

FINAL EXAM #1

In the mountains of West Virginia, Lonerock Coal Company was strip mining Ray's Mountain. They had already removed all trees from the top of the mountain. On a Monday morning, at 8:00 am, workers for the company began blowing off the topsoil and rock layers with dynamite to get to the coal. This process was in violation of federal law.

As a result of the exploding dynamite, a boulder weighing several tons rolled down the mountain. The boulder reached speeds up to 80 miles per hour. At the bottom of the mountain, the boulder bounced over the steeple of a church and landed on top of a single-wide trailer. Inside the trailer were two boys, Tommy (8) and his little brother Billy (5). Both boys died instantly.

At the time of the incident, the boys' mother, Wendy, was working at the local all-nite truck-stop and restaurant. She discovered her dead children when she returned home at the end of her shift.

Lonerock has refused to accept any liability. They contend the boys' mother knew of the mining operation and was Contributorily Negligent for leaving her children unattended. They also contend, if any liability should possibly exist, that the value of the boys' lives were nugatory because they were unemployed, ill-educated, and not likely to amount to anything in the future.

Wendy comes to you for advice. Explain to her the various legal issues implicated herein.

Issue	Rule	Analysis	Concl'n	Points Allotted
W v Lonerock				
Abnormally Dangerous Activity	Activity creates foreseeable and significant risk of physical harm; risk cannot be eliminated with due care; activity unusual for location	Dynamiting top of mountain creates foreseeable and significant risk; cannot be eliminated with due care; Inappropriate process in violation of law, but not inappropriate location	Probably not	10
Causation: Actual	But For	But for dynamiting, boulder would not have rolled down hill	true	7
Causation: Proximate	Direct; Reasonably Foreseeable Intervening Acts	Dynamiting caused boulder to roll down the mountain. Direct and foreseeable	true	7
Damages	Wrongful Death; Loss of Consortium; General Damages; Future economic loss punitive	Two boys dead		10

Negligence	Over-arching rule			4
Duty	RFP <u>Palsgraf v. LIRR</u> ; put boys in peril	Lonerock had duty to those at the bottom of the mountain	yes	7
Standard of Care	RPP Custom in the industry; statute	Reasonable care to make sure no person in harm's way; custom not mentioned; Statute controlled manner in which to strip mine?	yes	7
Breach	<u>Blyth v. Birmingham</u> ; Hand Formula, <u>US v. Carroll Towing</u>	Burden of clearing area versus probable serious injury from exploding dynamite on top of mountain	yes	7
Causation	See above	See above	yes	3
Damages	See above	See above	yes	3
Defenses	CN Comp Neg/Fault AOR	Mother left children alone; Mother knew or should have known of	Not likely	10

		dynamiting of mountain		
NIED for mother	Rule for third party plaintiffs: <u>Amaya</u> zone of danger rule; <u>Dillon v. Legg</u> ; <u>Thing v. LaChusa</u>	Mother not present at scene at time, did not see incident; arrived after dead.	no	15
Total points				90

FINAL EXAM 2

Monsanta manufactures the weed killer called *Weed-B-Gon*. It placed the product into the market in the 1970s. *Weed-B-Gon* contains a chemical called glyphosate. Glyphosate is what kills the weeds.

Prior to releasing the product into the market, Monsanto did extensive testing. It found that there was no discernible risk to users of the product. As a result, they marketed the product to both professional and non-professional users. The product contained a warning label. The label advised the user that the product should not be ingested, that the user should wear gloves and a mask while applying the product, and that the product should not be stored near flammables. The label contained no other warnings.

In November 2017, a large study in the *Journal of the National Cancer Institute* looked at nearly 45,000 glyphosate users. They concluded that users that had "high exposure" to the product had a 41% increase in relative risk of non-Hodgkins lymphoma (NHL). The study also concluded that users that had a "low exposure" to glyphosate had no increased risk of NHL. According to the American Cancer Society, the average man has a 2.4% risk of NHL; the average woman has a 1.9% risk NHL. Thus, high exposure to glyphosate increases the risk of NHL to 3.4% for men and 2.6% for women.

In December of 2017, DeWayne Johnson, a weekend gardener, sued Monsanto after discovering he had NHL. He claimed his use of *Weed-B-Gon* caused his NHL. Before the case came to trial, Johnson died.

Assume the family sues for Wrongful Death of Johnson. Discuss the family's cause of action in Strict Product Liability. Be sure to discuss all damages the family would seek to recover. Also discuss all the possible defenses for Monsanto.

