Solution and Answer Guide

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Chapter 06: Product Liability

Table of Contents

[Critical Thinking Questions in Features 1](#_Toc62740195)

[Adapting the Law to the Online Environment 1](#_Toc62740196)

[Critical Thinking Questions in Cases 2](#_Toc62740197)

[Case 4.1 2](#_Toc62740198)

[Case 4.2 3](#_Toc62740199)

[Case 4.3 4](#_Toc62740200)

[Chapter Review 4](#_Toc62740201)

[Practice and Review 4](#_Toc62740202)

[Practice and Review: Debate This 5](#_Toc62740203)

[Issue Spotters 6](#_Toc62740204)

[Business Scenarios and Case Problems 6](#_Toc62740205)

[Critical Thinking and Writing Assignments 12](#_Toc62740206)

# Critical Thinking Questions in Features

Adapting the Law to the Online Environment

1. Security engineers discovered that faulty coding in the Chrysler Jeep’s entertainment software made the car vulnerable to cyber attacks, conceivably enabling hackers to gain control of the vehicles. The United States Supreme Court has allowed a breach of warranty lawsuit against Chrysler by Jeep owners who contend they would not have purchased the cars had they known about the security defect. Why might the outcome of this case be important for strict product liability law?

Solution

An important question in the developing field of IoT strict product liability law is: who is liable for product malfunction that results from hacking and causes harm? The hacker, certainly. The manufacturer, perhaps, but only if a failed security system qualifies as a defective condition that makes the IoT product “unreasonably dangerous” to consumers or users. Even though it is not a strict product liability case, the Chrysler lawsuit does involve plaintiffs who have been harmed, albeit economically, by a manufacturer’s failure to protect its product against cyberattacks. Whether or not the plaintiffs prevail, their case will establish a precedent for the extent to which civil law is willing to hold manufacturers responsible for lapses in the cybersecurity embedded in their products.

Managerial Strategy

1. To protect themselves, manufacturers have been forced to include lengthy warnings for their products. What might be the downside of such warnings?

Solution

A lengthy warning is less likely to be read by a product’s user. And an injured user who failed to read and heed a warning might not be able to successfully argue as a plaintiff that a defect in the warning caused the injury.

1. Does a manufacturer have to create safety warnings for every product? Why or why not?

Solution

No. All manufacturers do not have to provide safety warnings for all products. As noted in the text, people know that knives are sharp and can cut fingers, for example, so a warning label on each knife warning consumers of the danger is arguably unnecessary. In fact, most household products are safe when used as intended. This is particularly true when the danger is open and obvious. Warning about such risks would not increase the safety of the product and might detract from it by undercutting the significance of other, less clear risks.

# Critical Thinking Questions in Cases

Case 6.1

1. In the initial trial, should the jury have found that O’Bryan was also at fault? How might this finding have affected the award of damages? Explain.

Solution

Yes, the jury should have found that O’Bryan was also at fault for the injuries that he received in the collapse of a ladderstand made by Primal Vantage Co. This finding would have reduced the maker’s responsibility for the amount of the award of damages to the percentage of the company’s fault.

O’Byran was injured—paralyzed from the waist down, and suffering unremitting pain—when he climbed the ladder of the stand to a platform fifteen feet above the ground and the platform collapsed. Attached to a tree for five years without inspection or maintenance, exposed to the elements and the growth of the tree, the deteriorated straps securing the stand to the tree had broken.

In O’Bryan’s suit against Primal Vantage, alleging product liability, the plaintiff argued that the warnings and instructions accompanying the stand were inadequate. The jury agreed and awarded damages to the plaintiff. Primal Vantage appealed, contending that any inadequacy in this regard was not the proximate cause of the accident—the cause was the failure of the owner of the stand to maintain it in accord with the instructions.

A state intermediate appellate court affirmed the judgment of the lower court. “The negligence of an intervening party does not relieve the manufacturer of the duty to warn adequately.”

In the actual *Primal* *Vantage* case, the jury found that O’Bryan also failed to comply with his duty of ordinary care and that this failure was a substantial factor in causing the accident. The jury calculated the total damages, and assigned fifty percent of the fault to each party, reducing Primal Vantage’s obligation by half.

