Professor DeWolf
Product Liability

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Sample Answer

QUESTION 1

A number of defendants might be explored as potential defendants in this case. Although the claims against them share certain features of product liability law, each will be taken separately.

1. Claim v. Clear-Cut

The manufacturer of the saw blade could be sued under a product liability theory. In order to succeed, Blanchard would have to establish (a) that there was some kind of product defect; (b) that the defect was a proximate cause of injury; and (c) Blanchard suffered compensable injury.

In addition, Clear-cut would probably assert the affirmative defense of contributory fault.

A. Liability theories

In general, a defendant is liable to a plaintiff injured by his product if the defendant's product was defective. The defect can occur in two major ways: as a manufacturing defect or as a design defect. In addition, the product may be defective by virtue of a failure to warn of a danger.

1. Manufacturing defect. A manufacturing defect occurs when a product does not meet the specifications established by the manufacturer for a product, and therefore is less safe than the same type of product manufactured by the defendant. In this case it is possible that the saw blade contained a manufacturing defect that caused the injury. Apparently Dr. Frankel believes that the saw blade was somehow warped before it was put into the saw. His testimony as an expert would be admissible to establish the existence of a defect. Of course it would be subject to rebuttal by the defendants. If the jury believes the blade was warped and that the warp in the blade caused the accident (see below), then Clear-cut would be liable for the injury.

Although there have been changes in product liability law (see the discussion re design, below), virtually all jurisdictions impose a standard of strict liability for manufacturing defects. That is, it is irrelevant whether the manufacturer exercised reasonable care; if the product is "out of spec" and that results in injury, the manufacturer is strictly liable.

2. Design Defect. It is possible that the saw blade was properly manufactured, that is, it met the manufacturer's specifications, but those specfications themselves were unreasonably dangerous. In general, courts have established two different tests for design defects: the first asks whether the product met the (reasonable) consumer's expectations; and the second asks whether the product fell short of optimum design because its risk/utility balance was skewed.[1]

(i) Consumer expectations. This test asks whether the product as manufactured created a danger that was unreasonable given the expectations of the average consumer. If a

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[1]A third standard, adopted by California and a few other jurisdictions, follows yet a third approach: under *Barker v. Lull* the consumer is allowed to recover if it fails either test, and the burden of proof is placed upon the defendant to show that the design is not defective, i.e., that the product is reasonably safe.

consumer would anticipate the danger created by the product, then no liability exists. However, if the consumer would in essence be surprised by the level of danger, then it may fail this test. Courts differ as to the level of sophistication expected of consumers; some would require actual appreciation of the danger; some would bar a claim so long as the consumer is merely aware of the danger.

(ii) Risk/utility. Other courts employ a test looking to whether or not the product could be improved by reducing the product's risk without impairing its utility. In other words, could the product be made safer at an acceptable cost. In effect this is the Learned Hand test often used in negligence cases, except that it focuses upon the product itself rather than upon the knowledge or conduct of the individuals who produced a product. In this way it approaches strict liability, in that an individual may behave perfectly reasonably, and unbeknownst to him a product turns out to be more dangerous than it needs to be. The utility consideration takes into account both the cost of producing the product as well as potential sacrifices in performance that might result from making the product safer.

Application to this case. In this case there might be a way to make saw blades that would reduce the risk of this kind of injury occurring. Even if the product was straight when it was first made, and only became warped during use, it might be "defective" because it could be made less susceptible to causing this injury for an acceptable cost. For example, suppose the saw blade warped because of excessive heat. Would a different alloy used to make the saw blade make it less likely to bend? Would that reduce this kind of injury? Increase it? How likely are these types of injuries?

Nothing on the face of the problem indicates the presence of a design defect, and since Dr. Frankel believes there was a manufacturing defect rather than a design defect, this claim would be weak. However, it might be possible to assert both claims.

3. Failure to warn. A manufacturer is also liable to a product user if the product lacks adequate warnings of the dangers that are encountered when using the product. There is disagreement among different jurisdictions as to whether the failure to warn theory is judged by a negligence standard or strict liability standard. (The difference would be that under strict liability the desirability of a warning is judged by the knowledge available at the time of trial, whereas under negligence the question would be whether the manufacturer knew or should have known of the danger at the time the product was designed.) In any event, the issue is whether the blade's warnings were inadequate. It appears that Blanchard was using the wrong blade for his task; he was using a blade designed for dimensional lumber instead of for plywood. If that had anything to do with the injury, perhaps the warning should have been more pronounced. To be adequate, a warning must (1) be prominently displayed; (2) describe the danger that will occur if the warning is not heeded; and (3) give instructions on how to avoid the danger. In this case, perhaps a warning should have said "Use of the wrong saw blade may cause the blade to jam, resulting in personal injury." The warning that was provided simply said to use a different saw blade for different kinds of wood. For all the consumer knew, it might simply not cut as well or not last as long.