Issue	Rule	Analysis	Concl'n	Points Allotted
P v Monsanto				
Wrongful Death	Majority: loss to survivors Minority: loss to estate	Children, so have no dependents. Mother? Estate established by mother?		
Strict Products Liability	Over-arching rule			
Proper P	Privity no longer required; an end user	Johnson was an end user	Yes	
Proper D	Any entity in stream of commerce	Manufacturer	yes	
Defect	Defect: Mfg? design? Three tests	As designed includes a carcinogen	no	
	warning	Dangers implied but not adequately described	yes	
Causation	Res Ipsa Loquitur (design)	Not sure what caused the NHL; D controlled manufacturing;	?	

		used glyphosate; P did nothing wrong; P was injured		
Actual	But for lack of warning, would Plaintiff not have used the product	How can P prove since Johnson is dead?	?	
Proximate	Direct v. Reasonably Foreseeable' Intervening acts	Can't tell if there is a causal link; NHL not reasonably foreseeable injury to weekend gardener	?	
Damages	Specials General Wrongful Death; Loss of Consortium; Punitives	Dead; funeral expenses; loss of financial support?; loss of consortium from a child?	yes	
Defenses	Misuse Comp Fault; AOR	Maybe failed to follow directions, but do not know	?	
Total Points				100

FINAL EXAM 3

Alfred was a licensed contractor that advertised himself as a "handyman." Brian contracted with Sean to repair the fascia boards around Brian's house.

Brian had a big playful Tibetan Mastiff named "Sir Poopsalot." While Alfred was working on the fascia board, Brian notified Alfred that Brian had to quickly go to the store, but that Brian would lock "Sir Poopsalot" in the house so Alfred would not be bothered.

Alfred decided to use a ladder rather than set up scaffolding for the job. He did this because he did not have a crew to help him and because this house only had a 5' set back on the sides.

While Alfred was up on his 12' ladder, somehow, "Sir Poopsalot" got out of the house. "Sir Poopsalot" started to bark up at Alfred to play. He then jumped up on the ladder causing the ladder to precariously slide. Alfred lost his balance. In a panic, Alfred grabbed onto the roof for dear life. Alfred eventually got control of the ladder, but not before he seriously injured his left shoulder.

When Brian returned home, Alfred told Brian what happened and that he needed to go to the hospital. Alfred further told Brian that Alfred would need compensation for the injury.

In response, Brian posted a review on-line that said in part: "Do not hire Alfred. He is a clown who can't stay on his own ladder, and then he will sue you for *his* incompetence."

Assume a Comparative Negligence jurisdiction. What causes of action can Alfred bring against Brian? What defenses can Brian raise in response?

Issue	Rule	Analysis	Concl'n	Points Allotted
Alfred v. Brian				
Negligence	Overarching rule			4
Duty of Care	RFP	LOLO owes duty to invitee		7
SOC	RPP	Reasonable care; RPP (Rowland v. Christian)		7
Breach	Prosser's <i>Res Ipsa Loquitor</i> factors	Do not know how dog got out, but Brian had control of doors and locks, Alfred did nothing wrong		7
Actual Causation	But For	But for "Sir Poopsalot" getting out, hitting the ladder, the injury does not occur		7
Proximate Cause	Direct v. Reasonably Foreseeable Intervening Acts?	Reasonably Foreseeable that if "Sir Poopsalot" got out, he would bother Alfred. Is injury reasonably foreseeable?		7

Damages	Specials, General, Punitives?	Injured shoulder. Do not know if he missed work; medical expenses		7
Defenses	Comparative Neg, AOR	Up on ladder instead of scaffolding; custom or practice in the industry may be the SOC; AOR as a handyman		7
Defamation	False and defamatory statement; Libel per se?	Did not fall off ladder; had not sued; A was not incompetent; effect business reputation?		7
	Of and Concerning	Mentions by name		5
	Publication	On line		5
	Damage to reputation; Actual, Presumed, Punitive	Unknown?		5
False Light	Malicious; False Light;	A had not fallen off his ladder; A had		7

	Highly offensive	not sued; injury was fault of dog. Called incompetent		
Defenses to both Defamation and False Light	Qualified privilege (protected opinion); First Amendment: private citizen and public concern	Incompetent is an opinion; Public concern re consumer protection?		15
Total Points				97

1)

Wendy v Lonerock Coal Company (LCC)

INTENTIONAL TORTS

Trespass to Chattel: An intentional act by defendant that interferes with the plaintiff's chattel, causing damages or diminution of value.