1. During *voir dire*, a potential juror asked whether the jury would be told how much Primal Vantage’s insurance company would pay if O’Bryan were awarded damages. How should the court have responded? Why?

Solution

In response to a question about the defendant’s insurance coverage, the court should have told the potential jurors that they would not be told how much Primal Vantage’s insurance company would pay if O’Bryan were awarded damages, because the fact and amount of insurance would have no bearing on the decisions they would be asked to make.

A court should make this sort of explanation to counteract any prejudice caused by questions about insurance. In theory, the existence and amount of insurance should not affect a determination of liability and damages in a negligence-based product liability suit.

In the actual *Primal Vantage* case, the court explained to the jury, “If someone’s liable you should find them liable, regardless of who is going to pay.” How much an insurer might pay “does not affect the amount of the loss.” For those reasons, “insurance does not matter at all when you’re assessing damages. Insurance does not change how you do the math. \*  \*  \* You decide on the number based on the evidence.”

Case 6.2

1. Why did Janssen downplay the risks of Risperdal in the warnings to physicians? Discuss.

Solution

Most likely, Janssen downplayed the risks of Risperdal in its warnings to physicians in order not to discourage its use, which thereby increased the maker’s return on its investment in the drug. Developing and testing drugs that may ultimately be approved for use by patients is an extraordinarily expensive endeavor. Taking any step late in this process that would discourage the use of a drug in which its developer has invested so much time, money, and effort could result in a significant economic loss.

Of course, the business strategy to understate the risks of the use of a prescription drug can cause negative results. Some patients who might not otherwise have been prescribed the drug may suffer harm from its use, leading to the imposition of liability on its manufacturer, as in the Stange case. And this could further lead to greater losses in human and economic terms than would have occurred if the maker had been upfront about the risks in the first place.

1. Suppose that instead of suffering harm through a prescription drug’s legitimate use, the plaintiff had been injured by a drug’s illegal abuse. Would the result have been different? Explain.

Solution

Yes, if instead of suffering harm through a prescription drug’s legitimate use, the plaintiff had been injured by a drug’s illegal abuse, the result would have been different.

When an injury is caused to a patient by the use of a prescribed drug, it must be proved that its maker failed to exercise reasonable care to inform the prescribing physician of facts that make the drug likely to be dangerous. And sometimes, liability may arise through a product’s foreseeable misuse. But if a person is harmed by a drug through its illegal abuse, there is no legal, or even logical, basis on which to impose liability on its maker.

Case 6.3

1. If the public wants to change the policy applied outlined in this case, which branch of the government—and at what level—should be lobbied to make the change? Explain.

Solution

The statute at the heart of this case is the National Childhood Vaccine Injury Act (NCVIA). The branch of the government that should be lobbied by the advocates for a change in the policy expressed through the statute is the legislative branch. Any change should be sought through the legislative process at the federal level by lobbying Congress. The reason is that the NCVIA is a federal statute.

1. What is the public policy expressed by the provisions of the NCVIA?

Solution

In the Supreme Court’s interpretation, the NCVIA’s program balances payment of compensation to victims harmed by vaccines and protection of the vaccine industry from the potentially devastating costs of tort liability. In effect, the Court adds a fourth assumption to the list in the text of the grounds for the public policy underlying the imposition of product liability—the liability imposed on the manufacturers of beneficial products should not be so onerous as to drive them out of business.

# Chapter Review

Practice and Review

Shalene Kolchek bought a Great Lakes Spa from Val Porter, a dealer who was selling spas at the state fair. After Kolchek signed the contract, Porter handed her the manufacturer’s paperwork and arranged for the spa to be delivered and installed for her. Three months later, Kolchek left her six-year-old daughter, Litisha, alone in the spa. While exploring the spa’s hydromassage jets, Litisha got her index finger stuck in one of the jet holes.