B. Proximate Cause

In addition to establishing a defect (or failure to warn) by the defendant, Blanchard would also have to establish that the defect was a proximate cause of the injury. In this case, the saw did not fly up and cut the plaintiff; instead, it caused him to fall on the floor. In establishing proximate cause, Blanchard would have to show that the defect was a "but-for" cause of the injury (i.e., without the defect, the injury would not have occurrred) as well as

showing that it was a "legal" cause--proximate enough to make the imposition of liability fair. Both aspects of this test seem to be satisfied, since Blanchard would not have fallen but for the bent saw blade; and although not exactly the kind of injury (cuts) that might be expected, it was the "bucking" of the saw that caused the fall, and would certainly be a foreseeable result of a problem with the saw.

C. Damages

Blanchard would be able to recover for economic loss (lost wages) as well as for pain and suffering. No punitive damages appear to be warranted, since there was, at least on the facts given, no basis for a finding of "reckless" or "flagrant" indifference to the risk of injury.

2. Claim v. Saw manufacturer

The saw manufacturer would be governed by the same law with respect to manufacturing, design and warning theories. There is no indication that there was a manufacturing flaw in the saw, although that is possible, in that two saw blades got bent. On the other hand, there might be a design defect in that the saw is too likely to cause bent saw blades. Again, the issue would be whether for an acceptable cost the danger could be eliminated.

A failure to warn theory might also be pursued, although it is quite likely that there was a owner's manual that contained lots of instructions. We aren't given the warnings that accompanied the saw. As with the saw blade, the same law would apply: is the warning prominent enough? Specific enough? Is there instruction on how to avoid the danger?

3. Claim v. Peachauers

Peachauers is an intermediate seller; that is, they did not manufacture the saw. Nonetheless, under Restatement §402A they are liable as a "seller." Some recent reform legislation passed in many jurisdictions provides for protection of the intermediate seller unless a claim against the manufacturer is not viable for some reason. Assuming the manufacturer is solvent, nothing really would be gained by a claim against the intermediate seller, since whatever liability theory is applicable to Peachauers would be applicable a fortiori against the manufacturer.

Defense of Comparative Fault

Even if Blanchard can establish that there was some defect in the product, or a failure to warn, his claim might be reduced by a finding of comparative fault. Although some jurisdictions have refused to recognize a defense based on contributory negligence, reasoning that they are based on two different legal concepts (strict liability and fault), an increasing number of jurisdictions now provide for comparative fault as a defense to a product liability action.

In this case Blanchard may have been negligent in selecting the wrong blade; or in failing to detect what was wrong with the saw, or in the operation of the saw itself. If the jury assigns a percentage of fault to his negligence, the award will be reduced by that amount. (Unless Blanchard is in a jurisdiction that does not recognize it as a defense, in which case it will be irrelevant.)

QUESTION 2

Two claims might be considered: one brought on Jimmy's behalf; and the second brought on behalf of grandma. Since grandma's claim represents the only claim for substantial damages, it will be considered first:

A. Grandma's Claims.

Grandma could possibly sue the manufacturer of Everbright, and she might also have a claim against Peter Pluto.

1. Against Everbright

To succeed in her claim against Everbright Grandma would have to establish (a) that the product was somehow defective; (b) that the defect proximately caused her injury; and (c) that she suffered compensable damages.

a. Product Defect. A product manufacturer is liable for injuries caused by a defective product. A product defect can consist of a manufacturing flaw or a design defect. A manufacturing flaw is present when the product doesn't meet the specifications established by the manufacturer. There doesn't appear to be anything unusual about this can of Everbright.

However, a case could be made based upon the design of the product. Design defects have been judged by is present when the product could have been made acceptable for a reasonable cost. In this case we would look to whether or not the product packaging could have been such as to prevent this kind of injury. Household products that contain poisons or flammable liquids, such as Drano or gasoline, have been found defective if they were not manufactured with a childproof cap. Courts have adopted one of two major tests[2] to determine whether a product design is defective: (1) whether it meets ordinary consumer expectations; and (2) whether the product is adequate based upon a risk/utility assessment. The former test is partly subjective, asking whether or not the consumer would or should have anticipated the risk that was created by the product; the second test is objective, and focuses upon whether or not the product could be made safer for an acceptable cost.

In this case it is not clear whether the product had a childproof cap on it. It appears it did not. Under the consumer expectations test, the question would be whether the ordinary consumer would expect the product to have such a cap. It appears that Pluto bought the product in large quantities, "industrial size," and it is likely that in such a case a childproof cap might not be expected. On the other hand, one of the gasoline can cases that we looked at (*Racine*), found that even though the product was one that consumers would be expected to keep out of the reach of children, given the likelihood of some child trying to play with a can full of gasoline, and given the catastrophic results, a childproof cap would be required.

