

## Question 4

Darla is in the pest control business. She develops and produces fumigation gas for her own use. She also sells the gas to consumers. Some of her competitors do not sell gas to consumers because consumers sometimes do not follow safety instructions.

Darla sold a container of fumigation gas to Albert for use in ridding his apartment of insects. Although she had intended to produce gas of standard toxicity, she had unknowingly produced gas of unduly high toxicity. Albert used the gas and succeeded in killing all the insects in his apartment. Because he used the gas carelessly, some made its way into the apartment of his neighbor, Paul. The gas caused Paul to suffer serious lung damage and to fear that he would contract cancer as a result.

1. Is Darla liable to Paul? Discuss.
2. If so, may Paul obtain damages from Darla for fear of contracting cancer? Discuss.

## ANSWER A TO QUESTION 4

Darla is in the pest control business and produces fumigation gas for her own use, and sells it to consumers. She unknowingly produced gas of unduly high toxicity which ended up causing Paul, a neighbor of the user Albert that bought gas from her, lung damage and fear of contracting cancer. Although Albert, who was in privity with Darla as he purchased the gas from her, was negligent in his use, there are several theories that Paul can employ to hold Darla liable for her personal injuries.

Paul can potentially sue Darla on theories of an abnormally dangerous activity that caused Paul harm, strict products liability, negligent products liability, implied warranty and express warranty and misrepresentation theories, as well as intentional tort theories.

### **Abnormally Dangerous Activity**

A defendant will owe a plaintiff a strict duty of care, regardless of the conduct of the particular defendant, when the defendant undertakes an abnormally dangerous activity. An abnormally dangerous activity is one with a high risk of harm, that is not commonly found in the community, which has a risk that cannot be eliminated with due care. The utility is usually lower than the risk of harm. The defendant is liable if the dangerous character actually and proximately causes the plaintiff damages.

Here, Darla is in the business of developing and producing fumigation gas, which she sells to consumers. Fumigation gas contains toxins that carry a risk of harm inherently. Darla will argue this is not an inherently dangerous activity, because fumigation gas is safe in normal amounts of toxicity, and is commonly used to control pests. She will argue it is "common in the community." Paul can counter that toxic gas always carries with it a high risk of harm, and unduly high levels of gas is not common in the community. Paul will argue that the gas is so dangerous that D's competitors will not sell it to consumers for fear that warnings are not enough to abate the danger.

Darla can point out that the risk can be eliminated with due care, as people call pest control and have fumigation all of the time, and this is safe. Paul will argue that no matter the due care, chemicals always carry risk of harm to people.

### **Causation**

Paul will argue that the dangerous character was the but-for cause of his harm, because but for the dangerous toxins, he would not have suffered lung damage and fear of contracting cancer. However, in terms of proximate cause, Darla will argue that Albert, the user of the gas, used it carelessly and the fact that the gas made its way to Paul's apartment was a supervening cause. Paul will counter that while this may have been a supervening cause, only unforeseeable intervening acts will break the chain of causation, and Albert's negligence was foreseeable, since Darla herself knew that "consumers sometimes do not follow safety instructions." It is likely that Albert's negligence does not absolve Darla here. Thus, the dangerous character of the chemicals can be said to be the actual and proximate cause of Paul's harm. If Darla's production of the fumigation gas is an "abnormally dangerous activity" then Darla is liable to Paul on this theory.

The issues of proximate cause and causation will be detailed below under the other theories of liability.

### **Strict Products Liability**

A defendant is strictly liable in tort when the defendant manufactures, distributes, and/or sells a product that is unreasonably dangerous and thus "defective" and the dangerous character actually and proximately causes harm to a plaintiff.

## **Duty and Standard of Care**

A defendant owes a strict duty of care to all foreseeable plaintiffs. The focus is necessarily on the character of the product, and not the actions or due care of the defendant, in a strict liability analysis.

First, it is necessary to see if P and D are proper parties. A proper defendant for strict products liability is a commercial seller of a product. This includes all parties in the chain of distribution. Here, Darla is in the pest control business. She develops and produces fumigation gas for her own use and sells it to consumers. She will argue that since she produces it for her own use, she is not a "commercial" seller and falls outside of the strict liability framework. However, Paul will rightly point out that since she "sells the gas to consumers" she is a proper defendant here.

