ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Seventeen-year-old Donna lives at home with her father, Frank, in Anytown, Alaska. Unfortunately, since she became a teenager, Donna has exhibited a short temper and outbursts of physical violence toward others. In particular, Donna has started numerous fist fights with fellow students and former friends, both at school and during social gatherings, often with no or slight provocation. Frank is aware of at least some of Donna's violent history, as her teachers and school principal have notified him of her behavior at school, as well as her several school suspensions over the years.

Since becoming aware of Donna's problem with fighting, Frank has attempted to work with her teachers and principal to curb her behavior. He has met with school officials to discuss the problem, and has restricted Donna from various activities and privileges in order to punish her. He has also taken Donna to various counselors to try to better understand her behavior and control her temper. Recently, Donna's behavior at school has improved, and in fact, she has not been in trouble for fighting at school for a full semester. Unbeknownst to her father, however, Donna has continued to start fights with others while she is out at parties or other social events with her friends.

One evening, while Donna is out with friends, she spots a stranger named Paul walking in her direction on the sidewalk. Paul has just spent a long day working at his office, and he is headed home, absently looking around at the people and buildings that he passes along the way. Under the mistaken impression that Paul is staring at her, Donna reaches for a rock on the ground and hurls it at Paul's head. Shocked, Paul sees the rock coming at him, but he is unable to duck out of the way, and the rock hits him, causing a large lump and a painful laceration on his forehead.

Within the applicable statute of limitations, Paul brings suit against both Donna and Frank.

1. Discuss the tort claims that Paul may pursue against Donna.

2. Discuss whether Paul will be able to successfully pursue a negligence claim against Frank.

GRADER'S GUIDE

*****QUESTION NO. 8*****

SUBJECT: TORTS

1. Discuss the tort claims that Paul may pursue against Donna. (45 points)

Paul will be able to successfully pursue claims for battery, assault, and negligence against Donna. Depending upon the evidence of emotional distress that he is able to put forward, which is only slightly addressed by the facts contained in the question, he may also be able to establish claims for intentional infliction of emotional distress and negligent infliction of emotional distress.

A. Battery

Paul has a battery claim against Donna. Battery is the intentional unlawful touching of another person. A person is liable for battery if the person acts with 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 § 13 (1965). The intent to cause a harmful or offensive contact is material only where battery is committed in performance of an act not otherwise unlawful. If the intended contact is unlawful or inherently wrongful, the actor need not mean for the contact to be harmful or offensive; the only intent required is to cause the unlawful or inherently wrongful contact to occur. *Merrill v. Faltin*, 430 P.2d 913, 917 (Alaska 1967).

Here, while the facts provide that Donna has a quick temper, perhaps suggesting that there was not a lot of thought behind her actions, Paul will be able to establish that Donna intended – however quickly she formed that intent – to either hit him with the rock that she threw or to cause him immediate fear that that rock would hit him. Because hitting someone with a rock, as Donna did here, is unlawful or inherently wrongful in itself, it does not matter whether Paul considered such contact harmful or offensive. Further, it is clear that the contact at issue occurred, as Paul was struck in the head by the rock Donna threw. Moreover, Paul suffered actual harm in the form of the lump and laceration to his forehead.

B. Assault

Paul also has a claim against Donna for assault. Assault occurs when a person intends to cause a harmful or offensive contact with another person or intends to create in another person the immediate apprehension of such a contact, and the other person is put in immediate apprehension of the harmful or offensive contact. *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992);

Williams v. Alyeska Pipeline Service Co., 650 P.2d 343, 348 (Alaska 1982); *see also* Restatement (Second) Torts § 21 (1965).

As discussed above, Paul will be able to establish through the willful nature of Donna's action toward him that she either intended to hit him in the head with a rock or that she intended to scare him and cause him to believe that he was about to be hit by a rock. Additionally, there is no question that such contact or feared contact is unlawful or at the very least inherently wrongful. Finally, under the facts provided in the question, Paul saw the rock coming at him after Donna threw it. While he apparently did not have time to dodge the rock, he was able to apprehend – however briefly – that he was about to be hit by the rock. Given Donna's intentional action and Paul's apprehension of immediate harmful contact, Paul can establish the elements of a completed assault. Of note, when the rock actually hit Paul in the forehead, the completed assault merged into a completed battery.

