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Strict Liability and Products Liability

1. In a suit by the plaintiff against Chemco, based on strict liability, the plaintiff will

The teenager invited his friend and classmate, the plaintiff, to assist him in a chemistry project. Referring to a library chemistry book on explosives and finding the chemistry set contained all of the necessary chemicals, the teenager and the plaintiff agreed to make a bomb. During the course of the project, the teenager carelessly knocked a lighted Bunsen burner into a bowl of chemicals from the chemistry set. The chemicals burst into flames, injuring the plaintiff. Although the chemistry set was as safe as possible, and its educational benefits exceeded its risks, the set did not contain a warning that it could be used to make dangerous explosives. A 16-year old boy purchased an educational chemistry set manufactured by Chemco.

- Prevail, because the chemistry set did not contain a warning that its contents could be combined to form dangerous explosives
- Prevail, because manufacturers of chemistry sets are engaged in an abnormally dangerous activity
- Not prevail, because the teenager's negligence was the cause in fact of the plaintiff's injury
- **Not prevail, because the chemistry set was as safe as possible, consistent with its educational purposes, and its benefits exceeded its risks**

Note:

A products liability claim may be brought by a plaintiff under multiple different theories: (i) intent; (ii) negligence; (iii) strict liability; (iv) implied warranties; and (v) express warranties. The prima facie case for a products liability claim based in strict liability includes (i) a commercial supplier of a product; (ii) producing or selling a defective product; (iii) actual and proximate cause; and (iv) damages. The plaintiff must prove that the defect existed when the product left the defendant's control. For liability to attach, the product must also reach the plaintiff without substantial alteration.

Under the Restatement (Second) of Torts, ordinary contributory negligence is not a defense in a strict products liability action where the plaintiff merely failed to discover the defect or guard against its existence, or where the plaintiff's misuse was reasonably foreseeable. However, assumption of risk may be a defense, where the plaintiff engaged in voluntary and unreasonable conduct and used the product despite discovering the defect and being aware of the danger.

D is correct. Under a products liability claim asserting a design defect, a plaintiff is required to show the existence of safer alternative designs. In general, the plaintiff must prevail in a risk-utility balancing test which illustrates that the risk and severity of the injury experienced was predictable. In some jurisdictions, once the plaintiff meets this burden and demonstrates causation, the burden then shifts to the defendant to demonstrate that their product was as safe as possible and that its benefits outweighed the risks. Here, the facts indicate that it was safe, consistent with its educational purposes, and its benefits exceeded its risks. Therefore, since the manufacturer met that burden, the plaintiff would not prevail on his design defect claim.

A is incorrect. The plaintiff would not prevail, even though the chemistry set did not contain a warning that its contents could be combined to form dangerous explosives.

Warnings are generally required when a product is (i) dangerous in a non-obvious way; (ii) the manufacturer knew about the danger; and (iii) the danger is present when the product is used as it is intended or used in another reasonable and foreseeable way. As a general matter, even if a product is safe for its intended purpose/use, manufacturers are expected to account for reasonably foreseeable uses, even if they are misuses of the product.

Here, the plaintiff and his friend did not use the chemistry set as intended and their misuse was not reasonably foreseeable by the manufacturer. The two attempted to make a bomb and used chemicals included with the chemistry set for that purpose. Further, in making the bomb, they did not consult with any instructions or warnings included with the chemistry set and instead consulted with a library book about explosives. Consequently, because the chemistry set was not used for its intended purpose, and the misuse of the product was not reasonably foreseeable, the plaintiff would not be able to recover for the absence of a warning.

B is incorrect. Any abnormally dangerous activities by the manufacturer of the chemistry set are irrelevant to the facts at issue. Abnormally dangerous activities can result in a defendant being held strictly liable for injuries. Specifically, ultra-hazardous activities by landowners and occupiers give rise to strict liability for any resulting injury, because the inherent danger or peculiar risk is unreasonably high when compared to their social utility, even in the absence of negligence and where all the proper precautions have been taken. However, the facts at issue here involve a strict product liability matter, in which the relevant question is whether the chemistry set was defectively designed. Consequently, the condition of the land where the manufacturer resides would be completely irrelevant.

C is incorrect. The teenager's negligence would not be dispositive of whether the plaintiff could prevail, although it may be relevant to the calculation of damages. Under a strict liability theory of products liability, a manufacturer has an absolute duty to make a product safe, and there is not a consideration of whether negligent acts by other parties defeat causation. Therefore, if the chemistry set was found to be defective, the teenager's negligent actions would not cut off the manufacturer's liability to the plaintiff.