Litisha yanked hard, injuring her finger, and then panicked and screamed for help. Kolchek was unable to remove Litisha’s finger, and the local police and rescue team were called to assist. After a three-hour operation that included draining the spa, sawing out a section of the spa’s plastic molding, and slicing the jet casing, Litisha’s finger was freed. Following this procedure, the spa was no longer functional. Litisha was taken to the local emergency room, where she was told that a bone in her finger was broken in two places. Using the information presented in the chapter, answer the following questions.

1. Under which theories of product liability can Kolchek sue Porter to recover for Litisha’s injuries?

Solution

Kolchek may sue the manufacturer Great Lakes for product liability based upon negli gence. Furthermore, she may assert claims against Great Lakes and Porter, as a mem ber of the distributive chain, for strict product liability based upon design defects associ ated with the spa and inadequate warnings with respect to its use.

1. Would privity of contract be required for Kolchek to succeed in a product liability action against Great Lakes? Explain.

Solution

Injured consumers may bring claims sounding in product liability or strict liability against manufacturers despite the absence of a direct contractual relationship. Potential defendants to such actions include manufacturers, sellers, and lessors.

1. For an action in strict product liability against Great Lakes, what six requirements must Kolchek meet?

Solution

Plaintiffs in strict product liability cases must show the product was in a defective con dition when it was sold, the defendant sells or distributes such products in the ordinary course of business, the product was unreasonably dangerous, the plaintiff suffered physical harm or injury to property as a result of use of the product, the injury was proximately caused by the defect, and the product was not substantially changed from the time it was sold to the time the injury occurred.

1. What defenses to product liability might Porter or Great Lakes be able to assert?

Solution

Comparative negligence allows the jury to compute the contributions of both parties to the situation. This results in the reduction or elimination of the plaintiff’s recovery, de pending on the state rule and the percent of negligence contributed. Leaving a six-year-old unattended in the spa may be deemed negligent and thereby reduce the plaintiff’s ultimate recovery.

Practice and Review: Debate This

1. All liability suits against tobacco companies for causing lung cancer should be thrown out of court now and forever.

Solution

It is difficult to believe that those who smoked in the past and those who smoke tobacco products today didn’t or don’t know about the health dangers of smoking.  After all, even 75 years ago, before any research was carried out, kids called cigarettes “coffin nails.”  Common sense tells anyone that inhaling smoke into one’s lungs cannot have a positive effect on one’s health.  Cigarettes are just another product that individuals have the choice to buy or not to buy.  There should be no liability issues here.

Cigarette companies for years promoted the glamour and even the safety of smok ing, so tobacco manufacturers should be liable for the deaths caused by cigarette smok ing, at least those that occurred in the past.  There is uncontroverted proof that the ads for cigarette smoking were misleading because they played down the negative health ef fects of this activity.  Any time false advertising is an issue, companies that engage in it should be held liable for the results of such advertising.

Issue Spotters

1. Rim Corporation makes tire rims and sells them to Superior Vehicles, Inc., which installs them on cars. One set of rims is defective, which an in spection would reveal. Superior does not inspect the rims. The car with the defective rims is sold to Town Auto Sales, which sells the car to Uri. Soon, the car is in an accident caused by the defective rims, and Uri is in jured. Is Superior Vehicles liable? Explain your answer.

Solution

Yes. Those who make, sell, or lease goods are liable for the harm or damages caused by those goods to a consumer, user, or bystander. The maker of component parts may also be liable. In this situation, Rim Corporation makes tires that Superior installs on its vehicles before selling them to dealers. Thus, Superior is the manufacturer, and Rim is the maker of component parts. A manufacturer is liable for its failure to exercise due care to any person who sustains an injury proximately caused by a negligently made (defective) product. Superior’s failure to inspect and test the tires it installs is a failure to use due care. Thus, Superior is liable to the injured buyer, Uri. Rim Corporation may also be liable.

1. Bensing Company manufactures generic drugs for the treatment of heart disease. A federal law requires generic drug makers to use labels that are identical to the labels on brand-name versions of the drugs. Hunter Rothfus purchased Bensing’s generic drugs in Ohio and wants to sue Bensing for defective labeling based on its failure to comply with Ohio state common law (rather than the federal labeling requirements). What defense might Bensing assert to avoid liability under state law?

