

### ESSAY QUESTION NO. 3

#### Answer this question in booklet No. 3

Catherine was injured while she and her cousin, David, were walking down the sidewalk in Anchor Town, Alaska. Renovations, Inc. was working on the façade of a building and had put up scaffolding. The scaffolding was made of metal pipes connected together. The scaffolding collapsed while Catherine and David were walking by. One of the metal pipes struck Catherine in the head, and she collapsed on the ground, moaning in pain but not bleeding.

Catherine was taken to the hospital emergency room where Doctor Smith treated her for a head injury. Although Catherine could not respond to Doctor Smith coherently, she never lost consciousness. Doctor Smith concluded that she had a minor concussion and chose not to order a CAT scan, which would have showed that she had extensive internal bleeding in her skull. As a result of the failure to treat the bleeding, Catherine slipped into a coma. She lingered in the coma for a month and then died. Two other emergency room physicians in town were appalled at Dr. Smith's failure to order a CAT scan and sent a joint letter to the medical licensing authority stating that all competent emergency room physicians would have ordered a CAT scan under the circumstances.

David was a college freshman. David's parents died when he was in grade school and Catherine took him in. Catherine raised him as if he were her own child. Catherine was not married and did not have any children of her own. Catherine was David's sole support through high school. David earned enough to pay for half of his college costs. Catherine paid the rest. She had promised him that she would provide the \$30,000 that he needed to complete college. David stayed in school after Catherine died, but he became very depressed and needed psychiatric treatment for six months.

The scaffolding was manufactured by Ladders, Inc. The scaffolding collapsed because the forges at Ladders, Inc. did not heat the metal sufficiently, making the pipes very brittle. Ladders, Inc. could modify its forges to make the metal stronger and less brittle. Renovations, Inc. properly installed and maintained the scaffolding. Prior to selling the scaffolding to Renovations, Inc., Ladders, Inc. had received three complaints of its scaffolding collapsing because the pipes were brittle and had snapped.

(In answering the questions below, please do not discuss punitive damages or statutory limitations on damages.)

1. Discuss what claims, if any, Catherine's estate could make against Dr. Smith and Ladders, Inc.
2. Discuss what claims, if any, David could make.

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 3 \*\*\*

#### **SUBJECT: TORTS**

#### I. The Estate's Claims

##### A. Medical Malpractice – 25%

Alaska Statute AS 09.55.540(a) defines the elements of a medical malpractice claim in Alaska:

The plaintiff must establish three elements by a preponderance of the evidence:

1. The degree of knowledge or skill possessed or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant is practicing;
2. That the defendant either lacked this degree of knowledge or skill or failed to exercise this degree of care; and
3. That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been occurred.

Marsingill v. O'Malley, 58 P.3d 495, 499 n. 2 (Alaska 2002).

The facts establish that the estate probably has a claim for medical malpractice. The letter from the two emergency room physicians arguably establishes the standard of care exercised by emergency room physicians at the time of Catherine's accident. The emergency room physicians stated that all competent physicians would have ordered a CAT scan under the circumstances. The letter also establishes that Doctor Smith breached the standard of care, for he did not order a CAT scan when all competent doctors would have. The letter essentially calls Dr. Smith incompetent. Moreover, Catherine collapsed on the ground moaning after being struck in the head and could not respond coherently to Dr. Smith. These facts arguably support the claim that Dr. Smith should have ordered the CAT scan, for they indicate that she has some sort of closed head injury. The facts also indicate that Catherine's estate will be able to show causation and damages because she slipped into a coma as a result of the internal bleeding in her head.

B. Product Liability – 25%

The estate may have a product's liability claim against Ladders, Inc. based on a design defect.

A product is defective if the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Shanks v. Upjohn Co., 835 P.2d 1189, 1194 (Alaska 1992). A product is also defective if the product's design caused the injury and the defendant fails to show that the benefits of the product's design outweighed the risk of danger inherent in the design. Id. An ordinary consumer would not expect the pipes on the scaffolding to snap. By the same token, the facts do not establish that Ladders, Inc will be able to show that the benefits of the scaffolding's design outweigh the risks inherent in the design. Ladders, Inc. could modify its forges to heat the metal properly. The facts do not, however, contain any information regarding the cost of the modification and how that might affect the profitability of the scaffolding. In any event, Ladders, Inc. would bear the burden of proving that the benefit of its design outweighed any risk.