2. The bartender has brought an action against Winery, Inc., alleging that the bottle that caused his injury was defective and unreasonably dangerous because its label did not warn that the stopper might suddenly shoot out during opening. The state has merged contributory negligence and unreasonable assumption of risk into a pure comparative fault system that is applied in strict products liability actions. A jury made the following findings of fact: that the bottle was defective and unreasonably dangerous because it lacked a warning, that a legally sufficient warning would not have prevented the bartender's injury, and that a reasonable bartender would have realized that a stopper could eject from the bottle and hit his eye. Will the bartender recover a judgment in his favor?

As a bartender was removing the restraining wire from a bottle of champagne produced and bottled by Winery, Inc., the plastic stopper suddenly shot out of the bottle. The stopper struck and injured the bartender's eye. The bartender had opened other bottles of champagne, and occasionally the stoppers had shot out with great force, but the bartender had not been injured.

- **No, because a legally sufficient warning would not have prevented the bartender's injury**
- No, because a reasonable bartender would have realized that a stopper could eject from the bottle and hit his eye
- Yes, with damages reduced by the percentage of any contributory fault on the bartender's part
- Yes, with no reduction in damages, because foreseeable lack of caution is the reason for requiring a warning

Note:

A products liability claim may be brought by a plaintiff under multiple different theories: (i) intent; (ii) negligence; (iii) strict liability; (iv) implied warranties; and (v) express warranties. The prima facie case for a products liability claim based in strict liability includes (i) a commercial supplier of a product; (ii) producing or selling a defective product; (iii) actual and proximate cause; and (iv) damages. The plaintiff must prove that the defect existed when the product left the defendant's control. For liability to attach, the product must also reach the plaintiff without substantial alteration. Generally, privity between the parties is irrelevant except for certain warranty theories of liability.

Under the Restatement (Second) of Torts, ordinary contributory negligence is not a defense in a strict products liability action where the plaintiff merely failed to discover the defect or guard against its existence, or where the plaintiff's misuse was reasonably foreseeable. However, assumption of risk may be a defense, where the plaintiff engaged in voluntary and unreasonable conduct and used the product despite discovering the defect and being aware of the danger.

A is correct. The bartender will not recover because a legally sufficient warning would not have prevented his injury. Commercial suppliers can be held strictly liable for injuries caused by the defective design of a product. Inadequate warnings which caused an injury are a type of design defect claim. In order to establish a prima facie case, the plaintiff would need to prove as follows: (i) the defendant is a commercial supplier; (ii) the defendant produced or sold a defective product; (iii) the defective product was the actual and proximate cause of the plaintiff's injury; and (iv) the plaintiff suffered damages to person or property. The defective condition was the lack of an adequate warning, which is treated as a design defect.

Here, the jury made findings of fact that the bottle was defective and unreasonably dangerous due to a lack of warning, it also concluded that a legally sufficient warning would not have prevented the bartender's injury and that a reasonable bartender would have realized that a stopper could eject and hit his eye. Despite the bottle being defective and unreasonably dangerous due to lack of an appropriate warning, this defect was not the actual and proximate cause of the bartender's injury, as the jury found that he would have been injured even with a legally sufficient warning. Therefore, the bartender will not recover damages.

B is incorrect. Ordinary contributory negligence is not a defense to strict products liability unless it rises to the level of assumption of risk. A plaintiff assumes risk if they discovered the product defect and were aware of the danger, but nevertheless unreasonably proceeded to use the product. As presented, the facts indicate that the bartender may have been contributorily negligent in failing to guard against the possibility that the cork would shoot out. However, the facts do not indicate that it was unreasonable for the bartender to open the bottle in light of the risk known to him at the time.

Consequently, since the facts do not indicate that the bartender here acted unreasonably and assumed the risk of injury, he would not be barred from recovery on the basis that a reasonable bartender would have understood the risk of injury.

C is incorrect. Although the bartender merely failed to guard against the possibility of injury, the bartender will not be able to recover, because the inadequate warning was not the actual and proximate cause of his injury.

D is incorrect. The bartender will not be able to recover against the bottler. The jury found that the bottle was defective due to an inadequate warning but concluded that the bartender's injury would have occurred even with a legally sufficient warning. Therefore, because the defect did not actually cause the bartender's injury, he will not be able to recover any damages.

3. If the plaintiff sues the manufacturer to recover the loss he has suffered as a result of the destruction of the cabinet's original finish, will the plaintiff prevail?