Here, Wendy would argue that LCC committed an intentional act by blasting the rock and that it resulted in the destruction of her trailer. This caused extensive damages and a great diminution in the value of the trailer, if not total destruction.

Conversion: An intentional act that causes the destruction or substantial interference with with plaintiff's chattel.

(See argument for Trespass to Chattel above)

Battery: An act with intent to cause (or with knowledge to a substantial certainty that the act would cause,) harmful or offensive contact to another.

Here, Wendy would argue that LCC committed an intentional act by blasting rocks off the mountain, that caused a harmful touching of her children, that should have been substantially certain to occur, because LCC was aware that there were people who lived below the area they were blasting.

Assault: An act with intent to cause (or with knowledge to a substantial certainty that the act would cause,) reasonable apprehension of imminent harmful or offensive contact to the plaintiff's person.

Here, Wendy would argue that an assault also occurred, however, because there is no facts to suggest that the boys were aware that the rock was coming down on them or had any apprehension of harm, this argument would likely fail.

Intentional Infliction of Emotional Distress: An intentional or reckless act amounting to extreme outrageous conduct causing severe emotional distress.

Here, Wendy would argue that the intentional act of blasting the mountain, against federal regulations, amounted to extreme and outrageous conduct that caused her severe emotional distress due to death of her children.

Defenses: There are no applicable intentional torts defenses for LCC.

NUISANCE:

Private Nuisance: A continuous act or omission that intentionally, recklessly, or negligently causes substantial unreasonable interference with plaintiff's use and enjoyment of land.

Here, Wendy would argue that LCC committed a continuous intentional, reckless and negligent act by blasting continuously on the mountain. LCC had already removed all the trees from the top of the mountain, and now were continuously blasting the hillside, causing an unreasonable interference with Wendy's use and enjoyment of her land.

Public Nuisance: An unreasonable interference with a right common to the general public.

Defenses:

Coming to the Nuisance: Plaintiff moved into an area where the nuisance was already present, or acquired or improved the land with knowledge of the defendant's activity.

LCC would argue that Wendy was aware of the mining activity common to the mountains of West Virginia, however, the facts do not show whether the mining activity occurred before or after Wendy was present in the area.

NEGLIGENCE:

In order to establish a cause of action for Negligence, it must be shown that there was a duty with an established standard of care that was breached by the defendant, causing harm to the plaintiff.

DUTY

Duty is established when a defendant has an affirmative duty to meet an established standard of care. In *Palsgraf v Long Island RR*, Justice Cardozo established that a duty was owed to any reasonably foreseeable plaintiff. A reasonably foreseeable plaintiff is anyone who is foreseeably in the zone of danger. The minority opinion of Justice Andrews is that a duty is owed to everyone.

Here, there was a duty owed by LCC to all reasonably foreseeable plaintiffs within the zone of danger of their mining activities. Wendy's sons were in the foreseeable zone of danger of LCC's mining activities because they were at the bottom of a mountain that was being blasted, causing boulders to tumble down the hill.

Standard of Care

Once it has been established that the defendant owes a duty, it is important to take note of the standard of care that was required to avoid harm. There are three general ways to establish a standard of care. The Reasonably Prudent Person (RPP) standard, Customs and Standards of an industry, and through statutes and regulations.

RPP: The reasonably prudent person standard is shown by establishing what a RPP would do or not do in similar circumstances. Here a RPP or reasonably prudent mining company would need to be aware of the fact that the mining activities they were undertaking would be dangerous to anyone in the area that may be struck by the debris. A RPP would be aware of this risk and take logical steps to minimize or eliminate the risk.

Customs and Standards of the Industry: There is also a standard of care that involves standard customs and practices of a particular industry. (Even when an industry meets the customs and standards they still must maintain the standard of care of a RPP) Here, the mining industry is an industry in which there are many dangerous activities, and proper precautions must be taken to avoid industry. A standard in the mining industry would certainly be to protect civilians that are within the area of their mining activities. LCC would be held to these standards of the industry.

Statutes and Regulations: A standard of care is also established by statutes and regulations. Here, there was a federal law that prohibited the blowing off of topsoil and rock with dynamite. Because LCC was violating federal law by doing so, it could be shown that they were negligent per se.

Breach of Duty

When a duty and standard of care have been established, it must also be shown that the defendant breached their duty. This can often be established by the Hand Formula, put forth by

Justice Learned Hand. The Hand Formula states that if the cost of avoiding the injury is outweighed by the likelihood and severity of the injury, a breach has occurred.