C. Negligence – 15%

The elements of negligence are duty, breach, proximate cause, and damages. Wickwire v. Arctic Circle Air Services, 722 P.2d 930, 932 (Alaska 1986). The court uses the D.S.W. factors to determine whether someone owes a duty in the absence of a statute, regulation, contract, undertaking, the parties' preexisting relationship, or existing case law. McGrew v. State, 2005 W.L. 273124 (Alaska 2005). There are six D.S.W. factors:

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 School Dist., 628 P.2d 554, 555 (Alaska 1981).

**Foreseeability** – This factor favors finding a duty because it is foreseeable that brittle pipes make the scaffolding more susceptible to failure and that the collapse of the scaffolding is likely to injure someone.

**Closeness of the connection** – The connection between Catherine’s injury and Ladders Inc.’s conduct is close. The use of brittle metal in the pipes made a collapse more likely, and the sudden collapse of the scaffolding was likely to injure someone.

**Moral Blame** – An argument can be made that Ladders, Inc. is morally culpable. Ladders, Inc. had reason to believe that its scaffolding was defective. Ladders, Inc. had received three complaints of scaffolding collapses due to brittle pipes, yet it did not alter its manufacturing process to make the metal stronger.

**Preventing Future Harm** – The policy of preventing future harm favors finding a duty. Well made scaffolding would reduce the likelihood of future injuries.

**Burden on the Defendant and the Consequences to Society** – There is not enough information to make a final determination as to the burden on the defendant. The facts indicate that Ladders, Inc. can modify its forges to make the metal less brittle, but there is no cost information in the facts. At some point, it would be cost prohibitive to make the modification. In any event, the cost of scaffolding would go up, and that cost would be passed on to the public.

**Insurance** – There is no information in the facts regarding insurance one way or the other. Presumably though, Ladders, Inc. is already carrying insurance. If so, there is no reason why it could not get insurance for a better made product.

The analysis above favors a finding of liability. However, it may be possible to craft a well reasoned argument against finding a duty.

On the assumption that there is a duty, the facts support a finding of breach, proximate cause and damages. Ladders, Inc. did not provide safe scaffolding even though it had reason to believe that the scaffolding would collapse because of the brittle metal used to manufacture the pipes. The faulty scaffolding caused Catherine’s injury because the pipe hit her after the scaffolding collapsed. Catherine suffered damages because she was injured and eventually died.

D. Wrongful Death – 20%

Alaska Statute 09.55.580 creates a cause of action for wrongful death. Whenever the wrongful act of a person causes the death of another, then the decedent’s personal representative may pursue a claim for wrongful death. Under Alaska’s statute, there is a preferred class of beneficiaries consisting of the spouse, children, and other dependants. If a member of the preferred class exists, the court may award damages for deprivation of pecuniary expectation, loss of support, loss of assistance or services, loss of consortium, loss of

prospective training and education, and medical and funeral expenses. This list is not exclusive according to the statute. Although the suit is brought in the name of the personal representative, the representative holds the recovery for the exclusive benefit of the preferred beneficiary rather than the estate. If there is no member of the preferred class, then the estate may recover for pecuniary loss only, and the recovery is treated like the other personal property in the estate.

The personal representative could file a claim for wrongful death. Catherine's death was caused by wrongful acts: the medical malpractice of Dr. Smith and the negligence and strict products liability of Ladders, Inc.

The personal representative would bring the claim for the benefit of David. According to the court, there must be a showing of actual dependence for a person to qualify as an "other dependent". Greer Tank & Welding, Inc. v. Boettger, 609 P.2d 548, 551 (Alaska 1980). David would be a member of the preferred class because he was actually dependent on Catherine. She took him in when he was orphaned in grade school and was his sole support through high school. Although he is partially supporting himself in college, Catherine paid for ½ of his first year's expenses. Moreover, she promised to pay the \$30,000 that he needed to complete his college education. David's dependency would probably end when he graduated from college. Nothing in the facts indicates that Catherine was going to continue providing support to him after graduation. The supreme court indicated in Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038, 1047 (Alaska 1986) that dependency normally ends with graduation from college.

In addition to compensation for his financial loss, David would be able to pursue claims for loss of consortium and mental anguish. Kavorkian, 727 P.2d at 1047. The facts suggest that David and Catherine were close because he suffered depression and required psychiatric treatment for six months after her death.

As noted above, David is the beneficiary of the wrongful death action. Some examinees may put the wrongful death claim in their answer to the question dealing with David's claims. They should receive credit for doing so as long as they recognize that the claim must be brought by the personal representative. A wrongful death claim is odd in that it is brought by the estate but for the benefit of a particular beneficiary, not the estate.