The plaintiff purchased the paint stripper and used it on his cabinet, being very careful to follow the accompanying instructions exactly. Despite the plaintiff's care, the original finish of the cabinet was irreparably damaged. When finally refinished, the cabinet was worth less than 20% of what it would have been worth if the original finish had been preserved. No other removal technique could have preserved the original finish. A professional restorer of antique furniture recommended that the plaintiff use a specific paint stripper to remove the paint and varnish from the cabinet. The plaintiff obtained and read a sales brochure published by the company who manufactures the paint stripper, which contained the following statement: "This product will renew all antique furniture. Will not damage original oil finishes." At a country auction, a plaintiff acquired an antique cabinet that he recognized as an extremely rare and valuable collector's item. Unfortunately, the plaintiff's cabinet had several coats of varnish and paint over the original oil finish. Its potential value could only be realized if these layers could be removed without damaging the original finish. Much of the value of the cabinet depends on the condition of a unique oil finish, the secret of which died with the original inventor.

- Yes, because no other known removal technique would have preserved the original finish
- **Yes, because the loss would not have occurred had the statement in the brochure been true**
- No, because the product was not defective when sold by the manufacturer
- No, because the product was not dangerous to persons

Note:

A products liability claim may be brought by a plaintiff under multiple different theories: (i) intent; (ii) negligence; (iii) strict liability; (iv) implied warranties; and (v) express warranties. The prima facie case for a products liability claim based in strict liability includes (i) a commercial supplier of a product; (ii) producing or selling a defective product; (iii) actual and proximate cause; and (iv) damages. The plaintiff must prove that the defect existed when the product left the defendant's control. For liability to attach, the product must also reach the plaintiff without substantial alteration. Generally, privity between the parties is irrelevant except for certain warranty theories of liability.

Under the Restatement (Second) of Torts, ordinary contributory negligence is not a defense in a strict products liability action where the plaintiff merely failed to discover the defect or guard against its existence, or where the plaintiff's misuse was reasonably foreseeable. However, assumption of risk may be a defense, where the plaintiff engaged in voluntary and unreasonable conduct and used the product despite discovering the defect and being aware of the danger.

Liability for misrepresentation occurs when a representation by the seller about a product induces reliance by the buyer. Liability for misrepresentation is usually based on strict liability in products cases. The plaintiff must show (i) the defendant is a seller engaged in the business of selling such products; (ii) misrepresentation must be of a material fact; (iii) intent to induce reliance of the buyer; (iv) justifiable reliance, (v) actual reliance; and (vi) proximate cause and damages.

B is correct. The plaintiff will be able to recover because the loss at issue would not have occurred had the statement in the brochure been true. Misrepresentation by manufacturers or suppliers is a type of products liability claim based on strict liability. In order for a plaintiff to recover damages, the misrepresentation must have been a misrepresentation of a material fact concerning the quality or character of the product, and the plaintiff must have been injured after relying on this misrepresentation.

Here, the plaintiff used the manufacturer's paint stripper on an antique cabinet after relying on the manufacturer's pamphlet that falsely claimed the product would restore antique furniture without damaging the original finish. However, when the plaintiff used the product as directed, it damaged the cabinet's original finish and significantly diminished its value. Therefore, because the manufacturer misrepresented a material fact and the plaintiff experienced a financial loss he would recover against the manufacturer.

A is incorrect. Although the plaintiff will be able to recover, the fact that no other known removal technique would have preserved the original finish is irrelevant. The plaintiff's claim is based on the fact that the manufacturer made a public misrepresentation of material fact which the plaintiff relied on to his detriment, not that the product is otherwise defective. Therefore, the plaintiff can recover against the manufacturer even if no product on the market can produce the results which the manufacturer here falsely claimed.

C is incorrect. Although a product not being defective at the time it left the manufacturer will cut off a manufacturer's liability on a design or manufacturing defect claim, the claim here concerns a manufacturer's misrepresentation of material fact. The claim here concerns a manufacturer's misrepresentation of a material fact. Therefore, whether the product was defective at the time it left the manufacturer's control is irrelevant.

D is incorrect. Because the plaintiff's claim is based on misrepresentation of a material fact by the manufacturer, the fact that the product was otherwise not dangerous is irrelevant and would not bar the plaintiff from recovering damages.

4. If the supplier is subject to liability to the plaintiff for damages, should the award include damage for emotional distress he has suffered arising from his knowledge of the increased risk that he will develop lung cancer?

