

ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

After several winter months without snow, Stan heard that a big storm had hit in the local mountains. He loaded up his snowmachine and a quart of whiskey, and was on the road well before sunrise. He was anxious to get on the trails, and drove very fast, despite the dark and icy conditions. Unfortunately, his trailer slid out as he was rounding an icy curve. His truck slid off the road and hit a pole, causing his trailer and snowmachine to roll toward the sidewalk.

Noel was walking on the sidewalk nearby when he saw the trailer come hurtling right at him. The trailer slid to a stop just as it touched Noel's feet. Noel escaped unhurt, but terrified.

Noel stood rooted to the same spot, muttering to himself about how the trailer had almost killed him. Stan was dazed and sluggish, but without physical injuries.

A bystander reported the accident and called for an ambulance. The paramedics examined Noel, while the police went through the standard accident procedures, taking photos and statements. The paramedics determined that Noel was in shock and took him to the hospital. Stan got a speeding ticket.

Noel was traumatized by the accident, and finds it difficult to drive or walk for fear of being hurt. He suffered no physical injury, but has suffered mentally. Noel remains in therapy, and his fear of walking and driving has affected his work life and his social life.

1. Describe the tort claims that Noel could bring against Stan in order to recover for his damages, and discuss his chances for success.

GRADER'S GUIDE

*** QUESTION NO. 7 ***

SUBJECT: TORTS

I. Intentional or Negligent Infliction of Emotional Distress (50 pts.)

Noel could seek to recover against Stan for intentional or negligent infliction of emotional distress.

A. IIED

The standard for IIED claims have alternatively been stated as a three- or four-pronged test, although the tests are substantively the same.

The three-pronged test limits recovery of emotional distress damages unaccompanied by physical injuries to cases (1) where the emotional distress is "severe," (2) where the conduct of the tortfeasor is intentional or reckless, and (3) where such conduct is capable of being characterized as extreme or outrageous.

The alternative four-pronged formulation holds that in order to recover for IIED a party must show: (1) extreme and outrageous conduct, (2) that is intentional or reckless, (3) and causes emotional distress (4) that is severe.

The trial judge must make a threshold discretionary determination whether the severity of the emotional distress and the conduct of the offending party warrant a claim of intentional infliction of emotional distress.

See Fyffe v. Wright, 93 P.3d 444, 455 (Alaska 2004); *Hancock v. Northcutt*, 808 P.2d 251, 257 (Alaska 1991), *citing King v. Brooks*, 788 P.2d 707 (Alaska 1990); *Teamsters Local 959 v. Wells*, 749 P.2d 349 (Alaska 1988); *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987); *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454 (Alaska 1985); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985).

1. Is Noel's emotional distress "severe"?

"Severe" emotional distress is the kind of distress that is sufficiently strong to be clinically diagnosed, and that would be viewed by a layperson as necessitating treatment. It should also be of a type associated with a specific trauma, and not with a longstanding personality trait. An upsetting event does

not cause “severe” emotional distress because it makes an angry person very angry, or a frightened person very frightened.

See Fyffe v. Wright, 93 P.3d 444, 456 (Alaska 2004) (Severe emotional distress is “distress of such substantial quality or enduring quantity that no reasonable person in a civilized society should be expected to endure it. Examples of serious emotional distress may include ‘neuroses, psychoses, chronic depression, phobia, and shock.’ However, temporary fright, disappointment or regret does not suffice under this standard.”), quoting *Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999); *See also Nelson, supra*, 976 P.2d at 868 (requisite severity of emotional distress is not present “where a plaintiff asserted that the defendant’s actions had made him ‘aggravated,’ ‘angry,’ ‘upset,’ ‘red in the face,’ or ‘bothered,’ and caused him ‘emotional distress and mental anguish.’”); *See also Murray v. Feight*, 741 P.2d 1148, 1158 (Alaska 1987) (plaintiff showed severe emotional distress resulted from defendant’s forcible entry onto and confiscation of plaintiff’s property following recent sudden death of plaintiff’s daughter); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (affirming trial court’s threshold determination that the plaintiffs had not demonstrated sufficiently severe emotional distress where dog pound mistakenly killed a pet dog that the plaintiffs had owned for about two months.).