## II. David's Claim - Negligent Infliction of Emotional Distress – 15%

Ordinarily a person must suffer a physical injury to recover for the negligent infliction of emotional distress. Allstate Insurance Co. v. Teel, 100 P.3d 2, 5 (Alaska 2004). However, a bystander may recover without a physical injury if he (1) was located near the scene of the accident, (2) had shock resulting from

the sensory and contemporaneous observance of the accident, and (3) had a close relationship with the victim. Id.

David can probably satisfy all three requirements. David was located near the scene because he was walking down the sidewalk with Catherine. He suffered depression as a result of Catherine's death and required psychiatric treatment for six months. The facts do not explicitly say that the shock was from the contemporaneous observance of her accident, but his subsequent depression supports an inference that his presence at the scene had an effect on him. Finally, he presumably had a close relationship with her, for she acted as his mother since grade school. She also promised to support him as he pursued his college education.

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# Alaska Bar Examination

JULY  
2005

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*Question **No. 3** Only*

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ISSUE # 1: Discuss what claims Catherine's estate may make against Dr. Smith and Ladders, Inc.

Generally, Catherine has strong negligence claims against Dr. Smith for failure to act as a reasonable person under the circumstances and against Ladder's Inc in strict liability.

In Alaska, in a tort claim for negligence, the plaintiff must prove a duty, a breach of the duty, causation and harm.

Regarding Dr. Smith, Catherine's estate may bring a negligence claim under this standard based on the following facts. As the emergency room doctor who treated Catherine, Dr. Smith had a duty to act as a reasonable person would under the circumstances. In circumstances involving ~~expert~~ experts such as doctors, the court would base this reasonable person standard on someone of like experience, and ~~also~~ education, as well as looking at the generally accepted practices of other similar experts in the community. Two other emergency room physicians, reasonable persons for purpose of ~~the~~ the standard, ~~and~~ were "appalled at Dr. Smith's failure to order a cat ~~scan~~ scan." Furthermore, these physicians offer, ~~evidence~~ being in town, represent the standards of other professionals in the community, and even published their discontent to the community medical licensing authority. Based on this information, Dr. Smith breached his duty to provide reasonable care by failing to



order a CAT scan. The facts indicate that the CAT scan would have revealed extensive internal bleeding, and that as a ~~the~~ result of the failure to treat the bleeding she slipped into a coma and died. This satisfies ~~the~~ a "but for" causation linking Dr. Smith's breach and Catherine's harm - "but for" Dr. Smith's failure to ~~the~~ order a CAT scan and discover ~~the~~ the bleeding (and presumably treat it) Catherine would not have died. The ~~short~~ month-long coma and eventual death were the harms caused by Dr. Smith's negligence.

A tort claim for strict liability is available to Catherine's estate against Ladders, Inc. Again, the general standard of negligence requires a duty, a breach of the duty, causation and harm. In actions of strict liability, however, the reasonable person standard is substituted for that of the prudent manufacturer ~~and~~ and the following factors are considered. The manufacturer will be held to a standard that considers the level of risk known to the manufacturer ~~is~~ balanced against the availability and feasibility of existing alternatives the manufacturer knew or should have known.

Ladder's Inc will be found to owe a duty because it is a company in the chain of distribution of the faulty scaffolding. ~~The~~ Ladders Inc can be held liable in strict liability ~~then~~ for the sale or distribution of the ~~so~~ scaffolding with a known manufacturing defect. The manufacturing defect was the

actual cause of harm because, while ~~it~~ being applied to an appropriate use (scaffolding used in a building renovation) the defect caused a harm to the plaintiff. The court ~~will~~ should find assignment of strict liability <sup>just</sup> appropriate under the circumstances because there exists reasonable alternatives; "Ladders, Inc could modify its forges to make the metal stronger and less brittle" if such a modification were reasonable and economically feasible. ~~Under these circumstances, where Ladders Inc had acted under a manufacturing defect, the~~

In summary on the strict liability claim, Catherine's estate should have a strong claim because ~~Catherine was a foreseeable person~~ Catherine was injured by ~~a manufacturing defect~~ an event or action caused by a manufacturing defect in scaffolding for which Ladder's Inc is in the chain of custody, while that scaffolding was being put to ~~the~~ an appropriate use, and there existed at the time of defect, a defect that the manufacturer had reason to know about, reasonable alternatives ~~to~~ to correct the defect. It is unknown whether these alternatives were sufficiently affordable/efficient ~~but~~ based on the available facts.