The plaintiff brought an action for damages, based on strict product liability, against the supplier of the materials that contained asbestos. The court in this jurisdiction has ruled against recovery of damages for negligently inflicted emotional distress in the absence of physical harm. The plaintiff is being treated by a physician for asbestosis, an abnormal chest condition that was caused by his on-the-job handling of materials containing asbestos. His physician has told him that the asbestosis is not presently cancerous, but that it considerably increases the risk that he will ultimately develop lung cancer.

- No, because the plaintiff's emotional distress did not cause his physical condition
- No, because the court does not recognize a cause of action for an increased risk of cancer
- Yes, because the supplier of a dangerous product is strictly liable for the harm it causes
- **Yes, because the plaintiff's emotional distress arises from bodily harm caused by his exposure to asbestos**

Note:

Usually, to recover damages for mental distress, the plaintiff must establish that he: (i) was within the "zone of danger" (i.e., the plaintiff's distress was caused by a threat of physical impact); and (ii) suffered physical symptoms from the distress (i.e., the defendant's conduct caused distress to the plaintiff that manifested in the form of physical symptoms).

However, a plaintiff may recover damages for mental suffering once he brings an underlying tort claim from which he suffered an original physical impact or injury, followed by emotional distress. In this instance, he may "tack on" damages for mental and emotional suffering to the underlying claim. This is because defendants are liable not only for physical consequences from his tortious conduct, but also for virtually all emotional or mental suffering that flows naturally from it. This includes fright at the time of the injury, "pain and suffering" from the injury, anxiety about the possibility of repetition, humiliation from disfigurement, and so on. These "tacked on" damages are often called parasitic in that they "attach" to the claim for physical injury, much like a parasite attaches to a host.

Exam Tip: The call poses a hypothetical: IF the supplier is held strictly liable for damages, should the plaintiff recover damages for his emotional distress caused by discovering his risk of getting cancer?

D is correct. The plaintiff may recover for his emotional suffering because the supplier was found strictly liable for the harm caused by asbestos exposure, and the mental distress flows from that underlying physical injury. Although generally, mental distress may not be recoverable on its own absent special circumstances, a plaintiff may "tack on" mental suffering damages when an underlying tort action gives rise to physical impact for which the defendant is liable.

Here, the plaintiff's injury is his abnormal chest condition from asbestos exposure, which we are to assume the supplier is strictly liable for. Therefore, because the plaintiff's emotional distress from receiving this diagnosis and future prognosis stems from this underlying injury, he may tack on the mental suffering damages.

A is incorrect. Determining whether the plaintiff's emotional distress caused the physical condition is only relevant in a claim for negligent or intentional infliction of emotional distress, neither of which applies here. Where there is an underlying physical injury that caused the emotional suffering, the latter may be tacked on and recoverable.

B is incorrect. The question asks you to presume that the supplier has already been found strictly liable, so the analysis must proceed to whether the emotional suffering may be added as damages. Whether the cause of action itself is proper is no longer the issue. The issue is whether, based on the hypothetical presented, the emotional impact of the physical injury and prognosis may be recoverable.

C is incorrect. This answer reaches the correct answer with the wrong reasoning. The plaintiff will recover damages for mental distress, but not because of the broad assertion that the supplier is strictly liable for all harm. The ability to tack on emotional suffering to an underlying claim requires that there be an underlying physical impact or injury, as explained above.

5. If the rescuer brings an action against the retailer to recover damages for his injuries, will the rescuer prevail?

In preparation for a mountain-climbing expedition, a climber purchased the necessary climbing equipment from a retail dealer in sporting goods. A week later, the climber fell from a rock face when a safety device he had purchased from the retail dealer malfunctioned because of a defect in its manufacture. Thereafter, a rescuer was severely injured when he tried to reach and give assistance to the climber on the ledge to which the climber had fallen. The rescuer's injury was not caused by any fault on his own part.

- No, because the retailer could not have discovered the defect by a reasonable inspection of the safety device
- No, because the rescuer did not rely on the representation of safety implied from the sale of the safety device by the retailer
- Yes, because the climber was not negligent in failing to test the safety device
- **Yes, because injury to a person in the rescuer's position was foreseeable if the safety device failed**

Note:

A products liability claim may be brought by a plaintiff under multiple different theories: (i) intent; (ii) negligence; (iii) strict liability; (iv) implied warranties; and (v) express warranties.

The prima facie case for a products liability claim based in strict liability includes (i) a commercial supplier of a product; (ii) producing or selling a defective product; (iii) actual and proximate cause; and (iv) damages. The plaintiff must prove that the defect existed when the product left the defendant's control. For liability to attach, the product must also reach the plaintiff without substantial alteration.