Here, Noel is suffering from distress that could reasonably be called “severe.” He was in shock at the time of the accident, and now has difficulty walking or driving because of his trauma. The emotional distress has affected his work and social lives, and he remains under a doctor’s care for it. Moreover, his particular form of distress – fear of being around cars – is of a type that is directly associated with the trauma he suffered, and having a large trailer hurtling toward you is the type of thing that would cause trauma in a reasonable person.

2. Was Stan’s conduct sufficiently “extreme and outrageous?”

The kind of “extreme and outrageous” conduct necessary to allow an IIED claim is similar to that required for an award of punitive damages. *Fyffe v. Wright*, 93 P.3d 444, 455 (Alaska 2004); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985). IIED liability may be found “only where the conduct [is] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 87 (Alaska 2001) (issuance of allegedly false, misleading or defamatory proxy solicitation statements not enough to support IIED claim). Liability for intentional infliction of emotional distress does not extend to mere insults,

indignities, threats, annoyances, petty oppressions, or other trivialities. *Finch v. Greatland Foods, Inc.*, 21 P.3d 1282 (Alaska 2001).¹

Noel has a difficult case to make. The fact pattern does not indicate that Stan actually had been drinking – only that he was speeding. This is clearly negligent, but is unlikely to be seen as so outrageous as to be beyond the pale. Indeed, most people speed when they’re in a hurry. The accident seems to have occurred due to simple negligence, which does not likely rise to the level of wanton and willful misbehavior necessary to support an IIED claim. However, speed of vehicle may affect the likelihood of recklessness. *E.g. Hayes v. Xerox Corp.*, 718 P.2d 929 (Alaska 1986) (negligent driving not enough to support punitive damages).

If Stan actually had been drinking, however, the result might well be different. Drunk driving could be seen as an act so outrageous and so beyond community standards of decent behavior that society should not tolerate it. *Cf Hayes, supra*, 718 P.2d at 929, *Fleegel v. Estate of Boyles*, 61 P.3d 1267 (Alaska 2002) (drunk driving sufficient to support punitive damages claim).

3. Intentional/Reckless conduct

As with the requirement of “extreme and outrageous” conduct, it will be difficult for Noel to show intentional or reckless conduct. The facts indicate that Stan intended to get onto the trails as quickly as possible – they do not indicate that Stan specifically intended to have an accident or to injure Noel.

As with the “extreme and outrageous” prong, the result would depend on whether Stan had been drinking. If he had not been drinking, his speeding was likely simple negligence, and would not support a recovery. If he had been drinking and driving, this would amount to reckless behavior and could support a recovery.

4. Causation

It is clear from the facts that the accident caused Noel’s emotional distress, and that the accident was caused by Stan’s speeding in icy, dark conditions.

¹ Alaska cases specifically dealing with the issue of whether conduct could support an IIED claim are not directly comparable to Noel and Stan’s car accident situation. *See, e.g. Lybrand v. Trask*, 31 P.3d 801 (Alaska 2001) (allegation that one neighbor had painted large words and symbols on roof of plaintiff’s house not enough to support IIED claim); *Odom v. Fairbanks Memorial Hosp.*, 999 P.2d 123 (Alaska 2000) (Allegations of bad faith termination, professional defamation, and conspiracy reached the level of outrageousness necessary to state IIED claim.)

B. NIED

In order to recover for NIED a party must show: (1) actionable negligence, (2) that causes emotional distress, (3) that is severe, (4) and is accompanied by physical injury.

Hinsberger v. State, 53 P.3d 568, 571 (Alaska 2002); *Kallstrom v. U.S.*, 43 P.3d 162, 165 (Alaska 2002); *Hancock v. Northcutt*, 808 P.2d 251, 257 (Alaska 1991).

1. Discussion of Elements

As discussed above, Noel can state a case as to the first three elements of NIED, but the facts also show that he has suffered no physical injury.

2. Exceptions to Injury Requirement

While damages are generally not awarded for NIED in the absence of physical injury, there are two exceptions to this rule: the preexisting duty exception and the bystander exception. *Kallstrom v. U.S.*, 43 P.3d 162, 165 (Alaska 2002).

The bystander exception is not applicable here, as this case does not involve emotional distress suffered by a bystander for injury to another.