Proper plaintiff-- Strict products liability does not require privity, or a contractual relationship between the defendant and the injured party. A proper plaintiff is thus a buyer, a user, or even a bystander that is harmed. Here, Paul was not a user or purchaser of the gas; his neighbor Albert was. Albert's careless use of the gas resulted in the gas making its way into Paul's apartment and causing him lung damage from breathing the fumes. Since Paul is a "bystander" harmed by the dangerous character of the product, Paul is a proper plaintiff and has standing to sue Darla.

## **Defect**

The defendant, Darla, is liable for a defect in the product that is unreasonably dangerous. There are three types of defects in products liability: a manufacturing defect, a design defect, and a failure to warn defect which is a subset of a design defect.

## **Manufacturing Defect**

A manufacturing defect is a defect caused during the manufacture of the product, whereby the product becomes unreasonable dangerous as a result of a problem during the manufacturing process. The defect is a result of a "one off" problem where the product emerges more dangerous than the other products that are manufactured with it.

Here, Darla may be liable for a manufacturing defect. She intended to produce fumigation gas of standard toxicity, which is presumably safe for human use when properly manufactured, as she is in the pest control business and sells to consumers. However, Darla unknowingly produced gas that was of unduly high toxicity, and sold it to Albert. Since this gas was "unduly toxic" this can demonstrate a product that was made to be unreasonably dangerous, as a result of the production process, and is different than the normal gas.

A manufacturing defect is demonstrated by the "Consumer Expectations Test" which essentially asks, would an ordinary consumer find the product to be more dangerous than they would anticipate? Here, while adult consumers are likely aware of the attendant dangers of toxic pest control fumes, Paul can argue that consumers do not expect that they will suffer serious lung damage as a result of someone spraying to kill some bugs in their apartment. This is likely a good argument for Paul. However, Darla can argue that consumers DO expect that fumigating can cause damage if they breathe in the fumes, and it is common sense that someone should not use too much gas. Darla will point out that the same is true for other items, such as household bleach. Paul likely has the better argument here, as consumers that spray for insects would probably not expect that the gas has "unduly high toxicity." Therefore, Paul has enough facts to prove a manufacturing defect here.

## **Design Defect**

A design defect occurs when a product as designed is unreasonably dangerous, and is measured in terms of whether there is a "reasonable alternative design" for the product that makes it more safe without impairing its utility and function and without making it unduly expensive so as to price the defendant out of the market. It may be the case that Darla's product of the gas was a design defect in terms of the way the chemicals were used. If she used a different chemical combination, she may have been able to avoid the problem of accidentally making it too toxic. However, there are no facts to show this, and it appears that Darla simply made one batch of gas too toxic. There does not appear to be a reasonable alternative design, because pest control fumigation gas is inherently toxic.

## **Failure to Warn Defect**

If there are either no warnings or inappropriate warnings on a dangerous product, this is a type of design defect. Here, it is not clear if there were warnings and what they were. However, because Darla's competitors do not sell the gas to consumers because they don't always heed instructions, there is some evidence that the gas does come with instructions. However, more facts would be needed to show that there were inadequate warnings here.

## **Causation**

### **Actual Cause**

There must be a showing not only that the product was dangerous but that the dangerous property actually caused the harm to the Plaintiff. The defect must have been present while the product was in Darla's control.

Here, but for the high toxicity levels, Albert's overuse of the product would not have caused the harm to Paul, or so Paul will argue. It is not clear if overuse of the normal gas would have caused the same problem. However, it is likely that the unduly high levels of toxicity caused the harm to Paul, when the fumes from Albert's apartment from Albert's spraying for bugs wafted into Paul's apartment. Therefore, Paul can likely argue that the dangerous defect was the actual, but-for cause of his harm.

It appears that Darla did have control of the product while it was defective, because it can be inferred that when she produced the gas with such high levels of toxicity this was the gas she sold to Albert, who used it and injured Peter.

### **Proximate Cause**

The harm must also have been proximately caused, meaning that it was foreseeable that the harm would occur, and that the defendant created the scope of risks. A strict products liability defendant is liable for all foreseeable misuses of a product, so a misuse that is foreseeable will NOT cut off the chain of liability because it is not an unforeseeable independent or abnormal dependent event such as would break the chain.

Darla will argue that Albert's negligence was an independent intervening cause and she should not be liable for Albert's negligent use of the gas. However, it is foreseeable that users may accidentally use too much gas, or do this purposefully without understanding the true harm. In fact, this was so foreseeable that Darla's competitors have in fact refused to sell gas to customers, because customers sometimes do not follow directions. This demonstrates the danger of the product and the fact that consumers are likely to misuse the gas, and harm themselves or others. Thus, Paul will be able to show that Darla's product was the proximate cause of his harm, despite the fact that Albert was negligent.

