ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

One winter morning, nineteen-year-old Vicky drove through her hometown of Anytown, Alaska, headed to the local grocery store to pick up some items for her parents. As she proceeded toward the store, a vehicle in the oncoming lane of traffic, driven by Dennis, strayed into Vicky's lane of traffic and hit her vehicle in a head-on collision. Vicky was seriously injured as a result of the accident, and medics worked to treat and stabilize her condition at the scene of the accident before transporting her to the hospital. Subsequent investigation revealed that in spite of numerous warnings by the passengers in his vehicle, Dennis had been turned around talking with his backseat passengers – completely ignoring the road ahead of him – at the time of the accident.

Soon after the accident, while Vicky was still being treated at the scene, one of the responding police officers obtained contact information for Vicky's parents and called her father, Peter. When Peter received the police officer's call, he rushed to the accident scene in time to see Vicky lying motionless on a stretcher being wheeled toward a waiting ambulance. Shocked, Peter rushed toward the ambulance, fearing that Vicky was dead. After being assured that Vicky was alive but unconscious, Peter followed the ambulance to the hospital and sat with Vicky for many hours until she regained consciousness.

Through several months of treatment, Vicky recovered from her injuries. Her father, Peter, was unable to put the image of the accident scene out of his mind. While he never sought counseling or other treatment, he suffered great fear and anxiety beyond the duration of Vicky's treatment.

Following Vicky's recovery, and within the applicable statute of limitations, Vicky and Peter filed a lawsuit against Dennis.

1. Briefly explain whether Peter can pursue a claim against Dennis for loss of consortium with his daughter, Vicky, as a result of the above-described accident.

2. Explain whether Peter can establish the elements of any other tort claim(s) against Dennis based upon the above facts.

GRADERS GUIDE

***** QUESTIONS NO. 6 *****

SUBJECT: TORTS

1. Briefly explain whether or not Peter can pursue a claim against Dennis for loss of consortium with his daughter, Vicky, as a result of the above-described accident. (10 points)

Given the age of Peter's daughter when she was injured, Peter may not pursue a claim for loss of consortium under Alaska law.

Alaska law does provide a right of recovery for loss of filial consortium for parents whose minor children have died or been injured. *See* AS 09.15.010; *Gillespie v. Beta Constr. Co.*, 842 P.2d 1272 (Alaska 1992). *See also Sands v. Green*, 156 P.3d 1130, 1133 (Alaska 2007) (reiterating eighteen as the age of majority in Alaska). Alaska Statute 09.15.010 provides that "[a] parent may maintain an action as plaintiff for the injury or death of a child below the age of majority." While this cause of action for loss of filial consortium derived from the common law rule that "a minor's labor belonged to his or her parents" and that "an injury to the minor [thus] resulted in a loss to the parents," *see Gillespie*, 842 P.2d at 1273, the parent's right of recovery now rests on an evolved understanding of the parent-child relationship and anticipates a parent's right to recover for "loss of society" with their child in the event of the child's injury or death.

As recognized by the statute creating the right to recovery of such damages, though, a parent can only recover for loss of consortium with their minor children. *See* 09.15.010; *see also Sowinski*, 198 P.3d at 1163-64 (holding that parents of minor children who died could only recover loss of consortium damages for the respective periods of time that the children would have been minors). The Alaska Supreme Court reiterated the statutory limitation of loss of filial consortium in *Sowinski*: "[The] statute does not allow a parent to recover damages resulting from the loss of a child who dies [or was injured] during adulthood. . . . The statute only creates a cause of action for parents 'for the injury or death of a child below the age of majority.'" *Id.* at 1163-64 & n.150. Parents, then, cannot recover for loss of consortium with their children who are injured, or who pass away, while aged eighteen or over. *Id.*

Here, while Peter's relationship with his daughter, Vicky, may otherwise have supported a claim for loss of filial consortium in the event of her injury, the facts indicate that Vicky was nineteen – beyond the age of majority – when she was injured by Dennis. Peter thus may not pursue a claim against Dennis for loss of consortium with his daughter.