Here, the likelihood of injury to people below the blasting being done by LCC was very high. When rocks are blown off a mountain at the top of a hill they fall down. The severity of injury caused by falling rocks is also very high. The severity of the injury in this case was high, as it caused the instant death of two young boys. The cost of avoiding such injury is likely quite low. Protective nets could have been installed to catch falling boulders and rocks, and for very little cost, the people living below the area where the explosions were occurring could have simply been warned of the day and time that these activities were occurring

Res Ipsa Loquitor: This Latin phrase means that "the thing speaks for itself". This can be used to establish a breach through the Prosser Test. The Prosser Test states that the event would not occur in the absence of negligence, the Defendant had exclusive control of the instrumentality used to cause the harm, and the Plaintiff is blameless in causing the harm.

Here, the falling of the boulder onto the house below, was not a natural event, and would not have occurred without some negligence on the part of LCC. Additionally, the instrumentality used, the dynamite, was under the exclusive control of LCC. Wendy would argue that her and the boys were blameless in causing the harm, as the boys were just innocently sitting in the house. LCC would argue that Res Ipsa does not apply because Wendy is not blameless, as she left her children home alone in a dangerous area.

CAUSATION

Once a breach of duty has been established, it must be shown that the breach was the actual and proximate cause of the harm to the plaintiff

Actual Cause is established using the "but for" and substantial factor tests. The but for test states that if the harm would not have occurred but for the defendant's negligence, there is actual cause. Actual cause can also be proven by showing that the defendant was a substantial factor in causing the harm.

Here, but for LCC's blasting of the mountain, the boys would not have died. LCC was a substantial factor in causing the harm because they loosed the boulder that eventually struck the home that the boys were in.

Proximate Cause is a discussion of foreseeability and directness. The harm must be reasonably foreseeable and direct. It is measured by the "chain of causation" and whether any intervening actions occurred that would cut off the chain of causation to the defendant's act. Intervening acts that are reasonably foreseeable will not cut off liability to the defendant, but unforeseeable superseding acts will. Unforeseeable superseding acts include "acts of God", criminal conduct, gross negligence of others, and intentional torts of others.

Here, LCC would argue that the gross negligence of Wendy in leaving her children unattended in an area known for mining was an unforeseeable superseding act that would cut off their liability as it broke the chain of causation. Wendy would insist that her leaving the boys unattended at the house has nothing to do with the boulder that came off the mountain. In fact, even if she had been attending to the children, she too would have likely been killed. LCC would also contend that it was unforeseeable that the falling boulder would reach such high speeds, jump over the high steeple of a chapel, and land on top of the small trailer. LCC would likely fail in these arguments, as it was reasonably foreseeable that anybody at the bottom of the mountain could be in danger from the falling debris.

DAMAGES

A plaintiff in a negligence case must prove damages. Here, Wendy would argue that she suffered general damages of emotional distress, as well as pain and suffering due to the extreme emotional impact of the death of her children. She would also argue that she suffered special damages due to the economic loss of losing her home and her belongings within, as well as any income she may have lost due to her recovery from the emotional distress.

Wendy would also argue that there was a wrongful death caused by LCC, and would seek damages for loss of consortium (companionship and love) with her children. She would also seek punitive damages to punish LCC for their reckless behavior and to deter them from committing similar acts in the future. Because it can be shown that LCC continued with the blasting despite the known risk, and in violation of federal regulation, malice could be established, and a jury may award punitive damages

DEFENSES

LCC would argue that Wendy was contributorily negligent in causing the harm, because she left the children in a potentially dangerous area without supervision. In a contributory negligence

jurisdiction, if it was determined that Wendy was contributorily negligent in any way, she would be barred from recovery.

LCC would also argue that Wendy assumed the risk when she put her trailer at the bottom of a mountain upon which blasting was occurring. They would state that Wendy acted unreasonably in the face of a known risk.

In a comparative negligence jurisdiction, if a plaintiff has acted negligently in causing the harm, their recovery can be limited by the percentage of their comparative negligence. If it could be shown that Wendy was contributorily negligent, this would limit her recovery.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: The defendant breaches a duty to the plaintiff by creating a risk of physical injury, and the plaintiff suffers emotional distress as a result. If the plaintiff is a direct victim of the negligence, they can recover even if they only suffered emotional harm.