C. Negligence

Necessarily included in Paul's claims against Donna is a claim for negligence. In order to establish a claim of negligence against Donna, Paul must establish by a preponderance of the evidence that: (1) Donna owed a duty of care to Paul; (2) that duty was breached; (3) there was a proximate causal connection between Donna's breach of her duty and Paul's claimed harm; and (4) Paul was actually harmed. *See e.g.*, *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 667 (Alaska 2000); *Silvers v. Silvers*, 999 P.2d 786, 793 (Alaska 2000). Here, Donna owed a duty to Paul to act reasonably and to use reasonable care to prevent harm to him. *See e.g.*, *Lynden Inc. v. Walker*, 30 P.3d 609, 614 (Alaska 2001) ("[G]enerally an actor, if he acts at all, must exercise reasonable care to make his acts safe for others. In this sense there is a general duty of care running to all who might foreseeably be injured by an actor's conduct."); APCJI 3.03A ("Negligence is the failure to use reasonable care to prevent harm to oneself or to others."). Donna necessarily, then, owed Paul a duty not to intentionally harm him by throwing a rock at him. *See supra.* Further, she clearly breached her duty to behave reasonably toward Paul, and the facts provided do not support any excuse for that breach. Finally, Paul was clearly harmed, in that he suffered a lump and laceration to his forehead, and that harm unquestionably resulted from Donna's unreasonable act of throwing a rock at Paul.

D. Intentional Infliction of Emotional Distress

Depending on whether Paul was emotionally harmed by Donna's behavior toward him, and the extent of such emotional harm, Paul may also be able to establish a claim for intentional infliction of emotional distress. 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, 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. v. Nat'l Bank of Alaska*, 948 P.2d 443, 453-54 (Alaska 1997). 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.

As discussed above, Paul will be able to establish that Donna intentionally threw a rock at him. Under the circumstances, including the unprovoked nature of the attack, Paul will likely also be able to establish that Donna's violent behavior was sufficiently outrageous and/or extreme to warrant an IIED claim. The determinative point will be whether Paul was emotionally harmed as a result of Donna's behavior, and if so, the degree to which Paul was emotionally harmed. According to the facts provided, Paul was "shocked" by Donna's behavior; however, he will need to establish more extensive, "severe" emotional distress in order to establish an IIED claim. He can only prevail on an IIED claim if he can show that Donna's behavior caused him the sort of mental stress that "a reasonable man, normally constituted, would be unable to cope with." *See id.*

E. Negligent Infliction of Emotional Distress

Again, depending upon the level of emotional harm resulting from Donna's behavior, Paul may also be able to establish a claim for negligent infliction of emotional distress. Where a defendant's negligence causes a plaintiff mental disturbance or emotional harm, and where such mental or emotional harm is accompanied by physical injury, illness, or other physical consequences, a cause of action for negligent infliction of emotional distress may lie. *See e.g.*, *Hancock v. Nurthcutt*, 808 P.2d 251, 257 (Alaska 1991) (citing W. Prosser and W. Keeton, *The Law of Torts* § 54, at 361 (5th ed. 1984)). "The general rule is that where a tortfeasor's negligence causes emotional distress without physical injury, [NIED] damages may not be awarded." *Id.* Here, however, Paul did suffer physical injury. Additionally, as discussed above, he will be able to establish that Donna's actions were at the very least negligent, and in fact, went beyond negligence. In order to recover for an NIED claim, however, Paul must still establish that Donna's actions caused him severe

emotional distress. *Id.* at 257-58; *see also Sowinski v. Walker*, 198 P.3d 1134, 1162 (Alaska 2008); *Chizmar*, 896 P.2d at 201-04. Paul's ability to establish an NIED claim, then, will again depend upon the evidence of emotional distress that he is able to set forth.

2. Discuss whether Paul will be able to successfully pursue a negligence claim against Frank. (55 points)

Barring a statute providing for vicarious liability in specific instances, none of which applies here, parents are not held vicariously liable for violent acts of their children; rather, liability depends upon whether a direct theory of negligence lies against the parent at issue. *See e.g.*, *Dinsmore-Poff v. Alvord*, 972 P.2d 978, 980 (Alaska 1999); *Siemion v. Rumfelt*, 825 P.2d 896, 897 (Alaska 1992). In order to establish a negligence claim against Frank, Paul will need to prove that Frank violated – or breached – a duty owed to Paul, and that such breach caused Paul harm. *See e.g.*, *Parks Hiway Enterprises*, 995 P.2d at 667 (elements of a cause of action for negligence are 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty; 3) a proximate causal connection between the breach and the harm; and 4) actual harm); *Silvers*, 999 P.2d at 793 (same). As a preliminary matter, there can be no doubt that Paul suffered actual harm. The major question posed by Paul's suit of Frank is whether Paul's harm was caused by Frank's breach of any duty owed to Paul.