## **Damages**

Paul suffered serious lung damage as a result of ingesting the gas fumes. He also worried that he would contract cancer as a result. Typically, products liability actions will only allow a recovery of personal injury or property damage but Paul's emotional distress may also be parasitic to this. This will be addressed below. However, Paul did suffer his requisite damage to recover.

In sum, Paul can likely recover on a strict products liability theory.

## **Defenses: Assumption of the Risk?**

Darla can invoke this defense, which means that one knows of a risk and voluntarily proceeds in spite of it. Paul did not know of the risks, and was an innocent bystander. Therefore, there is no defense.

## **Contributory Negligence**

The plaintiff's conduct is not an issue and cannot be a defense in strict liability, because the focus is on the character of the property, not the parties' conduct.

## **Negligent Products Liability**

Negligence focus on the conduct of the defendant, and not just the character of the property.

## **Duty**

A commercial producer owes a duty of reasonable care to foreseeable plaintiffs, who are plaintiffs in the "zone of danger" per Cardozo in Palsgraf. Here, Paul was arguably in the zone of danger. Even though he was not a user, it is foreseeable that the fumes



could leak out and harm people that are nearby, including neighbors. Darla will argue it is not foreseeable that someone in a different apartment would be harmed; however it is foreseeable that the toxic gas can waft.

### **Standard of Care**

Darla owed a duty to act as a reasonably prudent producer of fumigation gas would act under the circumstances. Since others in the pest control business do not sell gas to consumers, this is evidence of a lack of prudence on her part. She unknowingly produced high levels of toxins in her gas, and should have had safety controls, monitoring, and someone to check the gas before it went out. She likely breached her standard of care here.

The analysis of causation and damages is the same as above; therefore, Darla is likely liable for strict liability as well.

### **Contributory Negligence**

Paul was not negligent here, and thus this will not reduce a potential recovery.

Paul can recover for negligent products liability.

### **Implied Warranties of Merchantability**

A product is deemed merchantable for its intended purpose. Therefore, Paul may be able to argue a breach here, if the product was not fit for its intended purpose and was too dangerous. However, this is likely not the issue; the spray worked well and as intended, because it killed all of the bugs in Albert's apartment here. Therefore, Paul cannot recover on this theory.

### **Express Warranties/Intentional Torts/Misrepresentation**

Here, it does not appear that Darla made any representations to Paul at all, since she did not interact with him. Therefore, he cannot recover on express warranty or misrep theory.

Darla may be liable for battery if she knew to a substantial certainty that she would cause Paul harm but there does not appear to be evidence of this.

## **(2) Can Paul obtain damages for fear of contracting cancer?**

Proper damages for products liability in strict liability or tort involve personal injury and property damage only. Emotional distress can constitute a personal injury, but even if it did not, it is 'parasitic' to Paul's actual physical injury of lung damage so it would likely be awarded on this theory. If fear of contracting cancer is "emotional distress" which it likely is, then it is a proper measure of damages.

### **Damages must be foreseeable, certain, definite, and unavoidable.**

Paul can recover if his emotional distress is reasonable and foreseeable. Here, it is foreseeable that Paul would fear contracting cancer after ingesting toxic gas and suffering severe lung damage. An average person would have this fear especially since it is certain that he developed severe lung damage.

Paul could face problems proving his damages with definiteness/certainty. It is difficult to quantify this measure, and Darla will argue as such. However, a jury would weigh his suffering, and the credibility and likelihood of his distress, and award a number. Juries award damages for pain and suffering routinely, and could award damages based on "fear."

Paul did not need to mitigate here, since he was not a wrongdoer, and he cannot easily mitigate fear, unless he sees a therapist to reduce his fear, which would also cost money and be a measure of damages.

Therefore, it is likely that Paul would also recover damages for fear of contracting cancer, if this constitutes "emotional distress."

## **ANSWER B TO QUESTION 4**

### **1) Is Darla liable to Paul?**

Paul may bring a variety of claims against Darla including a claim based on strict liability, products liability, and negligence.

#### **Strict Liability**

A claim for strict liability may be made when the defendant is engaged in an abnormally dangerous activity, in which case he/she owes a strict duty of care to the plaintiff, and that activity causes harm to the plaintiff. Whether an activity is considered an abnormally dangerous one requires a determination of whether the activity is common in the community and whether the defendant, taking all reasonable and proper measures to ensure safety of the activity, the risks involved in the dangerous activity cannot be completely protected against.