~~per~~ probably

David has no claim regarding his tuition and college expenses ~~and~~ as these obligations by Catherine to a third party are not reasonably foreseeable ~~consequences~~ to either an emergency room doctor or a product manufacturer, ~~or they are so distant from the harm caused~~

David may, however, have a ~~an~~ a claim for negligent infliction of emotional distress. Alaska courts recognize negligent ~~infliction~~ infliction of emotional distress claims when there is a duty, a breach, causation and harm. Unlike standard tort cases, however, the measure of the ~~the~~ defendant's conduct is whether "such behavior was sufficiently outrageous or extreme as to offend a reasonable person's sensibilities" - a deliberately higher standard than simple reasonable care.

Applying the facts of the case, it may be found that Dr. Smith's conduct was "sufficiently outrageous and extreme." Two other emergency room doctors were "appalled" and ~~were~~ sufficiently so to motivate a joint letter of complaint. Still, it is impossible to decide this with certainty based on the facts provided. If Dr. Smith's conduct is so defined, ~~it~~ it would be a substantial factor in causing David to become very depressed and require treatment.

Against Ladder's Inc, David may show that distributing ladders and scaffolding with known dangerous manufacturing errors or defects is sufficiently "outrageous and extreme" as to ~~still~~ satisfy the standard for negligent infliction of severe emotional distress, <sup>as well as</sup> ~~and~~ the causation and harm elements. ~~have already been established.~~

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# Alaska Bar Examination

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(A.) Catharine v Ladders Inc.

① Catharine's Estate would bring a Products Liability Claim against Ladders Inc.

A Commercial Supplier, including a Retailer, Wholesaler or distributor are liable for defective products under the legal theories of <sup>Strict</sup> Products Liability, breach of warranty and Failure to Warn. Under Strict Products Liability, when a product leaves the commercial supplier in a defective position ~~is~~ <sup>and is</sup> unreasonably dangerous the Commercial supplier and anyone else related to the products distribution may be <sup>held</sup> liable.

A product may be defective from a manufacturing defect or a design defect.

A manufacturing defect renders ~~the~~ <sup>a single</sup> product coming off the production line as uniquely different from the rest of the products coming off the line. If this unique difference is unreasonably dangerous and likely to cause harm if use ~~is~~ <sup>for</sup> is reasonable purpose the the manufacture will be held liable. Here, this is not the case. The facts indicate the failure of the pipes was due to more of a design failure.

If the design of the product, when ~~judged~~ <sup>determined</sup> by the court could be design in an alternative way, such that the impact to the product or the consumer are benefited from the potential risk and the harm caused from the product necessitated could be potentially very ~~is~~ dangerous then the court rules in favors of changing the design and finds the ~~the~~ Company responsibly liable.

Here, previous reports had been reported stating that scaffolds had collapsed ~~because~~ <sup>because</sup> the pipes were brittle and snapped. This is enough for the court to find the potential for further harm is very great and the issue should be addressed.

Evidence or facts submitted also state that Ladders Inc did not heat the metal sufficiently and made the pipes very brittle. ~~The offer of~~ An alternative technique was suggested that Ladders Inc could modify its forges to make the metal stronger and less brittle.

If the court applies this alternative welding procedure to the benefits of the product and consumer, the results would be that both would win. The cost of using stronger metal that is less brittle must surely outweigh the risk of having injured people and also having killed Catherine.

~~Therefore the court would~~

The court also considers in the above analysis who uses the product; ~~with who~~, the user, the buyer the innocent bystander; in all cases everyone stands to benefit from the alternative suggested.

The court should also look at the warnings applied. Which doesn't apply to the passerby in this situation. And the Express and Implied warranties (of Merchantability and Special Purpose Products) which seem more applicable for the defense of Renovations Inc

if Ladders Inc tries to blame them for negligent installation and maintenance.

B Catherine v. Dr. Smith

It may be that Catherine's <sup>Estate</sup> would have a claim against Dr. Smith for lack of Duty of Care, ~~under~~ <sup>under</sup> Malpractice but ~~because~~ because Catherine was injured by Ladders Inc the harm suffered by Dr. Smith is a foreseeable injury arising from Catherine's original injury.