Where the existence and/or extent of a duty is not specifically set out in a statute or in other legal precedent, Alaska courts look to the following public policy factors in order to determine what, if any, duty is owed, as well as the nature and extent of the duty owed:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554, 555 (Alaska 1981). Here, while the *D.S.W.* factors are relevant to the determination of a legal duty, Alaska precedent offers direct guidance as to how such factors should be weighed.

Alaska law has long established that there is "no general duty to safeguard others from foreseeable harm when that would require controlling the conduct of another person or warning of such conduct." *R.E. v. State*, 878 P.2d 1341, 1348 (Alaska 1994) (citing *Div. of Corrections v. Neakok*, 721 P.2d 1121, 1125-26 (Alaska 1986); Restatement (Second) Torts § 314 (1965)). An

exception to this rule arises, however, where a defendant shares a "special relationship" with either a dangerous person or a potential victim such that the defendant is uniquely able to anticipate and control the behavior of a dangerous person or is better armed to warn a potential victim. *Id.* Here, Frank likely owed a general duty to supervise his daughter Donna. Although the Alaska Supreme Court has not outlined the exact contours of a parent's duty to supervise his or her child, the Court has recognized the principles behind such a duty and has suggested that that duty is described, at least in part, by the Restatement (Second) of Torts § 316 (1966). *Dinsmore-Poff*, 972 P.2d at 980-87; *see also e.g.*, *State v. Cowles*, 151 P.3d 353, 364 (Alaska 2006) (recognizing *Dinsmore-Poff* Court's analysis of parental duty to supervise); *State v. Sandsness*, 72 P.3d 299, 306 (Alaska 2003) (same); *P.G. v. State*, 4 P.3d 326, 333 (Alaska 2000) (same). Section 316 of the Restatement imposes upon parents:

> A duty to exercise reasonable care so to control [one's] minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that [the parent] has the ability to control [the] child, and (b) knows or should know of the necessity and opportunity for exercising such control.

According to the Alaska Supreme Court, "[t]he text of § 316 suggests a three-part test [for determining parental liability]: *i.e.*, whether parents knew or should have known of the (1) need, (2) ability, and (3) opportunity to control their child." *Id.* at 981. The Court also recognizes, however, that in imposing § 316, it should not adhere strictly to the above analysis. *Id.* Instead, as a practical matter, "courts first ask if parents knew of past conduct enough like that at issue to put them on notice of the need to correct their child's dangerous propensity." *Id.* Upon finding such knowledge on parents' part of past misconduct by their children, "[m]ost courts . . . have not then made a demanding, detailed inquiry," but instead "have usually just asked if the parents made some reasonable effort to prevent a recurrence." *Id.* at 982. Citing favorably the decisions of various out-of-state courts, the Alaska Supreme Court has recognized that in conducting the above analysis, "courts have been far from demanding in judging the reasonableness of parental efforts to correct a vicious tendency." *Id.* Many courts have also incorporated into their determinations the idea that it is often more difficult for parents to supervise and/or control near-adult children, particularly where the "dangerous" behavior at issue is more serious and/or involves greater deception. *Id.* at 982-83.

In light of the above factors, the Alaska Supreme Court has embraced the following analysis in examining efforts made by parents to supervise children who had demonstrated a dangerous propensity:

> To analyze thoroughly whether [such parents] acted reasonably seems to us to entail four questions: (a) Did they respond appropriately to specific prior violent acts? (b) Have their subsequent general efforts to control [their child/children] been reasonable? (c) Should they have foreseen the need to prevent this specific incident? and (d) If so, did they make reasonable efforts to do so? We do not mean to suggest that [parents] must successfully answer all four questions in order to avoid liability, but only that each question is relevant, in that an unfavorable answer could at least contribute to a finding of negligence.