The prima facie case for a products liability claim based in negligence includes (i) the existence of a legal duty owed by the defendant to that particular plaintiff; (ii) breach of that duty; (iii) actual and proximate cause; and (iv) damages. Generally, privity between the parties is irrelevant except for certain warranty theories of liability.

Under the Restatement (Second) of Torts, ordinary contributory negligence is not a defense in a strict products liability action where the plaintiff merely failed to discover the defect or guard against its existence, or where the plaintiff's misuse was reasonably foreseeable. However, assumption of risk may be a defense where the plaintiff engaged in voluntary and unreasonable conduct and used the product despite discovering the defect and being aware of the danger.

D is correct. A rescuer brought a products liability claim against the retailer of defective climbing safety equipment after the rescuer was injured while helping a climber when the equipment failed. The rescuer can succeed in the claim against the retailer because injury to a person in the rescuer's position was foreseeable if the safety device failed. Under both strict liability and negligence theories of products liability, anyone who is within the foreseeable zone of risk can bring a claim, and no privity is required. Here, the rescuer was within the foreseeable zone of risk since he was a bystander in the area and was injured after the device failed. Therefore, the rescuer could prevail against the retailer.

A is incorrect. The determining factor of the rescuer's success in bringing a claim is that he was a foreseeable plaintiff. Although it is possible that the rescuer could not recover against the retailer on a negligence theory, the facts do not support a conclusion either way as to whether the retailer could have discovered the defect. The facts also do not specify whether the rescuer brought a claim under negligence or strict liability.

B is incorrect. The rescuer is a non-user that would be able to recover against the retailer because he was a foreseeable plaintiff. The facts do not indicate whether the rescuer sought to hold the retailer liable under either strict liability or negligence theories, and the rescuer's reliance would likely be irrelevant under both theories.

C is incorrect. While it is true that the rescuer will be able to recover, this is not because of the climber's lack of negligence. The climber's negligence could potentially cut off the manufacturer's liability if it was the cause of the rescuer's injury, rather than the defective product. However, the facts indicate that the defective product was the cause, and therefore, the climber's negligence is irrelevant.

6. In that action, the pilot will recover

The warehouse owner recovered a judgment for damages from the pilot for the destruction of his warehouse and its contents, and the pilot has asserted a claim against the company to recover compensation on account of that liability. A company operates an aircraft maintenance and repair business serving the needs of owners of private airplanes. A pilot contracted with the company to replace the engine in his plane with a more powerful engine of foreign manufacture. The company purchased the replacement engine through a representative of the manufacturer and installed it in the pilot's plane. A short time after it was put into use, the new engine failed, and the plane crashed into a warehouse, destroying the warehouse and its contents. The company was guilty of no negligence in the procurement, inspection, or installation of the engine. The failure of the engine was caused by a defect that would not be disclosed by inspection and testing procedures available to an installer. There was no negligence on the part of the pilot, who escaped the disabled plane by parachute.

- **Full compensation, because the engine was defective**
- No compensation, because the company was not negligent
- Contribution only, because the company and the pilot were equally innocent
- No compensation, because the warehouse owner's judgment established the pilot's responsibility to the warehouse owner

Note:

A products liability claim may be brought by a plaintiff under multiple different theories: (i) intent; (ii) negligence; (iii) strict liability; (iv) implied warranties; and (v) express warranties. The prima facie case for a products liability claim based in strict liability includes (i) a commercial supplier of a product; (ii) producing or selling a defective product; (iii) actual and proximate cause; and (iv) damages. The plaintiff must prove that the defect existed when the product left the defendant's control. For liability to attach, the product must also reach the plaintiff without substantial alteration. Generally, privity between the parties is irrelevant except for certain warranty theories of liability.

Following a finding of liability and payment of damages, multiple tortfeasors may seek to shift the entire loss among themselves based on indemnification. Parties can contract for a right to an indemnity. In a strict liability case, each supplier of a defective product is liable to the injured customer. In addition, each supplier has a right of indemnification against all previous suppliers in the distribution chain. However, the manufacturer is liable if the product was defective when it left its control.

A is correct. The company supplied and installed the defective engine as part of its normal course of business in maintaining and repairing private airplanes for customers. Therefore, the company is a commercial supplier of a defective product and can be held strictly liable for resulting damages. Therefore, the pilot can succeed in recovering full compensation for the damage caused to the warehouse due to the defective engine.