Duty, Standard of Care, Causation, Damages (supra)

STRICT LIABILITY: In strict liability, a defendant is liable for injuring a plaintiff whether or not the defendant exercised due care. This applies to animals, abnormally dangerous activities, and products liability.

Abnormally Dangerous Activities (ADA): An ADA is an activity that creates a foreseeable and highly significant risk which reasonable care will not eliminate.

Here, LCC was conducting an abnormally dangerous activity by blasting rock from a mountain. This is an activity that creates a highly significant and foreseeable risk. LCC will argue that in the mountains of West Virginia, blasting is an activity that is not unusual for the location. Wendy will argue that because there were federal regulation prohibiting the manner of their blasting, that the activity was in fact unusual for the location. This discussion often brings up the balancing test of whether danger outweighs the value to society. LCC will argue that the need for coal is a great value to society, while Wendy will argue that the risk of innocent death far outweighs the value.

Causation: (Supra)

Damages (Supra)

Defenses (Supra)

DEFAMATION: ba

CONCLUSION: LCC would likely fail in their defenses for negligence, and would be found liable for the deaths of Wendy's children, as well as the destruction of her property and Wendy would be awarded general, special and punitive damages in connection to the wrongful death. They would be liable under intentional torts theories, as well as strict liability for abnormally dangerous activity.

END OF EXAM

2)

Johnson v. Monsanto

Strict Products Liability (SPL)

SPL is invoked when a defective product, for which an appropriate defendant is responsible, injures an appropriate plaintiff. SPL requires that the defect exist at the time it left the defendant's control. Here, Johnson (J) is claiming that J's use of Monsanto's (M) product, *Weed-B-Gone (WBG)*, led to him being diagnosed with non-Hodgkin lymphoma (NHL). J's family is now suing M for wrongful death, claiming the use of the defendant's product caused his NHL, which led to J's death.

Proper P/Proper D

A proper plaintiff is an end user either a purchaser or consumer, that is injured by a defective product. Here, J is a proper plaintiff because he was an end user. J was a weekend gardener who used M's weed killer. Thus, J is a proper plaintiff.

A proper defendant are all entities in the distribution chain. A manufacturer incurs absolute liability when an article he has placed on the market proves to have a defect. Here, M is a proper defendant because they were the manufacturer of the weed killer. Thus, M is a proper defendant.

A product is defective at the time of sale or distribution if it contains a manufacturing defect, design defect, or is defective because of inadequate warning.

Manufacturing Defect

A manufacturing defect is a product that departs from its intended design, even though all possible care was exercised in the preparation and marketing of the product. Here, there is no evidence that there was an anomaly with a particular purchase of M's product. Therefore, there was no manufacturing defect.

Design Defect

A design defect is manufactured as intended but the design itself presents a danger of foreseeable personal injury or property damage. Here, J will claim M is strictly liable due a design defect because of the high exposure of glyphosate in their product. To determine if there was truly a design

defect in M's product, the court will apply a consumer expectation test, danger-utility test, and hindsight-negligence test.

Consumer Expectation Test

The product is dangerously defective if a reasonable foreseeable purchaser would not have expected it to present the danger that resulted in his injury. Here, J will claim that M's product is defective because he would have not foreseen the possibility of being diagnosed with NHL simply by using a weed killer. J will claim that the he only used the product on the weekends and would not expect that occasional use of the weed killer would result in his diagnosis. M may argue that their product's main ingredient is used to kill weeds and that consumers should expect a heightened risk when using any chemical, which is why they recommend gloves and a mask when using the product. M will claim there is a bolvious danger when using a weed killer, which would not make WBG a dangerously defective product.

Danger-Utility Test

A product is defective if the danger of the product is greater than the utility or an alternative design could have reduced the danger at about the same costs. Here, J will claim that the risk of NHL was greater than the worth WBG had on the market. WBG's active ingredient placed it's users at high exposure of glyphosate, which increased users at risk of NHL by 41%. The likelihood that a user would get NHL was 41% more than non-users. NHL has the potential to result in death, which J will argue there was safer alternatives (such as pulling weeds with no chemicals or vinegar). By 2017, there were likely alternatives of weed killers that do not use glyphosate. M will argue glyphosate was the primary ingredient and the cost to make a new version would mean they would have to come up with an entirely new product. This would be costly due to testing, EPA approval and marketing. M may argue that the people are likely to get NHL even without using their product. However, the risk of NHL is less than 2.5% without the exposure to of glyphosate.