~~The~~ Dr. Smith did in fact owe a special Professional Standard of Care to Catherine that was Breached. Professional who are trained in a specific area of expertise are held to a higher standard to perform a higher standard of care. Here, Dr. Smith failed in his evaluation of Catherine and violated the duty of care owe to Catherine resulting in a breach. This breach of care led to the negligent care by Dr. Smith and ~~makes the link~~ only adds to the injury already suffered by the collapsing scaffold. Therefore, the addition of harm caused to Catherine from the breach of care by Dr. Smith is only a contributing cause of Catherine's death. We are not given any facts stating that Catherine's damages-death were cause only by Dr. Smith. ~~There~~

Therefore, Dr. Smith contributed to Catherine's damages and will be part of a lawsuit

against Ladder Inc as a 3<sup>rd</sup> Party defendant.

② Davids Claims

David vs Ladders Inc.

David will bring a claim base on ~~IIED~~ IIED and NIED.

IIED

<sup>infliction</sup> Intentional emotional distress requires intent to harm physically or emotional ~~cause extreme emotional harm~~ caused outrageous acts in the extreme. Here, David a close friend standing within the zone of harm witnessed his friend get injured by the scaffolding and the later die. This ~~reckless~~ reckless act cause David severe emotional distress for which he ~~is~~ is receiving treatment - Because of these facts he may be able to recover from Ladders Inc.

NIED

Negligent Infliction of Emotional Distress is very similar to IIED except the act is negligent instead of reckless behavior or action. If David has difficulty suing under IIED he may have a better cause of Action caused by Negligence.

David v. Dr Smith

David may try to bring an IIED and NIED against Dr Smith but David is probably too far removed from the Nexus of the injury and is not a "family" member. Although he may claim Catherine was like a mother to him.



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# 1. Catherine's estate's claims Against Dr Smith & Ladder

## ① claims Against Dr Smith

Catherine's estate can sue Dr Smith in tort. Tort claims fall under negligence, intentional torts, and strict/product liability. There is no evidence of intentional wrongdoing or defective products on Dr. Smith's part, so negligence claims are the estate's best bet.

The elements of negligence are: duty, breach, causation, and damages. All four elements must be met to hold Dr Smith liable.

### ① Duty

Parties ~~have~~ <sup>sue</sup> duties of care to other parties. Duty can arise from a contractual or family relationship or from a high standard such as <sup>the duty a</sup> common carrier or innkeeper owes its customer, but the default ~~is~~ or general rule is that a party owes to another party the duty to act as a reasonably prudent person under the relevant circumstances. In Alaska, duty is found according to the "DSW" factors: foreseeability of harm, certainty of harm, burden on the defendant & community of imposing a duty, policy of preventing future harm, & availability of liability insurance, among others.

Here, Dr. Smith owed to Catherine the duty of a reasonably prudent physician to act according to the local standards. ~~to other doctors stated that he breached that duty~~ This ~~element~~ is met

(ii) Breach

The second element of negligence is breach of the duty owed. A duty is breached if the defendant's ~~does not~~ acts do not reach the level of duty owed (ie by comparing the defendant's acts to the duty).

Here, it appears from the letter written by the other ER doctors that Dr. Smith did not live up to the duty of competence he owed Catherine - he did not order a CAT scan, where all competent doctors would have. This element is likely met.

(iii) Causation

This third element of negligence is divided into factual cause and legal (proximate) cause. Factual cause is found where, but for the defendant's negligence, the plaintiff would not be injured. Legal or proximate cause is found where an intervening act between a factual cause and the result <sup>causes or</sup> increases the plaintiff's harm.

Here, the scaffold's collapse is the factual cause - Dr Smith had nothing to do with that. But his acts are a proximate or legal cause of Catherine's harm. An intervening cause is not a superceding cause unless, viewed retrospectively it is highly extraordinary. Dr. Smith's intervening negligence is a substantial factor in Catherine's death - This element is met.

(iv) The final element of negligence is damages. As Catherine is dead - she clearly suffered harm.

All 4 elements of negligence are met - Catherine's estate would likely succeed on a negligence claim against Dr. Smith.

b. The Estate's Claims Against Ladders, Inc.

The estate can sue Ladders, Inc. in tort for strict products liability (PL). PL can be found in a manufacturing defect, design defect, or failure of warnings or warranty.

Manufacturing defects occur when one item differs from all other items made in the same unit. According to these facts, all scaffolds had the same problems, so manufacturing defect is not a basis for liability.

