149 Mich App 75, 81 (1986)].

Although a close call, the best answer is that Gloria will not succeed on her negligent infliction claim. The facts reveal that a serious injury was inflicted upon Bob, but whether this injury was of a nature to cause severe mental disturbance to Gloria is debatable. There is nothing to suggest that the injury was gory, nor is there any description other than it penetrated his shoulder and ripped into muscle. But, seeing one's child get hit in the shoulder with an arrow is akin to seeing him shot with a bullet, and likely this would be enough to meet this element. Additionally, Gloria suffered shock by witnessing the event, though the shock was only partially because of the injury Bob suffered. And, Gloria suffered no physical damage from her shock, which is required. *May v William Beaumont* Hosp, 180 Mich App 728, 750 (1989). As mother and son, Gloria and Bob were obviously in a sufficiently close relationship. However, Gloria did not witness the incident, nor did she arrive "fairly contemporaneously" with the incident occurring. Rather, Gloria saw it on video the day after it occurred, which was not "fairly contemporaneous" with the accident. An argument could be made that it was fairly contemporaneous since she did not know of the injury until she saw it occur in the video, and points should be awarded for that analysis, though a more reasonable conclusion is that Gloria should not prevail on her claim for negligent infliction of emotional distress.