In this case, Darla is engaged in the business of developing and producing fumigation gas which she uses for her own purposes in addition to selling to consumers. While some of her competitors do not sell the gas to consumers because consumers sometimes do not follow the safety instructions, the use of fumigation gas to rid one's home or business of pests may arguably be considered a matter common in the community. In this case, Albert did in fact use Darla's gas to rid his house of pests and thus an argument can be made that while the risk danger of using the gas cannot entirely be protected against, it likely is a matter common in the community, thus, a claim for strict liability will likely fail if P brings one against D.

#### **Strict Products Liability (SPL)**

For a claim of SPL, a defendant must be a commercial supplier of a good who supplies a dangerously defective product into the stream of commerce that causes, both actually and proximately, the harm to the plaintiff that results in damages.

### **Commercial Supplier**

In this case, D is in the pest control business in which she manufactures and distributes fumigation gas. While she does use it for her own use, she also sells the gas to consumers. In this case, she sold the gas to Albert who used it to kill the insects in his apartment. Thus, Darla would owe a strict duty to Albert, but also to Paul. The fact that the gas injured Albert's neighbor Paul, who was not in privity of contract with Darla for the sale of the gas is of no consequence because a commercial supplier owes a strict duty to all foreseeable consumers/users or people who may come into contact with the product. Here, despite the fact that Paul did not purchase and use the gas himself from Darla, this will not prevent him from pursuing a SPL claim against her. Because D may be considered a commercial supplier, this element is met.

### **Defective Product**

A consumer may attempt to show that a commercial supplier supplied a dangerously defective product by claiming that the product contained either a manufacturing defect (using the consumer expectation test), a design defect (feasible alternative tests), or an inadequate warning defect (information defect, which is a subset of a design defect.). In this case, Paul should argue that there was a manufacturing defect in the fumigation gas because Darla had produced gas of unduly high toxicity, and the ordinary consumer would have expected the gas produced to be of standard toxicity.

### **Manufacturing Defect**

As discussed above, using the ordinary consumer expectation test, Paul will argue that a reasonable consumer would not have expected Darla to supply the market (and here Albert) with fumigation gas that had an unduly high toxicity level as compared to the standard toxicity levels that are generally supplied. The fact that Darla produced the higher toxic gas unknowingly and unintentionally is of no consequence in a SPL suit because the supplier owes a strict duty of care to the reasonably foreseeable consumer (here Paul), and breach of that duty (by supplying the dangerously defective product) is enough to make out the prima facie case for duty and breach of the standard of care.

### **Inadequate Warning**

Alternatively, because the facts indicate that some of D's competitors do not sell gas to consumers because the consumers sometimes do not follow safety instructions, there may also be an issue of inadequate warning here; however, there is no evidence that D did in fact fail to supply a warning against the dangers of using the gas, so P's best argument would be to argue that the product was dangerously defective on account of the manufacturing defect.

### **Causation-actual cause**

The injury sustained by P must also be the actual cause of the supply of the defective product. In this case, D's supply of the product to Albert (A) actually caused the harm to P because but for the sale and use of the product in A's apartment, P would not have been harmed. Rather, the issue that D will argue here is that she is not the proximate cause (or legal cause) of P's injuries on account of A's misuse of the product.

### **Legal Cause (Proximate cause)**

Proximate cause is a legal limit on a D's liability, whereby courts will only cut off a D's liability to P's when it exceeds the foreseeable scope of liability. In this case, D will argue that A's misuse of the product in that A carelessly allowed the gas to seep into his neighbor P's apartment, should absolve her of liability because a reasonable person using the product would ensure that it would not injure others. However, this argument will likely fail because a commercial supplier must take into account a user's foreseeable misuse of the product, and such a misuse occurred in this case. It is foreseeable that a user of highly toxic pest control gas may injure other individuals on account of his negligent use of it. Thus, because a court would reject the argument that A's negligent misuse was an intervening and superceding cause that should cut off D's liability to P, this element will also be met.

## **Damages**

Finally, a P must have suffered some form of cognizable damages in order to affect a recovery. Because Paul suffered serious lung damage, a personal harm to his body, he will meet this requirement and his claim against D based on SPL will likely succeed.