B is incorrect. the pilot can recover full compensation even though the company was not negligent. Unlike a negligence theory of products liability, in which a commercial supplier may potentially avoid liability through a defense that they satisfied a duty of care, under a strict products liability theory, a commercial supplier has an absolute duty to make a product safe. Under a strict products liability, the supplier can be held liable even if they exercised all possible care. Therefore, the company would still be strictly liable for the damages caused as a result of the defective engine, and thus would have to pay full compensation.

C is incorrect. The pilot could still receive full compensation from the company even though the pilot and the company were not negligent and the manufacturer was responsible for the defective engine because the company could be held strictly liable as a commercial supplier. Therefore, the company would be liable for all damages resulting from the defective engine. The company could then seek to be indemnified by the manufacturer of the defective engine.

D is incorrect. The pilot could still seek full compensation from the company even though the warehouse owner has a judgment against the pilot. In order for a defendant to cite assumption of risk as a defense to strict products liability, the defendant must establish that the plaintiff voluntarily and unreasonably encountered a known risk. The facts here do not indicate the pilot assumed the risk. The judgment against the pilot established liability, not fault, and the pilot could recover full compensation under a strict liability claim against the company.

7. Assume that the defendant knew his dog would often chase cars but refused to restrain it. If the plaintiff asserts a claim against the defendant, will the plaintiff prevail?

A defendant's dog ran into the street in front of the defendant's home and began chasing cars. The plaintiff, who was driving a car on the street, swerved to avoid hitting the dog, struck a telephone pole, and was injured.

- Yes, because the defendant's dog was a cause in fact of the plaintiff's injury
- **Yes, because the defendant knew his dog had a propensity to chase cars and did not restrain it**
- No, because a dog is a domestic animal
- No, because there is no statute or ordinance making it unlawful for the owner to allow a dog to be unleashed on a public street

Note:

B is correct. The owner of an animal can be held responsible for the damage caused when that animal escapes its owner's property. Because the dog is a domestic animal, the damage caused by the defendant's dog will generally create liability for compensation only if the defendant knew of his dog's "mischievous propensity." (Note: Some states, however, have imposed strict liability statutes for damage caused by wandering/trespassing dogs).

A is incorrect. The plaintiff will prevail, but not because the dog was the cause in fact of the plaintiff's injury. As stated above, the owner of an animal can be held responsible for the damage caused when that animal escapes its owner's property.

C is incorrect. While owners of wild animals are held in strict liability for the animal's damages, owners of domestic animals can also be held strictly liable, if the animal's "mischievous" propensity is known.

D is incorrect. The defendant's dog is a trespasser, with or without an applicable leash law, once it leaves its master's property.

8. Will the plaintiff prevail?

The plaintiff has brought a strict product liability action in tort against the manufacturer of the car. You should assume that pure comparative fault principles apply to this case. The plaintiff took her new car out for a spin on a straight, smooth country road where the posted speed limit was 55 miles per hour. Intending to test the car's power, she drove for a considerable distance at over 100 miles per hour. While she was doing so, the tread separated from the left rear tire, causing the car to leave the road and hit a tree. The plaintiff sustained severe injuries. A plaintiff, who was 20 years old, purchased a new, high-powered sports car that was marketed with an intended and recognized appeal to youthful drivers. The car was designed with the capability to attain speeds in excess of 100 miles per hour. It was equipped with tires designed and tested only for a maximum safe speed of 85 miles per hour. The owner's manual that came with the car stated that "continuous driving over 90 miles per hour requires high-speed-capability tires," but the manual did not describe the speed capability of the tires sold with the car.

- No, because the plaintiff's driving at an excessive speed constituted a misuse of the car
- No, because the car was not defective
- **Yes, because the statement in the manual concerning the tires did not adequately warn of the danger of high-speed driving on the tires mounted on the car**
- No, because the plaintiff's driving at a speed in excess of the posted speed limit was negligence that was not excusable

Note:

A products liability claim may be brought by a plaintiff under multiple different theories: (i) intent; (ii) negligence; (iii) strict liability; (iv) implied warranties; and (v) express warranties. The prima facie case for a products liability claim based in strict liability includes (i) a commercial supplier of a product; (ii) producing or selling a defective product; (iii) actual and proximate cause; and (iv) damages. The plaintiff must prove that the defect existed when the product left the defendant's control. For liability to attach, the product must also reach the plaintiff without substantial alteration. Generally, privity between the parties is irrelevant except for certain warranty theories of liability.