A design defect is found where either (a) the product did not function the way a normal consumer could reasonably expect from it's foreseeable uses ("consumer expectations test"), or (b) the "Risk-Utility test" where an alternative design existed but was not used. Risk-Utility is found when an alternative exists, is feasible and cost-effective, and has few burdens on the consumer or manufacturer. Here, it is apparent from the facts that the pipes could have been designed in an alternative way to make them less brittle. Therefore the estate could sue under a Risk-Utility Theory of design defect for strict liability.

Finally, strict product liability could also arise from failure of warnings or warranty, but those do not apply here.

## 2. David's claims

① David can sue for negligent infliction of emotional distress (NIED). This tort occurs when a party negligently causes the plaintiff to suffer severe mental distress via the defendant's extreme or outrageous conduct. A bystander can recover for NIED when they are in the "zone of danger" and view the accident and are a close family member.

Here David was in the zone of danger - he was next to Catherine - but he is not an immediate family member. He would have to successfully argue that Catherine's acts of raising David "as if ~~she~~ he was her own child" amounted to being a close family member. (see below)

② David could try to sue for wrongful death - an independent tort available to a parent, spouse, child, or dependent. But again he would have to prove he was Catherine's legal dependent in order to recover.

③ If David proves he was a bystander under that

definitive, he might succeed on his NIED claim, especially in view of his ~~background~~ ~~steps~~ depression & need for 6 months of psychiatric care. However, (unlike intentional infliction of emotional distress) NIED requires showing physical symptoms of the distress.

All David has shown is mental symptoms (depression). ~~Thus~~ Thus his claim for NIED may fail.

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# Alaska Bar Examination

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① Catherine's estate claims against Dr. Smith & Ladders

As a threshold matter, a tort action in Alaska survives the death of the party who had standing to bring the ~~the~~ action, and does not "die" with them. Thus, Catherine's estate may sue on her behalf for personal injury and wrongful death.

Catherine vs. Dr. Smith

Negligence occurs where a party has a duty to the plaintiff, breaches a standard of care, and the breach is the factual and legal/proximate cause of the plaintiff's injury.

Here, Dr. Smith had a duty to act as a reasonable physician in the same or similar circumstances. His duty can be established through the expert testimony of the two ER physicians who wrote the letter to the licensing authority, so long as those two physicians were themselves board certified, that a reasonable doctor faced with an "incoherent" patient would order a CAT scan. Catherine's representative will ~~argue~~ <sup>argue that</sup> Dr. Smith breached the duty of care by negligently concluding that a CAT scan was not needed, something a reasonably prudent physician would have done.

Catherine must establish that the failure to order the cat scan was the ~~legally proximate~~ factual cause of her death. But for the failure to ~~to~~ order



If the Cat scan that would have detected the internal bleeding, she would not have slipped into a coma and died.

She must also establish proximate causation that more likely than not Dr. Smith's failure to order the Cat scan was a substantial factor in bringing about her injury, and that a reasonable person would regard that as a cause and attach liability to it. Death is certainly within the scope of the risk of internal bleeding in the skull, and the internal bleeding was allowed to continue undetected because the doctor failed to order the proper test. If there was a way to stop or ~~to~~ treat the internal bleeding had it been detected on time, a reasonable person would regard the failure to order the test as a cause of death and hold Dr. Smith liable.

Injury is established by the fact that Catherine did die after her coma.

vs. Ladders, Inc.

Ladders, Inc. can be liable ~~as~~ as a manufacturer of a defective product, and on a negligence theory.

Alaska offers three ways to bring a products liability action ~~and~~ ~~also~~ strict liability, ~~in~~ ~~not~~ inadequate warning, and breach of warranty.

A manufacturer is strictly liable when he places a product that is defective on the market and it reaches the consumer ~~with~~ substantially unchanged from when it left the manufacturer's hands. A manufacturing defect is found in a product that is different from the manufacturer's intended design or is different than others of its type, not present here. Here, the pipes are substantially unchanged, only assembled

A design defect can be established one of two ways - the product ~~was of a design~~ ~~failed~~ failed the consumer expectation test by not living up to the expected safety of an ordinary user, or the risk/utility test, where the product's safety risks are ~~comparable~~ outweigh the benefits of the design.

Here, the scaffolding failed to live up to the expectation of an ordinary consumer, because scaffolding that people stand on to build structures, and which is walked under, should not collapse under such normal ordinary use.

The scaffolding also fails the risk/utility test because Catterine can make out a claim that there is a feasible alternative design, stronger, less brittle pipes, and that the design can be modified, as the facts state. ~~Design is a matter of degree.~~ ~~And shifting the burden to A.~~ In considering whether Ladders, Inc. meets its burden to justify the design, the court will consider the feasibility of alternatives, seriousness of risk

and consequence of an alternative design on the product and consumer, and the costs to the manufacturer.