2. Explain whether or not Peter can establish the elements of any other tort claim(s) against Dennis based on the above facts. (90 points)

a. Intentional Infliction of Emotional Distress (40 points)

Based upon the nature of Dennis's actions causing the accident at issue, Peter's close familial relationship with Vicky, his experience witnessing his injured daughter in the context of the accident scene, and the resulting emotional harm suffered by him, Peter may be able to establish claims for both intentional infliction of emotional distress and negligent infliction of emotional distress against Dennis.

At the outset, because Peter suffered no physical injury as a result of Dennis's actions or the accident at issue, his potential tort claims against Dennis are limited to those that may be asserted to redress emotional harm. Two tort claims may be used in particular circumstances to redress a plaintiff's emotional harm: 1) intentional infliction of emotional distress; and 2) negligent infliction of emotional distress. *See e.g.*, *Nome Commercial Co. v. Nat'l Bank of Alaska*, 948 P.2d 443 (Alaska 1997).

In order to set forth a prima facie case for intentional infliction of emotional distress, a plaintiff must put forth facts demonstrating that 1) the complained of conduct was extreme and outrageous; 2) the conduct was intentional or reckless; 3) the conduct caused emotional distress; and 4) the distress was severe. *Chizmar v. Mackie*, 896 P.2d 196, 208 (Alaska 1995); *Teamsters Local 959 v. Wells*, 749 P.2d 349, 357 (Alaska 1988). "Liability [for IIED claims] has been found only where the conduct [complained of] has been 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." *Chizmar*, 896 P.2d at 208 (quoting *Oaksmith v. Brusich*, 774 P.2d 191, 200 (Alaska 1989)). Additionally, as noted above, the emotional harm claimed as a result of the conduct at issue must be "severe" or "serious." *Chizmar*, 896 P.2d at 204-09; *Nome Commercial Co.*, 948 P.2d at 453-54. Temporary anger, fright, disappointment, or regret do not constitute emotional distress supporting a claim for intentional infliction of emotional distress. *Id.* Rather, "[s]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Chizmar*, 896 P.2d at 204.

Here, the nature of Dennis's conduct in causing the car accident with Vicky, and the nature of the emotional harm suffered by Peter, may support a claim for intentional infliction of emotional distress. Both points – the requirement of intentional or reckless behavior, and the requirement of severe emotional distress – may be argued either way, but applicants should recognize and discuss those elements of an IIED claim as applied to the facts provided in the question. For instance, Dennis's behavior in causing the accident at issue

– turning around to talk with the passengers in the backseat of his vehicle while completely ignoring the road ahead of him, might be deemed sufficiently reckless to support an IIED claim. Particularly where Dennis continued to drive while turned around and ignoring the road – even after being warned not to do so by his passengers – one could argue that his conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bound of decency." *Chizmar*, 896 P.2d at 208.

Additionally, although Peter never sought counseling or other treatment for his alleged emotional harm, his inability to forget the scene of the accident and his level of fear and anxiety for numerous months after the accident may constitute sufficiently "severe" emotional harm to support a claim for intentional infliction of emotional distress. While the Alaska Supreme Court has provide some further definition of the term "severe" emotional distress, as discussed above, this element of emotional distress cases is still relatively subjective and fact-specific, judged on a case-by-case basis. *See e.g.*, *Chizmar*, 896 P.2d at 204-09; *Nome Commercial Co.*, 948 P.2d at 453-54. Depending on the evidence presented by Peter regarding the extent of his emotional suffering, as well as his manner of presentation, a fact-finder might determine that Peter's emotional harm was "severe" enough to go beyond that which a "reasonable man, normally constituted" could be expected to cope with. *See Chizmar*, 896 P.2d at 204. Alternatively, a fact-finder might lend greater weight to the fact that Peter never obtained treatment for his emotional suffering and find that lack of treatment to be an indicator that Peter's suffering was not sufficiently severe to trigger an IIED claim.