## **Defenses--assumption of risk and contributory negligence**

D might try and argue that P assumed the risk of being injured by A's use of the pesticide; however, for an assumption of the risk defense to work, the individual must have knowingly and voluntarily assumed the risk of the activity involved. Here, there are no facts to suggest that P assumed any risk whatsoever, let alone voluntarily accepted such risks. Thus, this defense will fail.

Alternatively, D will argue that A was contributorily negligent in allowing the gas to injure his neighbor; however, as discussed above, this defense will not work in a SPL case because the negligence of the user is not taken into account when there was foreseeable misuse of the product by the user.

## **Negligence claim against D**

The prima facie case for negligence includes duty, breach of that duty by falling below the requisite standard of care, causation (actual and proximate) and damages.

## **Duty**

Under the Andrews minority view, a person owes a duty to everyone; thus D would owe a duty to P in this case. However, under the Cardozo majority view, a person only owes a duty to all those foreseeable persons within the zone of danger. Under this view, D would also owe a duty to P because the fact that P's apartment was located next to A's apartment (from which the gas leaked out of and into P's apartment), it is likely that P was within the zone of danger as to the use of the toxic chemicals and also was a foreseeable plaintiff because D would reasonably foresee that someone's neighbor may be injured by use of the toxic chemicals, especially in the context of apartment homes

which are generally separated by walls and hallways from each other. Thus D owed a duty of care to P in this case.

### **Breach-Standard of Care**

D owed a duty to P and the standard of the duty would be to act as a reasonably prudent manufacturer and supplier of toxic chemicals used for pest control. Here, P will argue that D's actions fell below the requisite standard of care because D negligently produced a much higher toxic gas than she had intended to produce, and a reasonably prudent supplier of such gas would either test the levels of the gas before placing them in the market and selling them or, at the very least, having certain safeguards available to ensure that the gas level of the product produced would not exceed certain specifications. Because P can argue that D likely breached its standard of care in this case, P will have to show that his injuries were also the cause of his damages as well.

### **Actual Cause**

P will argue that but for D's supply of the negligently manufactured product to A, P would not have been injured. Because as discussed above this element is met, P must show that D is also the legal cause of his injuries.

### **Proximate cause**

D will argue, again, that A was in fact the legal cause of P's injuries because of his misuse of the product, and that such misuse was an unforeseeable intervening and superceding cause of P's injuries and should thus absolve D of any liability to P. However, for the reasons discussed above, this argument will likely fail because it is entirely foreseeable that an apartment owner who shares his residency in close proximity to other tenants might injure those tenants by misusing a toxic substance in an attempt to kill the pests in his apartment. Thus, P will be able to succeed on this element as well.



## **Damages**

Again, P must prove that he suffered damages that the law recognizes as compensable. Here, P suffered lung damage and because this is a form of personal injury for which the law provides a remedy, P will be able to easily meet this element.

Thus, P has also made out a prima facie case for negligence against D as well.

## **Defenses**

### **Contributory negligence**

A P's contributory negligence traditionally barred his claim for recovery against the D; however, many courts have adopted a form of comparative negligence to lessen the harshness of the result with regard to the complete bar on P's claim. In this case, D might try and argue that P was contributorily negligent because he should have been able to recognize the smell of the gas or that something was causing him discomfort in his apartment, and should have sought fresh air by going outside or moving out temporarily. However, there aren't any facts to suggest that the gas had an odor; for all intents and purposes, it might have been an odorless gas. Moreover, P might have been asleep while A used the gas and would not have noticed its effects on him. Because there is very little in the facts to suggest that P was contributorily negligent, this defense will likely fail for D to assert. Similarly, an assumption of the risk defense will also fail for reasons discussed above.

### **2) May P obtain damages for Darla for fear of contracting cancer?**

The issue is whether P can recover damages against D for his emotional distress. The claim that P would bring against D is one for negligent infliction of emotional distress, since the elements of an intentional infliction of emotional distress are not applicable here.

### **Negligent infliction of emotional distress (NIED)**

The elements for an NIED claim occur when a defendant negligently causes emotional distress to a plaintiff on account of the D's actions. Traditionally, an NIED claim required the P to suffer some form of physical harm, and not merely some intangible emotional harm out of fear that the courts would receive a large influx of junk cases for unsubstantiated claims. Here, P will likely be able to recover his emotional distress, i.e. fear that he will contract cancer from the exposure to the gas, because he has in fact suffered a physical manifestation of the harm in the form of the lung damage that he has seriously suffered. Thus, because P can show that he has suffered physical harm to his body, he will also be entitled to recover for his emotional distress as well.