Professor DeWolf Fall 1988
Products Liability Gonzaga Law School

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

I would analyze the potential exposure under (1) strict liability; (2) failure to warn; (3) negligence; and (4) warranty theories.

1. Strict Liability

Under Restatement §402A, a seller is strictly liable for a product that is unreasonably dangerous because of a defect either in manufacture or design. Several questions arise from the facts of this case: (1) although Bumper ("B") is clearly in the business of selling amplifiers, there may be a question as to whether there was a sale in this case. Agger ("Ag") didn't pay any money for it; on the other hand, it was given to him on condition that he permit use of his image for promotional purposes. Thus, he gave something of value for the product. In any event, since privity is not required by §402A I believe it applies.

(2) The facts do not suggest a manufacturing defect. There may, however, be a design defect. Design defects are usually judged by either of two standards: (a) did the product fall below the reasonable expectations of the ordinary consumer; and/or (b) did the risks posed by the product outweigh the cost of making the product safe enough to reduce or eliminate the risk? (Some states also follow the Barker test which permits a plaintiff to satisfy either test, and puts the burden on the defendant to show that the product was not defective under the risk/utility test.) Other jurisdictions provide for a consumer expectations test of manufacturing flaws and a risk/utility test for design defects.

(a) Under the consumer expectation test, the issue would be whether or not Ag had a reasonable expectation that he would not be shocked. I think he did. The occurrence was apparently a freakish one, and thus B can hardly claim, even under an "objective test" that Ag could have been aware of it at the time he "purchased" the product. (It is true that Ag may have known of a general risk of electric shock, but probably not arising from these circumstances. Conceivably, a conservative court like the one in Gray (the crane boom case) would charge Ag with some knowledge, but I doubt it. Moreover, a more liberal court like the one in the second gasoline-can case would limit the expectations only by risks whose magnitude the plaintiff appreciated.

(b) Under the risk/utility test, the issue would be whether or not the cost of a redesign would be less than the projected risk of such accidents occurring. One obvious redesign is the addition of the GFI device. The facts don't state how much such a device would cost, and the risk of this incident recurring appear quite minimal. In addition to the specific risk of this accident, which appears quite freakish, and by itself hardly worth preventing, there may be other kinds of accidents that a GFI device would prevent, and therefore its value may be considerable. On the other hand, I don't think that the plaintiff can point to the use of tubes by themselves as an unreasonably dangerous aspect of the product design, since to switch to transistors would interfere with product performance--even if it is an "aesthetic" kind of performance. The GFI device would permit product performance and still avoid the injury.

B should be aware that its use of the new GFI device may be admissible evidence in the trial of Ag's case. Although some courts have found that FRE 407 is applicable to strict liability cases and therefore exclude such evidence as a post-accident repair, other courts have found that the policy arguments in a negligence case do not carry over to a strict product liability case, and

therefore admit such evidence without restriction. Even in the restrictive jurisdictions, the evidence of redesign to use a GFI device would be admissible to rebut any contention by B that use of such a device at the time of manufacture was not feasible.

2. Failure to Warn

Failure to warn is a hybrid ofo strict liability and negligence theories. Some courts judge failure to warn theories by a negligence standard--that is, by looking at what the designer knew or should have known at the time of the design, rather than with hindsight after experience has provided a better estimation of the risks and benefits of the product. Even among courts that apply a strict liability theory to warning claims some have refused to apply the risk/utility test because of the "excess coverage" of that theory. However, the issue here would be whether a warning was required either under a negligence theory or because without a warning the product was unreasonably dangerous. No discussion is given in the facts of what warnings, if any, were provided. What warning should have been given? "Caution--contains electrical components--do not immerse in water?" It is hard to think of a warning that would have been worth giving and still effective in this case.

3. Negligence

B is required to exercise reasonable care to avoid injury to users of its equipment. A manufacturer is held to an expert standard, and is required to keep up with the developments in the field. The issue here would be whether a manufacturer exercising reasonable care would have put the GFI circuit in the Rolling Rock amp before it was sold to Ag. This analysis would essentially duplicate the issue of design defect considered above. In fact, it would be more difficult for the plaintiff to prove since it would require a showing that a reasonable person in B's position would have done differently given what was known at the time. Since no previous incidents of electrocution had occurred, perhaps no one would have reasonably anticipated the risk.

4. Warranty

The first issue to address in the warranty area is whether or not there was a contract between Ag and B, and if so, what it was. As noted above, this was not a typical sale, but there is certainly enough consideration to make it a contract and for B to create the same warranties that would have arisen in a typical sale. There appear to be no express warranties with regard to safety, and no exclusions or limitations on remedy; although there is a lifetime repair commitment, this does not conspicuously exclude other remedies. (Moreover, any exclusion of a remedy for personal injury is prima facie unconscionable.) There is thus an implied warranty of merchantability, which would largely overlap the consumer expectations test discussed under strict liability. It is hard to say what a "merchantable" amplifier would be like, in part because of the use of tubes rather than the more common transistors. However, under the implied warranty theory Ag would not have to prove fault: only that the product in fact failed to meet the test of being of "fair, average quality."

Causation and Damages. There appear to be no particular issues with respect to either causation or damages. The design defect, assuming there was one, was a cause-in-fact of the injury, and it was certainly foreseeable from the presence of strong electrical charges. Although the risk was small, it was certainly known to the engineers. The damages would be the traditional personal injury components: lost income, medical expense, pain and suffering. As to punitive damages, there doesn't appear to be any evidence that there was any conduct on the part of B to justify imposition of punitive damages; although B may have been negligent or may have produced a defective product, their conduct did not evidence a "flagrant disregard" of Ag's safety.

QUESTION 2

Max Malone ("M") would have a decent claim against Foremost ("F") based on several theories. As to strict liability, it doesn't appear that there was any defect in the design or manufacture of the product; the major issue is whether or not there was a failure to warn. As noted in the previous answer, the warning theory may be part of strict liability, or may be in the form of negligence. Under either analysis, it would appear that F had the ability to foresee that users of the product under some circumstances would suffer very serious physical injury. Although this reaction may be an "allergic" or "idiosyncratic" one (like the deodorant user in Kaempfe), in this case there may be a duty to warn because (a) the reaction is more common; and (b) the results are more devastating. Whereas in Kaempfe the adverse reaction was minor and temporary, here it is permanent and severe.

Although there was a warning on the glue package, it was deficient in two respects: (1) it gave no instruction on how to determine what "adequate" ventilation would mean; and (2) it did not tell the user about the gravity of the risk. Unless the user is given adequate information about what dangers are posed by the failure to heed the warning, the warning is inadequate. On the other hand, F may argue that because the incidence of such a severe reaction is rare, the warning was adequate.

Another issue may be whether or not F had a duty to warn the user directly, as opposed to just his employer. Apparently Jack was aware of the risks of formaldehyde, but didn't pass them along. Arguably F had a duty (unlike the foundry/sand case where direct warning was impractical) to warn M directly of the risks.

Causation. It may be that a better warning, if given to M wouldn't have made any difference; M would have to be careful to define a warning that he can testify credibly would have caused him to use better ventilation or perhaps would have caused him to take alarm sooner when his symptoms first developed.

Warranty and Misrepresentation. I don't see any additional leverage to be obtained from a warranty theory; the statement "finest wood glue available" is a statement of opinion, not fact, and is therefore not a warranty.