The court, as the trier of fact, may find that based on the danger-utility test, M does contain a design defect.

Hindsight-Negligence Test

A product is defective if a reasonable person, knowing of the danger it presented, would not have placed the product in the stream of commerce. M created the product in 1970 after extensive testing. In late 2017 is when the study regarding the effect that glyphosate had on those who used it was discovered. J will argue that had M placed WBG on the market knowing what they know now

would make them strictly liable because the risk is so significant. Unless M can provide studies minimizing the danger of glyphosate, the court is likely to find WBG defective.

Warning Defect

A product has a warning defect when it fails to adequately describe the risk of use the product or contains no warning at all. Here, for M to be strictly liable due to a warning defect J would have to prove that if WBG contained a warning that use of the product increased his risk of NHL by 41%, he would have heeded it. The only warnings that WBG contained were about users should wear gloves and mask when applying the product, not to ingest it, and not to store near chemicals. The warning was inadequate because it failed to include the more serious dangers of using the product, a dangerous disease that could lead to death. J will claim by failing to fully inform consumers of the risk, the product was defective.

M would argue that the warning was accurate based on their knowledge and was adequate. WBG was a chemical that killed weeds, therefore, a reasonable person would generally assume a danger as long as they used the product as intended. If a user did not use a product as intended, without gloves and a mask for instance, they are placing themselves at a higher risk that should release liability to the manufacture.

Causation

For a defendant to found strictly liable, they must be both the actual and proximate cause of the harm. Here, J must show that the defect existed when it left M's control.

Actual Causation

A defendant is the actual cause if but for their acts, the plaintiffs harm would not have occurred. Here, J will argue that but-for them using a dangerous ingredient, glyphosate, in their product and failing to warn users of the dangers of glyphosate, J would not have gotten NHL and died. Therefore, M is the actual cause.

Proximate Causation

If the act, use, or misuse of the product was reasonably foreseeable, then the defendant is strictly liable. Here, J will argue that it was reasonably foreseeable that an end user would use the product without mask and/or gloves because that is not something that someone has laying around the

house all the time. J will argue that the warning was not adequate that a user would link the products use with being ill with NHL.

M will argue that it is foreseeable that not using the product as intended would increase the likelihood of adverse reaction to a chemical. If a user failed to wear a mask and/or gloves, they would increase the possibility in ingesting the product. The user should be aware that weed killers are a dangerous in thier own nature and should take extra precautions when using them to keep themselves safe. However, users of week killers do not assume that the use of thier product will result in NHL, therefore, it is likely the court will find M the proximate causation of J's NHL.

Damages

Under SPL, an end user can recover if they have personal injury or property damage and if one of those are present, economic loss. Here, J died before the case came to trial. The facts do not indicate a cause of death for J. If J's cause of death is found to be due to NHL, M can possibly be liable for wrongful death. J's family can seek general damages for the emotional distress caused by his illness, loss of contortium for his spouse (if applicable) and children. They cannot seek pain and suffering because that is personal to J who is no longer present. The family can also seek special damages for J's medical bills.

The family may also see punitive damages against M for their reckless conduct. However, there is a lack of evidence of recklessness here, and M's conduct aligns more with negligence.

Defenses of M

Misuse

If a product is used in a way not intended, used in a unforeseeable manner or alter in a foreseeable way, there is no case for SPL. Here, M will claim that J did not use gloves or a mask when using the product, thus increasing the possibility of him ingesting the product. However, there is no evidence that J misused the product other than intended, thus, this would not be a valid defense.

AOR

The plaintiff must know of the risk of the defective product and voluntarily use it anyway. Here, M will claim that J knew the use of a chemical to kill weeds carried an inherent danger but chose to use it anyway. It's like using a knife; there is a possibility to get cut but when you do, people don't go and

sue the knife manufacture. This is a valid defense but people are aware of cutting themselves by the blood it draws. People don't know they have NHL until its too late.

Comparative Fault

Conclusion: Therefore, the court is likely to find M strictly liable for J's NHL diagnosis. Unless the family can prove that NHL led to his death, M would not be liable for his death.

END OF EXAM

2)

WRONGFUL DEATH: STRICT PRODUCTS LIABILITY

When an unreasonably dangerous defective product is placed into the stream of commerce, almost any individual or entity involved in manufacturing or distributing the product may be held strictly liable (without actual fault) for personal injury or property damage suffered by a foreseeable consumer, user, or bystander. An action in strict products liability may be maintained to recover from the wrongful death caused by the product if you are a survivor or heir (majority position) or executor of the decedent's estate (minority). The state of California permits either a survivor or the estate to bring an action for wrongful death.