The “pre-existing duty” exception allows a plaintiff to recover for emotional distress caused by mere negligence “where the defendant owes the plaintiff a preexisting duty.” *Hinsberger v. State*, 53 P.3d 568, 571 (Alaska 2002).

“Under *Hancock*, whenever a defendant stands in a contractual or fiduciary relationship with the plaintiff and the nature of this relationship imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress.” *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995).

The facts do not indicate that there was a contractual or other fiduciary relationship between Stan and Noel. The facts do indicate that Noel did not suffer a physical injury. His NIED claim would therefore fail.

II. Assault/Battery (20 pts.)

Battery is the intentional unlawful touching of another person. A person is liable for battery if the person acts with the intent to cause harmful or offensive contact, or the imminent apprehension of such a contact, and the contact occurs. *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); see also *Restatement (Second) Torts* § 21 (1965).

Assault occurs when a person acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and the other person is thereby put in such imminent apprehension. *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); see also *Restatement (Second) Torts* § 21 (1965).

Assault and battery are both intentional torts. As noted in the restatement:

- (1) An actor is subject to liability to another for battery if
 - (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, ...
 - (2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

Restatement (Second) of Torts § 18 (1965).

Although the facts indicate that Noel was put in imminent apprehension of offensive contact due to Stan's actions, and that there actually was such an offensive contact (when the trailer touched his feet), the facts do not indicate that Stan had the requisite intent to cause such apprehension or contact. Moreover, even if Stan had been drinking, this would create mere recklessness, not intent. Noel can state no claim for assault or battery.

III. Negligence (30 pts.)

Finally, Noel could bring a simple negligence claim.

A plaintiff in a negligence action must (1) establish a standard of care, (2) show that the defendant failed to exercise this standard of care, and (3) establish that the failure was the proximate cause of the defendant's injuries. *Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1115 (Alaska 2002).

Noel can easily establish a duty not to speed or drive recklessly and a breach of this duty. He can also establish that Stan's breach is the proximate cause of his injury. Examinees may note, however, that it is unclear whether Noel could recover for his purely emotional distress damages in the context of a simple negligence claim.

Examinees may get points for discussing negligence per se in this section.

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Question 7.

Battery-

Battery is the offensive or unlawful touching of another, or the intent to create apprehension of such offensive touch in another. Battery, includes such offensive touching by object where the object is in control of the offender. Here, Stan was in control of the vehicle which, although slight, came in contact with Noel, and thereby was an offensive touching. The touching need not be harmful, only unwanted, no matter how slight. Assault is the intent to create apprehension of an unlawful touch. Here, Noel was actually touched and so Battery would be the Tort Claim for negligence.

Elements of Negligence-

Noel, in a claim for negligence would have to show Stan owed a duty to Noel, that duty was breached, the breach was the proximate cause of Noel's damages, and actual physical or emotional damages occurred. Here, Stan owed Noel a duty to drive within legal limits and safely, he breached that duty by speeding in violation of Alaska vehicle code, the car and trailer he had actual possession and control of touched Noel in an offensive way thereby being the proximate cause of his emotional distress. To recover based on emotional distress, objective findings of the damages would be required through examination and evaluation.

Contributory Negligence-

If Noel was found to be contributory negligent in the accident, Alaska does not bar recovery, just reduces the recovery by the amount Noel might have been negligent. Here, the

facts don't indicate Noel was contributorily negligent.

Damages-

Noel can seek incidental and consequential damages as compensation for indirect and direct expenses related to medical bills, lost work, therapy, job re-training, etc., under the facts. The facts do not indicate he is married, so there is no cause to address loss of consortium under Alaska law.

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Noel can recover for Assault, negligence, and Battery and can bring a claim for Negligent Infliction of emotional Distress (NIED), but will not recover.

1) Battery is causing the harmful or offensive contact with the ~~the~~ another's person. Here, Stan caused the snowmobile to touch Noel's person ^(lightly touched his feet) by his driving. The contact need be slight + need not cause injury to be offensive. ^{Thus, it does not matter that Noel was lightly touched on his feet that is enough.} The harm is also a dignitary harm that people should not be touched without their consent.