Similarly, under the risk/utility test, it would be relevant how often a container like this would be within reach of children, and what the risk was in the event that it was played with by a child. Since the product "looks like a milkshake," the risk of injury might be considerable. Thus, the relatively small cost of a childproof cap, compared with the probability and magnitude of harm, might make a container without a cap unreasonably dangerous and therefore defective.

b. Proximate Cause. Grandma might have a more difficult time showing that the product defect was a proximate cause of this injury. To show proximate cause, Grandma would have to establish (1) that the defect was a "but-for" cause of her injury, i.e., if it had not been for the defect, she would not have been injured; and (2) the injury was "proximate" enough to the defect to make the injury reasonably foreseeable. As to the first test, "but-for" cause, there are serious doubts that a childproof cap would have made any difference. The kind of cap that is on gasoline cans, for instance, can be taken off. This cap had been taken off in order for the

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[2]As noted above, there is also the *Barker v. Lull* test which gives the plaintiff the choice of which test to use, and which shifts the burden of proof to the defendant.

product to be applied, and it is unlikely that it would have made any difference whether the initial removal of the cap could have been done by a child or not. Second, as to "proximate" cause, the injury was a stroke caused by an emotional reaction to seeing someone else that Grandma thought was poisoned. Everbright could argue convincingly that this is *not* the kind of injury that would be anticipated by the lack of a childproof cap, and therefore the proximate cause test has not been met.

c. Damages. The final element to be established is whether or not the injury constitutes compensable damages. In some ways this would be similar to the proximate cause test. Grandma will have difficulty showing that she suffered an injury that is compensable, since she was not physically injured by the product. In some ways this would be similar to the *Gnirk* case (mother watches child drown in canal). There the defendant claimed that the mother was not entitled to compensation since she suffered only emotional injury. There the district court permitted the mother to claim damages, finding that her emotional injury manifested itself in physical terms. Here of course we have an even stronger case in terms of the manifestation of injury, but Grandma still might have trouble because of the more tenuous proximate cause situation, as discussed above.

As will be noted below, Everbright could assert a defense against Grandma based upon comparative fault. Everbright might also be interested in the effect of the claim against Pluto, also discussed below.

2. Grandma's Claims Against Pluto

Grandma might also have a claim against Pluto based upon his leaving the Everbright in a way that led to this accident. The real question is whether Pluto owed any duty to Grandma, and if so, whether it was breached.

Breach of Duty. Pluto would be sued in his capacity as an owner of land, and under some kind of attractive nuisance theory. If he knew of the potential for child trespassers, and knew there was a serious risk of injury that the children would not appreciate, he would be under a duty to exercise reasonable care to prevent such injuries if the precautions were relatively cheap. Here it might be that he knew Jimmy might wander over, and under the circumstances he failed to exercise reasonable care to remove the container.

As a consequence, Pluto might have breached a duty toward Jimmy, but whether that duty also extends to Grandma would depend upon the proximate cause analysis described above. Would it be foreseeable that, even assuming a potential injury to Jimmy, that Grandma would have such a strong reaction and be injured as a result? A difficult case, to be sure. However, it might have some bearing on the disposition of the case against Everbright, as the following discussion indicates:

3. The Effect of Comparative Fault

Several issues of comparative fault need to be addressed. The first has to do with whether Grandma herself was at fault in the way she reacted to the problem. This would be the "contributory negligence" issue; the second would be the effect of a finding that more than one tortfeasor was responsible for her injury.

Contributory Negligence. Grandma herself might be at fault for allowing Jimmy to wander alone unsupervised. (Some consideration might be given to whether or not she is protected by some form of family immunity. Since she hasn't encountered the risk through a classic form of negligence, it would be hard to consider this as a true contributory negligence

case. But maybe it would qualify. If so, it would have the effect in many jurisdictions of reducing her recovery by the percentage that she is found at fault. On the other hand, some jurisdictions ignore contributory negligence so long as it does not constitute "assumption of risk," that is, a knowing and voluntary encounter of the risk. That doctrine doesn't appear to apply here. Thus, a finding of contributory negligence would at most reduce Grandma's recovery by the percentage she is found at fault.

Multiple Tortfeasors. In the event that both Pluto and Everbright are found to be liable for the injury to Grandma, we would have to decide what effect that would have upon the recovery. The first question is whether Grandma would still entitled to joint and several liability. In some jurisdictions she would be; in others she would be limited to the percentage share of each defendant; but if both parties are solvent, joint and several liability won't make a big difference. The defendants would be entitled to allocate fault among themselves according to their respective percentage shares, but again that would not be of much interest to Grandma.

B. Jimmy's Claims.

Jimmy would be able to recover on a theory similar to Grandma's, except he would not have the difficulty of establishing foreseeability, nor would have the difficulty of establishing that his damages were of an appropriate type. However, he would have similar problems with respect to multiple tortfeasors. But I wouldn't spend much time on Jimmy in view of the lack of any significant damages.