Johnson's family is presumably his survivors and/or executors of his estate. Therefore they can maintain a wrongful death suit following his death.

Proper Plaintiff

A proper plaintiff in a strict liability action is any end user, purchaser, consumer, or bystander injured by the defective product.

Johnson was a weekend gardener who used Monsanto's product *Weed-B-Gon*. Whether or not he actually purchased the product containing the glyphosate is irrelevant since it was likely sold by a retailer and privity with the manufacturer is not required. He is a proper plaintiff in this case.

Proper Defendant

Almost any commercial supplier who is involved in the release of a defective product into the stream of commerce may be held liable for the resulting injury. Strict liability does not apply to service providers or casual sellers. Under the majority rule it does not apply to a successor corporation in business, though it may apply in minority jurisdictions if the successor maintains the same operations.

Monsanto is a corporation that manufactures weed killer containing dangerous chemicals. They sell those products, either through a wholesale/retail chain or directly; facts are not given to determine this but it is likely that their products are sold in home and garden stores.

They may also have been selling them via mail order in the 1970s, or even door to door. Because Monsanto placed the product into the stream of commerce in its (now known) defective state, they are a proper defendant.

Manufacturing Defect Theory

Occurs when the product was not manufactured as intended.

In this case, there is no way to which batches of Weed-B-Gon that Johnson over the years and the chemical in question was an ingredient in the proper recipe which might have been present in a defective batch. It is not useful to pursue a manufacturing defect theory here.

Design Defect Theory

Occurs when the product was manufactured as intended, but the design itself renders the product unsafe.

The inclusion of a dangerous chemical known to increase the risk of certain cancers could give rise to a finding that Weed-B-Gon was a defective product. However there is no duty to make all products absolutely safe; the 2017 study concluded that even with the increased risk, it was still in the single digits for both men and women who used the product heavily, and low-exposure users had no elevated risk at all.

The Johnson family may attempt to use the Danger-Utility test to argue that the threat posed by the product outweighed its benefit to society. However the court will examine the product based on alternatives known at the time the product was sold. The study released in November 2017 identified the danger posed by glyphosate for the first time, but the product had been on the market since the 1970s. Johnson was already ill at the time, so he cannot claim that his use of the dangerous product took place after the study was released. At whatever point he used the product, it would have been before the study made the danger known.

The family's best argument is the Hindsight-Negligence test, which establishes that a design is defective if a reasonable person knowing of the risk would not have placed it into the marketplace. Even so, future scientific discoveries are not usually imputed going back almost 50 years. Johnson would have to prove that he had only started to use the product

very recently, at a time when modern scientific testing could reasonable have discovered the danger -- Monsanto's extensive testing in the 1970s found the product relatively safe for all users.

Warning Defect Theory

Occurs when the manufacturer fails to give adequate warning of risks not immediately apparent to users. Risks must be known at the time of sale, however a post-sale duty to warn may arise if a seller later discovers that there is a substantial risk to a product previously thought safe and there is a reasonable and cost-effective way to warn past purchasers.

Monsanta did extensive testing when the product was developed in the 1970s. At that time it was believed relatively safe, so they put a warning on the label about wearing gloves and a mask, not ingesting it, and not storing it near flammables. Even imagining that the increased risk of NHL had been discovered at that time, it is not certain that failing to mention it on the label would be found as a warning defect however. The costs (both financial and in terms of how effective a warning label is at communicating its message) of including a detailed warning about NHL may still not have been justified. Because the risk, though a 41% increase, was still very small -- only 3.4% for men -- and only occurred after prolonged use, Monsanto could argue that even if they'd known, leaving it off the label still wouldn't constitute a warning defect.

Causation

If the defect that caused the injury existed when it left the defendant's control, actual causation has been shown. Res ipsa loquitur is permitted to show causation. Proximate causation must be proved as in negligence.

We are not told whether Johnson died of non-Hodgkins lymphoma. Presuming that he did, he must next prove that his use of Monsanto's product either caused, or contributed to the risk, of his disease. Because the burden of proof in a tort action is preponderance of the evidence, a plaintiff must usually show that it more than 50% likely that the defendant's act is responsible for his injury. Even with the increased risk of high exposure, the risk of contracting NHL is only 3.4% for men. And there is no evidence to suggest that Johnson, a

weekend gardener, not a professional landscaper, was exposed to the higher levels required for the increased risk.