b. Negligent Infliction of Emotional Distress (50 points)

Peter may also be able to establish a claim for negligent infliction of emotional distress. "Generally, damages are not awarded for NIED claims in the absence of physical injury." *Kallstrom v. United States*, 43 P.3d 162, 165 (Alaska 2002). Alaska law, however, allows for two established exceptions to the requirement of physical injury. *Id.* One exception to the requirement of physical injury lies where the defendant owed the plaintiff a preexisting duty. *Id.* at 166. In order to meet the elements of the preexisting duty exception, "a defendant must stand in either a fiduciary or contractual relationship with the plaintiff." *Id.* Because there are no facts here indicating that Dennis stood in any such relationship with Peter at the time of the accident, the 'preexisting duty' exception to the physical injury requirement does not apply.

Another exception to the requirement of physical injury arises in the case of "bystanders." *Id.* at 165; *Sowinski v. Walker*, 198 P.3d 1134, 1162 (Alaska 2008). According to Alaska law, "a negligent defendant breaches the standard of care owed to a plaintiff who suffers emotional harm after witnessing physical harm to [his or] her loved ones if three conditions are met: (1) the plaintiff was located near the scene of the accident; (2) the emotional harm resulted directly from observing the scene of the accident, rather than learning of it later; and

(3) the plaintiff and victim were closely related." *Sowinski*, 198 P.3d at 1162 (citing *Beck v. State, Dep't of Transp. & Pub. Facilities*, 837 P.2d 105, 109 (Alaska 1992); *Tommy's Elbow Room v. Kavorkian*, 727 P.2d 1038, 1041 (Alaska 1986)). Additionally, in order to recover damages on such a claim, "the harm suffered by the plaintiff as a result of the shock must be severe, but it does not necessarily need to result in physical illness or injury." *Id.* (citing *Chizmar*, 896 P.2d at 201-04)); *see supra* for further definition of "severe" emotional harm.

Peter may be able to establish a claim for negligent infliction of emotion distress against Dennis under this theory. Under Alaska law, he was sufficiently close to the accident scene to assert a bystander claim, and according to the facts presented, his emotional harm at least arguably resulted from the shock of observing the accident scene, including his daughter's unconscious state at the accident scene. The Alaska Supreme Court has interpreted those requirements of the bystander theory liberally, and has made it clear that "the plaintiff need not actually witness the accident [at issue] and that merely witnessing an injured or dead family member at the scene of the accident is sufficient to assert an NIED claim." *Id.* (citing *Beck*, 837 P.2d at 109-10 (holding that a plaintiff who saw her daughter "for the first time" in the hospital could assert an NIED claim); *Tommy's Elbow Room*, 727 P.2d at 1040, 1043 (holding that a plaintiff who arrived at the scene of a car accident in time to find his daughter injured and being removed from the car could assert an NIED claim)); *contrast Mattingly v. Sheldon Jackson Coll.*, 743 P.2d 356, 365-66 (Alaska 1987) (affirming the rejection of an NIED claim where plaintiff was 150 miles away when he learned of the accident injuring his son and had no "sudden sensory observation" of his injured son).

Additionally, under Alaska law, Peter – as Vicky's father – is certainly sufficiently closely related to Vicky to make a claim as a bystander. *See e.g.*, *Tommy's Elbow Room*, 727 P.2d at 1040, 1043.

Finally, as discussed above, Peter's inability to forget the scene of the accident and his level of fear and anxiety for numerous months after the accident may constitute sufficiently "severe" emotional harm to support a claim for negligent infliction of emotional distress. Again, the evidence presented by Peter regarding the extent of his emotional suffering, as well as his manner of presentation, will help to determine whether Peter's emotional harm was "severe" enough to go beyond that which a "reasonable man, normally constituted" could be expected to cope with. *See Chizmar*, 896 P.2d at 204.