Solution

Bensing can assert the defense of preemption. An injured party may not be able to sue the manufacturer of defective products that are subject to comprehensive federal regulatory schemes (such as medical devices and vaccinations). In this situation, it is likely that a court would conclude that the federal regulations pertaining to drug labeling preempt Ohio’s common law rules. Therefore, Bensing would not be liable to Rothfus for defective labeling if it complied with federal law.

Business Scenarios and Case Problems

1. **Product Liability.** Carmen buys a television set manufactured by AKI Electronics. She is going on vacation, so she takes the set to her mother’s house for her mother to use. Because the set is defective, it explodes, causing considerable damage to her mother’s house. Carmen’s mother sues AKI for the damage to her house. Discuss the theories under which Carmen’s mother can recover from AKI. (See *Product Liability Claims*.)

Solution

Carmen’s mother can bring a suit against AKI under a theory of negligence or strict liability. Under negligence theory, Carmen’s mother would have to show that AKI failed to exercise due care to make the product safe and that this breach of duty was the proximate cause of the damages.

If Carmen’s mother brings a suit under a theory of strict liability, according to the *Restatement (Second) of Torts*, she needs to establish six basic requirements of strict prod uct li ability, which are as follows: (1) the defendant must sell the product in a defec tive condition; (2) the defendant must normally be engaged in the busi ness of selling the product; (3) the product must be unrea sonably dangerous to the user or consumer because of its defective condition; (4) the plaintiff must incur physi cal harm to self or property by use or consumption of the product; (5) the defec tive condition must be the proximate cause of the in jury or damage; and (6) the goods must not have been substantially changed from the time the product was sold to the time the injury was sustained.

Under either theory (negligence or strict liability), privity of con tract is not required. Some courts may not allow re covery for property damage unless personal injury also occurs.

1. **Product Liability.** Jason Clark, an experienced hunter, bought a paintball gun. Clark practiced with the gun and knew how to screw in the carbon dioxide cartridge, pump the gun, and use its safety and trigger. Although Clark was aware that he could purchase protective eyewear, he chose not to do so. Clark had taken gun safety courses and understood that it was “common sense” not to shoot anyone in the face. Clark’s friend, Chris Wright, also owned a paintball gun and was similarly familiar with the gun’s use and its risks.

Clark, Wright, and their friends played a game that involved shooting paintballs at cars whose occupants also had the guns. One night, while Clark and Wright were cruising with their guns, Wright shot at Clark’s car but hit Clark in the eye. Clark filed a product liability lawsuit against the manufacturer of Wright’s paintball gun to recover for the injury. Clark claimed that the gun was defectively designed. During the trial, Wright testified that his gun “never malfunctioned.” In whose favor should the court rule? Why? (See *Product Liability Claims*.)

Solution

The court should rule in favor of the manufacturer, finding that the gun did not malfunction but performed exactly as Clark and Wright expected. The court should also point out that Clark and Wright appreciated the danger of using the guns without protective eyewear. Clark offered no proof that the paintball gun used in the incident failed to function as expected. He was aware that there was protective eyewear available but he chose not to buy it. He was an active partici pant in shooting paint balls at other vehicles. The evening of the incident Clark carried his paintball gun with him for that purpose. Wright also knew it was dan gerous to shoot someone in the eye with a paintball gun. But the most crucial tes timony was Wright’s statement that his paintball gun did not malfunction.

1. **Product Misuse.** Five-year-old Cheyenne Stark was riding in the backseat of her parents’ Ford Taurus. Cheyenne was not sitting in a booster seat. Instead, she was using a seatbelt designed by Ford but was wearing the shoulder belt behind her back. The car was involved in a collision. As a result, Cheyenne suffered a spinal cord injury and was paralyzed from the waist down. The family filed a suit against Ford Motor Co., alleging that the seatbelt was defectively designed. Could Ford successfully claim that Cheyenne had misused the seatbelt? Why or why not? [*Stark v. Ford Motor Co*., 365 N.C. 468, 723 S.E.2d 753 (2012)] (See *Defenses to Product Liability.*)

Solution

No, Ford could not succeed on a claim that Cheyenne had misused the seatbelt. Product misuse occurs when a product is used for a purpose that was not in tended. This defense has been severely limited by the courts. It is recognized as a defense only when the particular use was not reasonably foreseeable. Manufacturers and suppliers are required to expect reasonably foreseeable mis uses and to design products that are safe when misused or marketed with a pro tective device, such as a childproof cap.