2) Assault is ^{intentionally} placing another person in reasonable fear of imminent harmful or offensive contact. Here, Noel saw the snowmobile coming at him and was terrified that it would hit him. ~~His~~ ~~fear~~ ~~was~~ ~~caused~~ by Stan caused the snowmobile to go hurtling toward Noel.

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For both Assault & Battery,
The common element that
is arguably missing is that of
Stan's intent. With intentional torts,
it is not required to show that
Stan intended the harm, it is enough
that he intended the act that
caused the harm - if so, he will
be responsible for all results that
reasonably & foreseeably follow.

Stan will try to argue that it
was an accident - he did not mean
to hurt Noel or for the snowmobile
to fly off the trailer. Noel will
counter that Stan did intend
to drive quickly in icy & dangerous
conditions & that the likely &
probable result is an accident
with injured pedestrians. Stan
probably has the better argument.

If Noel is successful, he can recover
all damages caused by the
assault & battery, regardless of
the absence of physical injury.
This includes the hospital bills, continued
mental pain & suffering as a
result of the accident, and his therapy bills.

3) Negligence: In order to make out a case for negligence, Noel must show four elements: 1) duty, 2) breach, 3) causation (actual + proximate) and 4) injury.

Regarding duty, it is elementary that a driver owes a duty of care to other drivers + to pedestrians to drive as would a reasonable, prudent person under all circumstances, including weather and road conditions. Here, Stan ~~breached that duty~~ had a duty of extra caution because he was pulling a trailer + driving after a storm in known dark + icy conditions.

Regarding Breach, he breached the duty by driving very fast in such conditions. Noel will also argue that Stan committed negligence per se by speeding. The Speed limits are designed to prevent accidents + harm to motorists + pedestrians. Thus Stan is liable in Negligence per se by speeding without any emergency justification - he was just excited to

go snowmobiling

Regarding causation, there is actual causation because, but for Stan's carelessness the accident would not have happened. There is also proximate causation - prox. cause is when Δ's conduct is such an important factor in causing the harm that an ordinary, reasonable person would find it to be the cause and would attach responsibility to it. Here, Stan's conduct was the only cause of Noel's harm, and thus is a proximate cause - such harm was foreseeable.

Regarding damages - once liability is established Stan ~~is~~ takes Noel as he found him and must pay for mental distress, hospital & therapy bills

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J.E.
4) ~~NIED~~ will probably not
work because, although in
the zone of danger, Noel
had no physical damages.
Thus, no recovery under
~~NIED~~. NIED

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Intentional Infliction of Emotional Distress

This would be Noel's best cause of action. Star acted in a manner that was reckless by speeding around icy curves with a trailer & snowmobile. Although he doesn't appear to have intended for the snowmobile and trailer to roll, his behavior was reckless & with disregard to the certainty that seeing the trailer coming toward him would certainly cause Noel emotional distress. Star's conduct was also outrageous & offensive in that he took substantial risks with his driving. He knew or should have known that his driving & the trailer whipping around would cause emotional distress & Noel suffered from severe emotional distress. He isn't able to drive

or walk. Noel should be able to recover economic + non economic damages, \$K a year or up to 400K.

Battery - not as good claim.

There ~~was~~ could be a harmful or offensive touching,

The trailer struck Noel's pit, Noel did suffer

damages + which were caused by Stan's actions

There is a problem with intent, Stan didn't intend

to crash + lose the trailer, act might infer that

Stan's recklessness + disregard for the known risk might qualify for

~~disregard~~ intent, but that's a stretch.

Assault

Here there was apprehension of or imminent harmful

or offensive contact with the trailer, there was

actual injury, however, this claim has the same

Problem as the potential battery claim, intent.

Negligence - pretty good claim

Here Noel was a foreseeable Plaintiff - Star had

a duty of ~~care~~ reasonable care to drive in a manner

as to not endanger pedestrians, he breached

that duty, his breach was the actual cause (but for)

+ proximate cause of Noel's injuries/damages,

and Noel did suffer an injury/damage. Noel would

probably be entitled to economic + non-economic damages

A jury could find punitive, in the amount of \$20K or

3x the consequential damages, + then 1/2 the

punitive would go to the State -

Negligence Per Se -

This is probably as strong a claim as the ITED

Claim. Because Stan got a speeding ticket, we know there was a statute regulating his behavior. Noel as a pedestrian was within the class of people a speed limit ordinance is designed to protect. Stan's speeding did violate the statute, & that coupled with his careless & imprudent driving caused the wreck which dislodged the trailer which caused Noel's injuries.