Id. at 985. Notably, in *Dinsmore-Poff*, where the Court found that the defendant parents were aware of their teenage son's long history of emotional disturbance and violence – including his arrest twenty-one months earlier for shooting a boy – those parents nevertheless could not have foreseen their son's shooting of another individual on a particular subsequent occasion and thus could not have foreseen the need to intervene so as to prevent that event. *Id.* at 979, 986-87. The Court reiterated:

> [A] plaintiff must show more than a parent's general notice of a child's dangerous propensity. A plaintiff must show that the parent had reason to know with some specificity of a present opportunity and need to restrain the child to prevent some imminently foreseeable harm. General knowledge of past misconduct is, in other words, necessary but not sufficient for liability.

Id. at 986. That decision by the Court in *Dinsmore-Poff* is consistent with its common use of foreseeability as a major factor in determining the existence of a duty: "if no harm is foreseeable from the defendant's conduct, then no duty is owed." *P.G. v. State*, 4 P.3d 326, 332-33 (Alaska 2000); *see also Nicholson v. MGM Corp.*, 555 P.2d 39 (Alaska 1976).

Here, there is no question that Frank is and has been aware of at least some of his daughter's history of violent behavior. Donna's teachers and principals have informed Frank about her history of, and propensity for, starting fist fights at school with little or no provocation. Moreover, Frank is aware that Donna has been suspended from school for violent behavior several times over the years since she became a teenager. It is unclear, given the facts provided, whether Frank is also aware of any of Donna's violent behavior while outside of school or whether he should reasonably have known about such behavior outside of school. Still, Frank is clearly on notice of the fact that his daughter has a history of acting out violently with little or no provocation.

As the Court instructed in *Dinsmore-Poff*, however, such generalized knowledge of past behavior, in itself, does not render Frank negligent or liable. In assessing whether Frank was negligent, one must ask whether Frank made

reasonable efforts to control or respond to his daughter's violent behavior, and whether he should reasonably have foreseen the need to control his daughter on the particular occasion in which she threw the rock at Paul. With respect to the first inquiry, Frank did make efforts to respond to and control his daughter's fighting behavior. He met with his daughter's teachers and principal, imposed restrictions and discipline in order to punish and dissuade his daughter from fighting, and took her to a counselor in order to better understand and perhaps better control her behavior. Particularly given the success that these measures appeared to have while Donna was at school, Frank's response to his daughter's violent behavior would likely be deemed reasonable. Examinees may argue that Frank should have done more to be aware of and control his daughter's behavior; however, they should be mindful of the Alaska Supreme Court's hesitation to second guess parents' disciplinary choices and to impose too great a burden on parents. The Court has emphasized that such a burden "would ensure that parents who know of a child's violent propensity would almost always have to face a jury whenever the child hurt someone," an end the Court seeks to avoid. *Dinsmore-Poff*, 972 P.2d at 987.

Additionally, it does not appear from the facts that Frank should reasonably have foreseen that there was a particular need to control or discipline Donna on the evening in question, when she threw the rock at Paul. First, as far as Frank was aware, Donna's behavior and control over her temper at least arguably appeared to be improving. She had not gotten into any fights at school for a full semester. To the extent that Frank was unaware of his daughter's violent behavior while she was out with friends away from school, he could not foresee a need to control or prevent such behavior. Moreover, although Donna had demonstrated a past propensity for engaging in fist fights with people she knew, she had not previously attacked strangers by throwing things at them. While one could once again argue that Frank should have been more aware and controlling of his daughter's behavior, a court would likely find that Frank could not have reasonably foreseen Donna's particular behavior on the evening in question and thus that he owed Paul no specific duty to control or prevent her behavior on that occasion. *See Dinsmore-Poff*, 972 P.2d at 987-88 ([In order to support a claim of negligent parental supervision, a "plaintiff must first make some showing that the parents should have known at the time of a specific need and occasion to control their child. To send to a jury the general-measures argument alone would carry the rule of § 316 too far towards making parents, once aware of their child's dangerous propensity, into insurers and prison wardens until the child's eighteenth birthday."); *see also P.G.* and *Nicholson*, *supra*.

Given the measures that Frank took to control and prevent his daughter's violent behavior generally, and given the lack of facts suggesting that Frank should reasonably have foreseen the need to control and prevent

Donna's attack on Paul, Paul's negligence claim against Frank will likely prove unsuccessful.