In the facts of this problem, Cheyenne was too young to be negligent, and it is reasonably foreseeable that a child would wear a seatbelt incorrectly without understanding the risks.

In the actual case on which this problem is based, the court issued a judg ment in Cheyenne’s favor.

1. **Business Case Problem with Sample Answer**—**Product Liability.** While driving on Interstate 40 in North Carolina, Carroll Jett became distracted by a texting system in the cab of his tractor-trailer truck. He smashed into several vehicles that were slowed or stopped in front of him, injuring Barbara and Michael Durkee and others. The injured motorists filed a suit in a federal district court against Geologic Solutions, Inc., the maker of the texting system, alleging product liability. Was the accident caused by Jett’s inattention or the texting device? Should a manufacturer be required to design a product that is incapable of distracting a driver? Discuss. [*Durkee v. Geologic Solutions, Inc*., 502 Fed. Appx. 326 (4th Cir. 2013)] (See *Product Liability Claims*.) **—For a sample answer to Problem 6-4, go to Appendix E.**

Solution

Here, the accident was caused by Jett’s inattention, not by the texting device in the cab of his truck. In a product-liability case based on a design defect, the plaintiff has to prove that the product was defective at the time it left the hands of the seller or lessor. The plaintiff must also show that this defective condition made it “unreasonably dangerous” to the user or consumer. If the product was delivered in a safe condition and subsequent mishandling made it harmful to the user, the seller or lessor normally is not liable. To successfully assert a design defect, a plaintiff has to show that a reasonable alternative design was available and that the defendant failed to use it.

The plaintiffs could contend that the defendant manufacturer of the texting device owed them a duty of care because injuries to vehicle drivers and passengers, and others on the roads, were reasonably foreseeable due to the product’s design that (1) required the driver to divert his eyes from the road to view an incoming text from the dispatcher, and (2) permitted the receipt of texts while the vehicle was moving. But manufacturers are not required to design a product incapable of distracting a driver. The duty owed by a manufacturer to the user or consumer of a product does not require guarding against hazards that are commonly known or obvious or protecting against injuries that result from a user's careless conduct. That is what happened here.

In the actual case on which this problem is based, the court reached the same conclusion, based on the reasoning stated above, and an intermediate appellate court affirmed the judgment.

1. **Strict Product Liability.** Medicis Pharmaceutical Corp. makes Solodyn, a prescription oral antibiotic. Medicis warns physicians that “autoimmune syndromes, including druginduced lupus-like syndrome,” may be associated with use of the drug. Amanda Watts had chronic acne. Her physician prescribed Solodyn. Information included with the drug did not mention the risk of autoimmune disorders, and Watts was not otherwise advised of it. She was prescribed the drug twice, each time for twenty weeks. Later, she experienced debilitating joint pain and, after being hospitalized, was diagnosed with lupus. On what basis could Watts recover from Medicis in an action grounded in product liability? Explain. [*Watts v. Medicis Pharmaceutical Corp*., 236 Ariz. 19, 365 P.3d 944 (2016)] (See *Strict Product Liability.)*

Solution

Watts might recover from Medicis in an action grounded in product liability on proven allegations that the drug was unreasonably dangerous because Medicis failed to provide adequate warnings of its known dangers. A product’s maker or seller is liable for products that are so defective as to be *unreasonably* dangerous. This exists when a product is dangerous beyond the expectation of the ordinary consumer or a less dangerous alternative was economically feasible, but the maker or seller failed to use it. A product may be deemed *unreasonably* dangerous because of inadequate instructions or warnings.

