

Instructions

1. The examination consists of two parts, which will be administered separately. The time allowed for each part and for the break between parts is as follows:

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|--------------------------|------------|
| Part I: Essay | 55 minutes |
| Break | 10 minutes |
| Part II: Multiple Choice | 55 minutes |
| TOTAL TIME: | 2 Hours |

The instructions for Part I (Essay) are as follows:

- a. This is an open book examination. You may use any written materials you like to assist you with this essay examination.
- b. You cannot take anything from the classroom when you are finished with the exam. Return all of the materials you are given for the exam in the envelope provided to you.
- c. Do not use your name on anything you return with your exam. Place your confidential student identification number along with the course information on the outside cover all of the bluebooks you use. You must also place this information on the outside of the envelope you receive your exam materials in.
- d. Write on only one side of your bluebook. You MUST skip lines in your answer. You may write any additions or corrections to your answer on the opposite page and draw an arrow to show me where you want to insert the new material.
- e. Be prepared to read the facts of an imaginary case set in the fictional state of New Brittany in which you are an appellate justice. The facts include; the actual case, the trial court's decisions and any controlling law (statutes or case law). You must; 1) State the issues in the case (in a brief paragraph); 2) Write a short appellate opinion finding for the plaintiff plus a separate short appellate opinion finding for the defendant. Indicate your decision in each section as an appellate justice by stating that you would have "affirmed" or "reversed" the trial court's decision.
- f. You will be graded on your ability to identify the issues in the case as well as the quality of your legal reasoning and writing. Writing that is conclusory and devoid of a reasoned discussion of how the facts and law interrelate will receive little or no credit.

Part I
ESSAY QUESTION
(55 minutes)

On July 4, 2010, Jenna Post was playing at the home of her best friend Stacy Winkler when she was injured by the Winkler's dog. The two girls were in the Winkler's backyard playing "chase and tag" along with other children. The Winkler's dog, a seven year-old golden retriever, was in the backyard with the children and had been resting peacefully in a corner of the yard while the children were playing. At some point during "Chase and Tag", Jenna was running from Stacey and tripped and fell or stepped on the dog's tail. The dog reacted by trying to get away from Jenna and in doing so scratched her right eye. There was no evidence that Jenna or any of the other children did anything to tease or aggravate the dog before the incident. The dog has no history of aggressive behavior and had not ever attacked or injured any other person. The cornea of Jenna's eye was torn and needed a special surgical repair. One year after the incident, Jenna's vision is still blurry in her damaged eye but over time the cornea is expected to heal completely without affecting her vision.

Plaintiff (Jenna), by her parents, brought a cause of action against the defendant under the New Brittany "Dog Bite" statute (NB Statute, Title 4, section 117) for injuries inflicted by the defendant's dog. The matter proceeded to a court trial, judgment for the plaintiff. Defendant appeals, arguing the trial judge made an error of law.

The New Brittany "Dog Bite" statute holds dog owners liable for injuries caused to others if their dog attacks or otherwise injures a person. It provides as follows:

"If a dog, without provocation, attacks or injures any person who is peacefully conducting themselves in any place they may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained." (NB Rev. Stat. Title 4, section 117, 2010.)

In the case of *Pillars v. Saint* (1978) 23 NB App. 2d 451, the court held there are four elements that must be proved for liability to attach under the "Dog Bite" statute: injury caused by a dog owned or harbored by the defendant; lack of provocation; peaceful conduct of the person injured; and the presence of the person injured in a place where they have a lawful right to be.

The plaintiff argued at trial and argues in her appeal that her act was unintentional and thus she did not "provoke" the dog within the meaning of the statute. Furthermore, plaintiff argues in her appeal that if the state legislature intended the "Dog Bite" statute to apply to only intentional acts of provocation it would have clearly said so in the language of the statute.

The defendant argued at trial and once again in his appeal that it is implicit in the statute that the plaintiff need not intend to agitate or provoke the dog. Instead according to defendant it is sufficient if the plaintiff's action (intentional or unintentional) is such that it "provokes" the dog to act.

The statute is silent about whether the provocation under the “Dog Bite” statute requires intentional or unintentional acts. There is also no case law on point defining “provocation” under the “Dog Bite” statute. The learned trial court judge made an analogy to the law of self-defense and relied on the case of *Johnson v. State Farmer’s* (1985) 21 NB App. 3d 105. In that case, the court held under the self-defense statute of New Brittany, a person is allowed to defend themselves from unlawful use of force from another person when, amongst other things, they are sufficiently “provoked.” The *Johnson* court defined “provocation” as a deliberate act on part of the actor, such that it “induces” the other party into action to defend themselves. When this definition was applied to the case at hand the trial judge found for Plaintiff because she did not deliberately act when she stepped or fell on the dog’s tail.

You must complete the following:

- 1) Assume you are an appellate justice for the New Brittany Appellate Court.
 - a) Write a short opinion upholding the trial judge’s decision.
 - b) Write a short opinion reversing the trial judge’s decision.

- 2) Assume you are a state legislator in New Brittany.
 - a) Rewrite the statute to remove any ambiguity regarding the “provocation” element of NB Rev. Stat. Title 4, section 117.