Under the Restatement (Second) of Torts, ordinary contributory negligence is not a defense in a strict products liability action where the plaintiff merely failed to discover the defect or guard against its existence, or where the plaintiff's misuse was reasonably foreseeable. However, the assumption of risk may be a defense when the plaintiff engaged in voluntary and unreasonable conduct and used the product despite discovering the defect and being aware of the danger.

C is correct. Under a products liability claim based on a strict liability theory, a commercial supplier can be held strictly liable for the production or sale of a product which is in a defective condition or is unreasonably dangerous to the user based on a design or manufacturing defect. A type of design defect is an inadequate warning which does not have clear and complete warnings that may not be apparent to users.

Here, the car manufacturer is clearly a commercial supplier and they provided an unreasonably dangerous product without adequate warnings. Specifically, the manufacturer created a high-powered sports car and marketed for its ability to travel at high speeds. However, although the car was designed with the capability of reaching speeds more than 100 miles per hour, it was equipped with tires only tested and designed to safely reach a maximum speed of 85 miles per hour. Further, the manufacturer failed to adequately warn users of this danger, as while the owner's manual informed users that high-speed capability tires were necessary to drive continuously more than 90 miles per hour, it did not provide a warning that the car was not equipped with high-speed capability tires, and therefore could not travel safely at higher speeds. Therefore, the inadequate warning by the car manufacturer was a defect and the manufacturer could be held strictly liable for the plaintiff's resulting injury.

A is incorrect. The plaintiff would not be barred from recovering against the manufacturer on the basis that the plaintiff's driving more than the speed limit was a misuse of the car and/or negligent behavior. Ordinary contributory negligence is not a defense in a strict products liability action where the plaintiff merely failed to discover the defect or guard against its existence, or where the plaintiff's misuse was reasonably foreseeable.

B is incorrect. The manufacturer failed to give proper directions and specific warnings of the unreasonably dangerous condition presented by the lack of high-speed capable tires provided with the vehicle. Therefore, because there was a defect that caused the plaintiff's injury, she could hold the manufacturer strictly liable.

D is incorrect. Despite violating speed limits being negligent behavior, it would not bar the plaintiff from holding the manufacturer strictly liable. Although the plaintiff was negligent, she did not assume the risk of injury, because she was unaware that the car was unreasonably dangerous due to the inadequate warning.

9. If the farmer brings an action against the chemical company to recover the value of the cows that died, the farmer will

A chemical company manufactured a liquid chemical product known as XRX. Some XRX leaked from a storage tank on the chemical company's property, seeped into the groundwater, flowed to a farmer's adjacent property, and polluted the farmer's well. Several of the farmer's cows drank the polluted well water and died.

- Prevail, because a manufacturer is strictly liable for harm caused by its products
- **Prevail, because the XRX escaped from the chemical company's premises**
- Not prevail, because the farmer is not a foreseeable plaintiff
- Not prevail, because the chemical company was not engaged in an abnormally dangerous activity

Note:

Strict liability requires proof of the following elements: (i) the nature of the defendant's activity imposes an absolute duty to make safe; (ii) the dangerous aspect of the activity is the actual and proximate cause of the plaintiff's injury; and (iii) the plaintiff suffered damage to person or property.

An activity may be characterized as abnormally dangerous if it involves a substantial risk of serious harm to a person or property even when reasonable care is exercised. For an activity to be considered abnormally dangerous, two requirements must be met: (i) the activity must create a foreseeable risk of serious harm even when reasonable care is exercised by all actors; and (ii) the activity must not be a matter of common usage in the community. The storage and transport of toxic chemicals and flammable liquids often, but not always, give rise to strict liability.

In most states, the defendant is liable only to foreseeable plaintiffs, meaning persons to whom a reasonable person would have foreseen a risk of harm under the circumstances. The harm must result from the kind of danger to be anticipated from the abnormally dangerous activity; i.e., it must flow from the "normally dangerous propensity" of the condition or thing involved.

B is correct. This is a strict liability question based on the abnormally dangerous activity of handling a toxic chemical: XRX. To sustain this cause of action, the farmer must prove that the nature of the activity imposed an absolute duty on the company to make it safe, that the damages were caused by the defendant's failure to do so, and that damages occurred. Based on the facts presented, the chemical company had an absolute duty to make conditions safe because it was performing an abnormally dangerous activity by manufacturing and storing XRX, a toxic chemical. The farmer can prove damage to his property through the death of his cows. The only other necessary showing is that the leak of XRX, the chemical that killed the cows, escaped from the company's premises. This choice is therefore correct because it seals liability by establishing this causation, which is the only remaining element of strict liability.