In the fact of this problem, Medicis Pharmaceutical Corp. made Solodyn, a prescription drug. Medicis warned prescribing physicians that “autoimmune syndromes, including drug-induced lupus-like syndrome,” are possible from the use of the drug. Amanda Watts’s physician prescribed Solodyn for her acne. An insert included with the drug did not mention the risk of autoimmune disorders, and Watts was not otherwise advised of it. Later, she was diagnosed with lupus. In other words, Medicis did not adequately warn Watts about the risks of Solodyn and the inadequacy of the warning contributed to Watts's injuries.

In the actual case on which this problem is based, Watts filed a suit in an Arizona state court against Medicis to recover for her injuries. The court dismissed her complaint. A state intermediate appellate court vacated the dismissal and remanded the case, based in part on the reasoning stated above.

1. **Strict Product Liability.** Duval Ford, LLC, sold a new Ford F-250 pickup truck to David Sweat. Before taking delivery, Sweat ordered a lift kit to be installed on the truck by a Duval subcontractor. Sweat also replaced the tires and modified the suspension system to increase the towing capacity. Later, through Burkins Chevrolet, Sweat sold the truck to Shaun Lesnick. Sweat had had no problems with the truck’s steering or suspension, but Lesnick did. He had the steering repaired and made additional changes, including installing a steering stabilizer and replacing the tires. Two months later, Lesnick was driving the truck when the steering and suspension suddenly failed, and the truck flipped over, causing Lesnick severe injuries. Could Lesnick successfully claim that Duval and Burkins had failed to warn him of the risk of a lifted truck? Explain. [*Lesnick v. Duval Ford, LLC,* 41 Fla.L.Weekly D281, 185 So.3d 577 (1 Dist. 2016)] (See *Product Liability Claims*.)

Solution

No, Lesnick could not succeed on a theory of product liability against the sellers of the lifted pick-up truck by arguing that they failed to warn him of the risk of a lifted vehicle. A product may be deemed defective because of inadequate warnings. But the defect and its risks must be fore seeable—that is, the seller must know, or have reason to know, of the defect and its risks. Liability would exist if a knowledgeable seller withheld this information from its customers.

In this problem, Duval Ford sold a new Ford F–250 pick-up truck to Sweat. Sweat had Duval install a lift kit on the truck, and also modified the suspension system and replaced the tires. Later, through Burkins Chevrolet, Sweat sold the truck to Lesnick. Sweat had had no problems with the truck’s steering or suspension, but Lesnick did. He had the steering repaired. Lesnick made other changes, including installing a steering stabilizer and again replacing the tires. Lesnick was driving the truck when the steering and suspension suddenly failed, and the truck flipped over, causing him severe injuries.

In these facts, the sellers had no duty to warn Lesnick of risks associated with the lifted truck because there is no evidence that there was anything inherently dangerous about the truck when it was sold. Furthermore, Lesnick was well aware that the truck was lifted, and this fact was likely a factor in his decision to buy the truck.

In the actual case on which this problem is based, Lesnick filed a suit in a Florida state court against Duval and Burkins, on a theory of product liability, alleging that the sellers failed to warn him of the risk of a lifted vehicle. The court issued a summary judgment in the defendants’ favor. A state intermediate appellate court affirmed this judgment, on the conclusion stated above.

1. **Spotlight on Pfizer, Inc.—Defenses to Product Liability.** Prescription drugs in the United States must be approved by the Food and Drug Administration (FDA) before they can be sold. A drug maker whose product is approved through the FDA’s “abbreviated new drug application” (ANDA) process cannot later change the label without FDA approval. Pfizer Inc. makes and sells by prescription Depo-T, a testosterone replacement drug classified as an ANDA-approved drug. Rodney Guilbeau filed a claim in a federal district court against Pfizer, alleging that he had experienced a “cardiovascular event” after taking Depo-T. He sought recovery on a state-law product liability theory, arguing that Pfizer had failed to warn patients adequately about the risks. He claimed that after the drug’s approval its maker had become aware of a higher incidence of heart attacks, strokes, and other cardiovascular events among those who took it but had not added a warning to its label. What is Pfizer’s best defense to this claim? Explain. [*Guilbeau v. Pfizer, Inc.*, 80 F.3d 304 (7th Cir. 2018)] (See *Defenses to Product Liability.)*

Solution

Pfizer’s best defense to the claim that it failed to add warnings about certain risks to the label of Depo-T is preemption. Federal law can preempt state-law product liability claims, preventing an injured party from suing the maker of a defective product on the basis of a circumstance that is subject to a comprehensive federal regulatory scheme.