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Intentional Infliction of Emotional Distress (IIED)

To have a claim for IIED, Noel must prove that Stan intentionally engaged in extreme or outrageous behavior that caused severe emotional distress or physical harm.

Here the facts state that Noel was not physically injured, but he was in shock, traumatized, and suffered mentally - evidenced by his therapy and his fear of walking and driving which has affected his work and social life. This would likely satisfy the emotional distress element. The hurdle for Noel is proving that Stan intentionally engaged in extreme or outrageous behavior. The facts indicate that Stan drove very fast in dark and icy conditions

around a curve, while pulling a trailer.

This is likely reckless - acting with disregard of a known risk - Stan knew or should have known it might be icy because he knew a big storm had hit. However, it may not amount to outrageous conduct. Outrageous conduct is defined as the act that would make a reasonable person go "outraged." If Stan had been drinking the whiskey at the time, it would likely be outrageous. Thus Noel is not likely to recover for IIED, but if he did prove the elements, he would be entitled to pain and suffering in addition to medicals and wage loss, capped by tort reform. Noel may assert the intentional tort of

3/5

negligent

NIED. However, he would have to prove recklessness, discussed earlier, which is more likely than proving outrageousness. However, he would also have to prove that Stan knew of Noel's weakness for a certain type of conduct.

Here, there is no evidence that Stan knew Noel.

Noel may also bring a negligence claim.

Negligence is established by proving ^{to foresee} duty, breach, causation and damages. ~~The standard duty~~

Here, a person walking on a sidewalk is a foreseeable plaintiff. The duty in this situation is the "reasonably person standard" — act as a reasonable person under

the circumstances to prevent harm to others. As discussed earlier, ~~it is not~~ regarding recklessness, it

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is likely that driving too fast on an icy curve into the dark is a breach of the RPP standard of care. Legal cause involves foreseeability. This would likely be established as it would be foreseeable that someone would suffer harm from the experience of almost being killed. Damages would be the major hurdle for Noel. Ordinarily, one must suffer physical harm in a negligence claim to recover for the physical and the mental harm. However in Alaska, physical harm is not required if the party was in the zone of danger — where it would be reliable to believe that the person actually suffered mentally. Here, Noel was likely in the zone of danger, as the accident occurred right

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at his feet, so Noel has a good
argument under negligence. As
mentioned earlier, Alaska's tort reform has
capped pain and suffering and punitive damages.

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#1 Noel could bring claims of assault, intentional and negligent infliction of emotional distress and negligence against Stan in order to recover for his damages.

ASSAULT: Noel could bring an assault charge. Assault is the intentional placing of another in fear of imminent physical injury. Here Noel was terrified of being hit by the trailer as it was coming at him only stopping at his feet. The fact fulfill the requirement of all the elements except intent. Nothing in the facts indicate that Stan intend to scare Noel. So Noel would lose on Assault.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

For this a person must intend to cause another by extreme and outrageous conduct severe emotional distress.

As w/ assault there is no intent. So Noel would lose this claim.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

This is the same as intentional infliction without the intent. Negligent infliction requires recklessness & extreme distress manifested physically by extreme and outrageous conduct.

Here because of Stan's reckless driving Noel ~~s~~ watched a trailer & snowmachine hurtling at him and stopping just as it touched his feet. Noel suffered from shock & remains in therapy as his fear has affected his work and social life.

Noel has a good chance of success with this claim.

NEGLIGENCE

To prove negligence, Noel must prove there was a duty, Stan breached that duty causing Noel damages.

Everyone owes a duty when driving a car to drive in a safe and responsible manner. Stan breached that duty by driving very fast in dark and icy conditions. Because of his driving and losing control

Stan caused "damages" to Noel. Directly caused as it was his sliding & hitting a pole, causing his trailer & snowmachine to roll toward the sidewalk.

Noel was a foreseeable victim within the zone of danger.

Finally, Noel was damaged as he had to be taken to a hospital for shock, but no actual physical damages.

For Noel to succeed he must prove damages if he can do so he can succeed in negligence.