A is incorrect. This answer reaches the correct answer with the wrong reasoning. The farmer will prevail, but not because a manufacturer will be liable for any and all harm that results from its products. For strict liability to apply to the manufacture of products, the plaintiff must make certain showings. For example, courts generally hold companies strictly liable for "unreasonably dangerous" products found to be defective. Thus, it is too broad to assert that a manufacturer will be liable for harm caused by its products. To be strictly liable, the products must be of a certain kind and pose an unreasonable danger to customers. Nevertheless, the farmer will prevail because the company was engaged in an abnormally dangerous activity, and all three elements are satisfied, as explained above.

C is incorrect. It is true that defendants are usually only liable to foreseeable plaintiffs, meaning people to whom a reasonable person would have foreseen a risk of harm under the circumstances. In this case, the farmer is certainly a foreseeable plaintiff given that his property is adjacent to the company's property, and a leak would be likely to affect him and his property interests.

D is incorrect. This is a misapplication of the law to the facts. For an activity to be considered abnormally dangerous, it must create a foreseeable risk of serious harm despite reasonable care and not be a matter of common usage in the community. It is well-accepted that the storage of toxic chemicals often triggers strict liability. Here, the chemical company's storage of XRX created a foreseeable risk of harm that could not be eliminated by due care, shown by the fact that the escaped chemicals were dangerous enough to pollute water and kill livestock. The chemical manufacture and storage was also not a common usage of the land, shown by the fact that the storage area was surrounded by farmland. Therefore, the storage of XRX is an abnormally dangerous activity.

10. In the plaintiff's action for damages against the builder, the plaintiff should

A builder purchased a large tract of land intending to construct residential housing on it. The builder hired a contractor to build a large in-ground swimming pool on the tract. The contract provided that the contractor would carry out blasting operations that were necessary to create an excavation large enough for the pool. The blasting caused cracks to form in the walls of the plaintiff's home in a nearby residential neighborhood.

- Prevail, only if the builder retained the right to direct and control the contractor's construction of the pool
- **Prevail, because the blasting that the contractor was hired to perform damaged the plaintiff's home**
- Not prevail, if the contractor used reasonable care in conducting the blasting operations
- Not prevail, if the builder used reasonable care to hire a competent contractor

Note:

The doctrine of vicarious liability provides that in some situations, the tortious act of one person may be imputed to another because of some special relationship between the two. The latter will be held liable even though his conduct may have been blameless. For example, vicarious liability commonly applies in employer/employee relationships, family relationships, or joint enterprises.

The distinction between an employee and an independent contractor often hinges on whether he is subject to control by the supervising party, meaning whether the supervisor exercises control over the physical details of the work. An independent contractor is generally considered his own boss.

A person who hires an independent contractor is generally not liable for the torts of that person. However, there are exceptions to this rule. For example, there are duties considered to be "non-delegable," meaning the employer/delegator will be vicariously liable, irrespective of the fact that he hired an independent contractor to perform the work. When the independent contractor is specifically engaged in work that is abnormally dangerous, such as blasting, the employer will be strictly liable, as if he had done the work himself.

B is correct. Although the general rule is that the employer of an independent contractor will not be vicariously liable for the contractor's tortious conduct, this does not apply where there is a non-delegable duty. Abnormally dangerous work is considered non-delegable and will be subject to strict liability. One type of inherently dangerous activity that falls under this category is blasting. Here, the contractor's blasting operations necessary to excavate for the pool triggers strict liability, which imposes liability on the builder for the plaintiff's property damage.

A is incorrect. This answer reaches the correct answer with the wrong reasoning. The plaintiff will recover damages from the builder regardless of the degree of control the builder had over the contractor's blasting operations. This issue - the degree of control over a project - normally applies to a determination of whether someone is classified as an employee or independent contractor for purposes of vicarious liability. However, this distinction is irrelevant in cases involving abnormally dangerous work, which triggers vicarious strict liability regardless of whether the worker is an independent contractor or employee. Blasting is so dangerous that courts will not allow the builder to delegate liability for the harm it causes.

C is incorrect. The reasonableness of the contractor's conduct is irrelevant because strict liability applies, which holds actors liable for harm in situations where even reasonable care cannot alleviate all risk of harm. The builder's non-delegable duty to make safe the blasting operations renders him liable for the damage to the plaintiff's property, regardless of whether the contractor acted reasonably.

D is incorrect. As explained above, when strict liability applies, the reasonableness of the actions becomes irrelevant. The builder had a non-delegable duty of care to the plaintiff because blasting is an inherently dangerous activity, and whether he acted reasonably will not disrupt his liability for the damages.