Here, Pfizer makes and sells Depo-T, a testosterone replacement drug classified as an ANDA-approved drug. In this case, Guilbeau had been prescribed the drug and allegedly suffered a cardiovascular event from its use. He claimed that after the drug’s approval, Pfizer had learned of a higher incidence of such occurrences among those who took it but had not added a warning to the label. But the maker of a drug approved through the Food and Drug Administration’s ANDA (abbreviated new drug application) process cannot later change the label without the agency’s approval. Thus, federal law acted to preempt Guilbeau’s state law claim.

In the actual case on which this problem is based, Pfizer asserted that federal law preempted Guilbeau’s claim. The court dismissed the suit. The U.S. Court of Appeals for the Seventh Circuit affirmed, stating, “ANDA holders have an ongoing federal duty of sameness. At all times their drugs’ labeling must be the same as the .  .  . labeling that was the basis of the ANDA approval.”

1. **A Question of Ethics—The IDDR Approach and Product Liability**. While replacing screws in a gutter, John Baugh fell off a ladder and landed headfirst on his concrete driveway. He sustained a severe brain injury, which permanently limited his ability to perform routine physical and intellectual functions. He filed a suit in a federal district court against Cuprum S.A. de C.V., the company that designed and made the ladder, alleging a design defect under product liability theories. Baugh weighed nearly 200 pounds, which was the stated weight limit on this ladder. Kevin Smith, a mechanical engineer, testified on Baugh’s behalf that the gusset (bracket) on the ladder’s right front side was too short to support Baugh’s weight. This caused the ladder’s leg to fail and Baugh to fall. In Smith’s opinion, a longer gusset would have prevented the accident. Cuprum argued that the accident occurred because Baugh climbed too high on the ladder and stood on its fourth step and pail shelf, neither of which were intended for the purpose. No other person witnessed Baugh using the ladder prior to his fall, however, so there was no evidence to support Cuprum’s argument. [Baugh v. Cuprum S.A. de C.V., 845 F.3d 838 (7th Cir. 2017)] (See *Strict Product Liability*.)
2. What is a manufacturer’s legal and ethical duty when designing and making products for consumers? Did Cuprum meet this standard? Discuss.
3. Did the mechanical engineer’s testimony establish that a reasonable alternative design was available for Cuprum’s ladder? Explain.

Solution

**1.** In designing and making a product for consumers, the manufacturer has the duty to make the product reasonably safe so that it does not create an unreasonable risk to the user. This is the legal standard to which product liability law holds the maker in a suit by a consumer, and thereby the minimal ethical standard.

This would have been the relevant standard when Cuprum decided to make and market a ladder for consumer use. The company would have wanted to keep the cost as low as possible, in order to enhance profits. The stakeholders would have been Cuprum’s owners, officers, and employees, as well as its wholesale customers and perhaps the larger community. But the company should also have wanted to avoid foreseeable risks of harm with its product, in order to avoid the negative effects of bad publicity. This would have meant designing the ladder to be at least as safe as other ladders on the market. The stakeholders then would have included, in addition to those listed above, the product’s consumers.

The ladder could have been designed cheaply without regard for safety. Or it could have been designed for safety without regard to expense. Too far towards either end of this range would impact a subset of stakeholders. A manufacturer would most likely decide to seek a balance between these two objectives to satisfy most stakeholders. For example, Cuprum might have planned its ladder with an eye to keeping manufacturing and shipping costs low, and then included with its product warnings to consumers about potential hazards.

The evidence presented in the Baugh case indicated that at least one of the ladder’s gussets was too short to support its user’s weight. If so, then Cuprum failed to live up to its ethical and legal duty to make the ladder reasonably safe. The defective design might have resulted from Cuprum’s attempt to save money. Given the negative consequences—Baugh fell and sustained serious brain injuries for which he sued the company—none of Cuprum’s stakeholders could have been satisfied by these events.