~~Re Catherine~~

Before Catherine can get to the jury on these claims she must also establish causation and injury. She will have to establish that but for the ladder collapsing, she would not have died, and that the defective pipes were more likely than not a substantial factor in bringing about her injury & that a reasonable person would attach liability to it. As pipes don't normally collapse, her negligence claim would be based on *res ipsa loquitur*.

An intervening cause does not supersede and break the chain of liability if it is foreseeable. Thus, Ladders, Inc. will be liable for the death ~~caused~~ caused by the subsequent negligence of Dr. Smith in failing to order the test that would have detected the extent of the injury. A tortfeasor takes the risk that a second party such as a rescuer or doctor will also be negligent in treatment and so the first tortfeasor will be a proximate cause of the ultimate injury.

② David's claims

In Alaska, a bystander who observes the plaintiff's injury at the scene of the injury may

recuer if he is a close relative of the plaintiff. Here, David may or may not be able to establish that as a cousin he was a "close" relative of Catherine. If so, he can recover from his psychiatric problems as a result of observing her injury at the time of its occurrence.

David may also plead a claim for negligent infliction of emotional distress, where he could argue that the defendants (Dr. Smith and Ladders) breached the duty to not cause emotional distress in others by causing Catherine's injury, and that conduct was extreme and outrageous, and that David has suffered injury as a result. Injury, however, in a "NIED" claim, must also manifest physically to be actionable. David has only been "depressed;" he has not suffered any physical problems with his depression.

~~If he brings a survivor action against the defen-~~

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1. Claims By Catherine's Estate

Estate v. Dr. Smith

Catherine's estate would not have any strict liability claims against the Doctor since he is not a manufacturer, is not engaged in an abnormally dangerous activity and does not own wild animals. The estate also does not have any intentional tort claims against the doctor since the facts do not indicate that he acted intentionally in harming Catherine. The estate does, however, have a negligence claim against the doctor.

To make a claim of negligence, the plaintiff must show that a duty existed, the defendant breached that duty, the breach caused an injury, and that there are damages. The estate may win on a negligence claim against the doctor for failing to order the CAT scan.

The doctor has a duty to act as a reasonably prudent person and, as a doctor, as a competent professional in good standing. When he began diagnosing and treating Catherine, he owed that duty of care to her specifically. This duty could be established by evidence showing that competent doctors would always order a CAT scan when dealing with a head injury. Doctors are not always held to a national standard when they are working in small towns without access to all the same equipment and resources that those working in a large city hospital may have access to. This doctor is apparently from a very small town since Anchor Town is in Alaska and basically anyplace other than Anchorage and Fairbanks would not be considered a high tech capitol of the country. The doctor would still be held to a level of competency judged by a community of similar size and circumstances standard. In this case, two other doctors in town were so appalled at Dr. Smith's failure to order a CAT scan that they wrote into the licensing authority. They would be allowed to testify that in their community, the one in which Dr. Smith practices, CAT scans are always ordered where there has been a head

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injury and that Dr. Smith's failure to do so was a breach of the level of care he owed his patients, which included Catherine.

The doctor breached his duty to order a CAT scan where there has been a head injury when he failed to do so for Catherine who came in with a head injury.

The estate would also argue that the doctor's failure to order the CAT scan caused Catherine's injury. A person's breach of duty is the cause of an injury where the action of failure to act is a "but for" cause of the injury and proximate cause. The action or failure to act is the proximate cause of the injury where it is such a substantial factor in bringing about the injury that a reasonable person would assign responsibility to it.

In this case, but for the doctor's failure to order the CAT, the internal bleeding would have been discovered and Catherine may have lived. The doctor could argue, however, that the head injury was so severe that even if a CAT scan had been ordered he wouldn't have been able to do anything about the bleeding and she would have died from the injury anyway. If the estate could show that Catherine could have survived or at least lived longer than she did without the CAT scan, the estate could prevail on this issue.

The doctor's failure to order the CAT scan was also the proximate cause of Catherine's death. Because no CAT scan was done, Catherine's injury was not discovered and she was unable to receive treatment for it as a result. The doctor could argue that the scaffolding people are responsible instead but this would probably not be successful since his own negligence was enough in and of itself to cause Catherine's death. She might have survived the head injury if he had done his job right.