The family risks finding themselves trapped in the post hoc fallacy: *post hoc, ergo proctor hoc* (after this, therefore because of this). Just because Johnson used a product that is now known to cause NHL and Johnson had NHL does not necessarily mean that the product caused his particular diagnosis.

Johnson may at least benefit from the heeding presumption (if applied in his jurisdiction), that if the warning had been on the product he would have followed it.

Damages

See discussion of damages, *infra*.

DAMAGES JOHNSON FAMILY MAY RECOVER

The main avenue of recovery for wrongful death is monetary damages. In strict products liability, damages are only recoverable if there is personal injury or property damage. Purely economic loss, e.g. the purchase price of the defect product, is not recoverable without privity.

If Johnson's family is successful in proving that Monsanto's design or warning defect caused his death, they may recover general and special damages. It is unlikely they will be able to recover punitive damages in this case -- rare in strict products liability.

General

General damages are for suffering and hedonic loss. They also include loss of consortium, or the love and felicity of a close relationship, however not all courts permit recovery of loss based on the parent-child relationship.

The pain and suffering of Johnson's illness, as well as his family's loss of consortium (his spouse may recover anywhere, but other family members may or may not recover depending on the jurisdiction, e.g. in California his minor children *may* be able to recover emotional damages for the loss of parental affection following that parent's death) with him may be compensated with general damages. Hedonic damages are usually combined into one, i.e. they may not recover for the pain of his illness separately from his loss of enjoyment of life.

Special

Special damages compensate for economic loss. They may include costs associated with the death as well as future or imputed income that the decedent would have earned.

Depending on Johnson's age and profession, his family may be able to recover the wages he would have earned over the rest of his work-life expectancy, discounted by a formula involving interest and inflation to present value. They will certainly be able to recover for medical costs and the cost of his funeral, etc.

MONSANTA'S DEFENSES

Assumption of Risk

Recovery is barred if the plaintiff knows of the defect and uses the product anyway.

In this case, there is no way Johnson could have known that the product was risky since the study identifying the risk wasn't published until shortly before his death, after he had already been diagnosed with NHL. Monsanto may argue that the advisement to wear gloves and a mask was sufficient to put users on notice that exposure to the product might cause adverse effects. But it is unlikely that the court will find Johnson knowingly and voluntarily assumed the risk that he would contract a rare cancer just because he was warned to protect his skin -- the logical inference is that the product might cause burning or skin irritation.

Comparative Fault

While contributory negligence is not a defense to strict products liability (there is no negligence involved), the plaintiff's comparative fault in causing his injury can reduce recovery. Comparative fault usually occurs when the plaintiff fails to discover or guard against the defect. However there is no duty to discover latent defects.

In this case, the defect in Weed-B-Gon was so latent that the manufacturer didn't find out about it until almost 50 years later. It would be ridiculous to expect a casual gardener to mount a scientific study to determine whether the weed killer he was using was safe. There is no evidence to suggest that Johnson substantially misused the product -- and even foreseeable misuse is no bar to recovery in a strict products liability case.

Sophisticated User

A sophisticated user is one whose expertise with the type of product can raise the presumption that a detailed warning is not necessary because the user is already aware of the risks involved. A sophisticated user can also be a supervisor responsible for overseeing his employee's use of the dangerous product, and his expertise creates a duty to train and warn the employee about risks, thereby relieving the manufacturer from labeling for the end user.

Monsanta may argue that Johnson, a long-time gardener, was a sophisticated user who should have realized that the product was dangerous. However Johnson was only a weekend gardener. There are no facts to suggest that he was specially trained to understand the dangers of week killer.

Marketshare Liability: Failure to Join Other Defendants

While marketshare liability is a theory of recovery under negligence, it would be a novel argument for Monsanta if they could prove (1) that other companies were manufacturing similar products containing glyphosate, (2) that Johnson used those products as well, and (3) it is impossible to tell which of the products created the harmful exposure. When multiple companies manufacturing a fungible product (usually a prescription drug) are each potentially responsible for the product that caused the plaintiff's injury, they may all be held jointly and severally liable based on their share of the marketplace at the time the plaintiff was injured unless they can prove they did not sell the dangerous product. However, many jurisdictions will require at least most, if not all, of the potential marketshare defendants to be joined in the action. If Monsanta can convince the court to proceed on a marketshare theory, they may be able to get the case thrown out for failure to join all possible defendants.

END OF EXAM