**2.** Perhaps, yes. Kevin Smith, a mechanical engineer, testified on Baugh’s behalf that the gusset on the ladder’s right front side was too short to support Baugh’s weight. In his opinion, this short gusset caused the ladder to collapse and Baugh to fall. This testimony was presented to a jury as evidence of causation, and as evidence that a reasonable alternative design—ladders that used a longer gusset—was available.

In the actual problem on which this problem is based, a jury found in Baugh’s favor, and awarded him more than $11 million in damages. On Cuprum’s appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed the result. The appellate court concluded, “A rational [jury] could conclude that, based on a preponderance of the evidence, the alleged defect in the ladder was the most probable cause of the accident.”

Critical Thinking and Writing Assignments

1. Time-Limited Group Assignment. Bret D’Auguste was an experienced skier when he rented equipment to ski at Hunter Mountain Ski Bowl in New York. When D’Auguste entered an extremely difficult trail, he noticed immediately that the surface consisted of ice with almost no snow. He tried to exit the steeply declining trail by making a sharp right turn, but in the attempt, his left ski snapped off. D’Auguste lost his balance, fell, and slid down the mountain, striking his face and head against a fence along the trail. According to a report by a rental shop employee, one of the bindings on D’Auguste’s skis had a “cracked heel housing.” D’Auguste filed a lawsuit against the bindings’ manufacturer on a theory of strict product liability. The manufacturer filed a motion for summary judgment. (See *Product Liability Claims*.)
2. The first group will take the position of the manufacturer and develop an argument why the court should grant the summary judgment motion and dismiss the strict product liability claim.
3. The second group will take the position of D’Auguste and formulate a basis for why the court should deny the motion and allow the strict product liability claim.
4. The third group will evaluate whether D’Auguste assumed the risk of this type of injury.
5. The fourth group will analyze whether the manufacturer could claim that D’Auguste’s negligence (under the comparative negligence doctrine) contributed to his injury.

Solution

**1.** The court should grant the manufacturer’s motion for summary judg ment and dis miss D’Auguste’s complaint. There is no proof as to whether the crack in the heel housing was substantial enough to have caused D’Auguste’s left ski to come off, whether the crack existed before the accident, or whether the crack resulted from the impact during the accident. In fact, there is no proof that the crack was in the binding at tached to the left ski. In other words, there is no evidence that the crack constituted a defect. Furthermore, the “snap off” of the left ski may have been caused, not by a defect in the binding, but by negligence in the setting of the bindings.

**2.** The court should deny the manufacturer’s motion for summary judg ment and allow D’Auguste’s claim to proceed. Despite the lack of proof with re spect to the cracked heel housing noted in the previous answer, D’Auguste could still show that there was a defect in the binding and succeed in his ac tion if he could prove that the product did not perform as intended and exclude all other causes for the product’s failure that are not attributable to the de fendant.

**3.** It could be argued that D’Auguste assumed the risk of his injury by asserting that he was an experienced skier who chose to ski the icy trail on which he was injured. In other words, he recognized the risk and voluntarily assumed it. As a skier, D’Auguste would have known that injuries occur on ski slopes. As a renter, he would have known that borrowed goods are not always in perfect condition. As a sportsman who selected a difficult trail to descend, he would have been aware of the potential for heightened risks. As an experienced participant who chose to proceed, he would arguably have assumed these risks.

D’Auguste might successfully respond with proof that the defect in the skis was the cause of his injuries, and that he did not assume the risk of that defect.

**4.** The manufacturer could claim that D’Auguste’s negligence, under the comparative negligence doctrine, contributed to his injury. Here, the skier’s intentional actions—choosing the difficult trail, attempting a sharp turn on an icy slope with borrowed equipment, and perhaps failing to take other proactive steps to prevent his injuries as he slid—might be applied to apportion liability and reduce the manufacturer’s damages.

Of course, D’Auguste would argue that none of his actions constituted negligence, or that the manufacturer’s defective skis superseded any negligence on the skier’s part.