There is also clearly damages in this case. Catherine died as a result of the doctor's negligence in failing to order the CAT scan.

Estate v. Ladders, Inc

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The estate could make a strict liability claim against Ladders, Inc. A manufacturer can be found strictly liable for a product under three different theories. First, it could be strictly liable for a defective product. Second, there may be liability for an inadequacy of warnings. Third, there may be liability for a breach of warranty.

First, a manufacturer can be strictly liable for a defective product if it is defective when it leaves the control of the manufacturer and is not substantially changed before it reaches the hands of the consumer. The defect can be either a manufacturing defect or a design defect.

A manufacturing defect exists if the product does not conform with the same kind of product made by the manufacturer or if it does not match the manufacturer's intent for how the product is supposed to turn out. Here, the facts indicate that Ladders did not heat the metal sufficiently, making the pipes very brittle. Apparently, this is not how Ladders intended its product to turn out so there may be a manufacturing defect.

There are two tests for determining whether a design defect exists. The first is the consumer expectations test: if the product does not perform as safely as a consumer would expect while being used for its intended or foreseeable uses, it is defective. Here, Renovations (the consumer of Ladder's product) expected the scaffolding to be safe for using as scaffolding. Renovations used it as scaffolding but it collapsed while being used for its intended purpose.

The second test for a design defect is the risk/utility test. There the court looks at the cost and feasibility of designing the product in an alternative fashion against the adverse consequences the alternative design would have on the consumer and on the product and with the gravity of the injury caused by the current design. Here, the facts indicate that Ladders could modify its forges to make the metal stronger and less brittle. It seems that the cost of making some modifications to the forge would be small compared with the loss of human life which its current design causes. It is also very feasible to make the modifications to the forge. This is also not just a one time incident. There have been three other complaints of scaffolding

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collapsing, all of which carries with it the risk of death or serious bodily injury. The alternative design for the manufacturing of the scaffolding would also not have any negative impact on the product itself since it could still be used as scaffolding and would be even better than the old.

The estate would still need to show causation and damages. Causation is discussed above but as applied to Ladders, Ladders could argue that it was Renovation's use of the product that was an intervening cause to Catherine's injury. The facts, however, indicate that Renovations properly installed and maintained the scaffolding. Since there was no negligence on the part of Renovations, Ladders is the only person to assign responsibility to.

Damages are also present in the form of Catherine's death.

There may also be an inadequacy of warnings strict liability claim. Warnings must clearly communicate to the user the scope of the risk associated with use of the product, the seriousness of the potential harm caused by that risk and must be communicated so as to put a reasonably prudent person on notice. Ladders knew that their scaffolding was collapsing and causing injury. They should have at least included a warning that people using the scaffolding not allow anyone to walk underneath it. That would have prevented Catherine's injury.

There could also be a breach of warranty strict liability claim. Alaska does not allow any warranties to be imported from the common law so the only warranties possible would be a warranty of merchantability and warranty of fitness. A warranty of merchantability exists on all products as it leaves the hands of a producer that it will be fit for general purposes. Here, Ladders was selling scaffolding that wouldn't stand use as scaffolding. This is a breach of the warranty.

A warranty of fitness may have also existed if the seller knew the buyer needed the item for a specific purpose and that the buyer was relying on the seller to provide a good product for that use. Ladders had to have known that Renovations needed the scaffolding to put up against a building and use as scaffolding so the warranty probably existed.

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Again, need to show causation and damages as discussed above.

In the alternative estate, could make a negligence claim against Ladders for breaching duty to act reasonably in providing a safe product which they breached when Ladders kept selling scaffolding that they knew was collapsing and which caused Catherine's death.

## 2. David's claims

David may have a claim for negligent infliction of emotional distress. In negligence claim of action, he would need to prove an existing duty, breach of that duty, causation and damages. He would need to prove that he suffered severe emotional distress when he saw Catherine (a relative) being hit by the scaffolding while he was in the same zone of danger and that the injury was caused by Renovation's negligence in not posting warnings to people walking under the scaffolding or by using a faulty product. David would not need to show physical damage since he was related to Catherine. They were cousins and though not immediate family by blood, Catherine had raised David as her own son. His severe emotional distress is indicated by the fact that he became very depressed and needed psychiatric treatment for six months. He was walking right next to Catherine when she was struck by the collapsing scaffolding and was in danger of being struck by it himself. This places him in the zone of danger.

David could also have a claim against Catherine's estate for the \$30,000 that she had promised him so that he could finish college.

**END OF EXAM**