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Products Liability

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Gonzaga Law School

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

Introduction

Prior to discussing the settlement offer from the Riding Range, I would want to determine the chances of prevailing against other parties, and the potential effect of a settlement. The primary defendant (other than Range) would be Tryco Corporation, but as noted below I would consider other defendants as well.

I. Tort Claims

My first approach would be through a tort theory.[1] To prove a tort claim for products liability, the plaintiff must establish (1) that the product was defective, either by manufacturing, design, or warning defects, (2) that the defect proximately caused his injury, and (3) that he has suffered a compensable form of injury.

A. Defect

Most product liability cases are based upon asserting that the product is defective because it is unreasonably dangerous. In 1965 the Restatement of Torts (2d) incorporated § 402A, which provides for strict liability in the event of a defect rendering the product unreasonably dangerous.

1. Manufacturing

It doesn't appear that there was a manufacturing flaw in this case. A manufacturing flaw is found when the product departs from the manufacturer's specifications. Here the defect (if any) is to be found in the design of the product or the warnings supplied with it.

2. Design

a. The standard to be used

Jurisdictions differ on the standard to be applied when determining whether a product is defect in design. Some use a strict liability standard, based upon a determination of whether a reasonably prudent manufacturer would have placed the product in the stream of commerce *if he (or she) knew then what is known now about the product*. In other words, the advantage for the plaintiff of a strict liability test for product defects is that knowledge acquired since the time of manufacture or sale can be used to show that the product was (is) unreasonably dangerous. Two major tests have been used to establish whether the product is unreasonably dangerous. The first is the **consumer expectations** test. Under the

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[1] In some jurisdictions, and I'd certainly want to see whether this jurisdiction was one of them, all tort claims have been merged into a single claim that doesn't distinguish between tort and warranty.

consumer expectations test, the product is defective if it fails to meet the reasonable consumer's expectations for product performance or safety. The second test, the **risk/utility** test, asks whether the product could be made more safely for an acceptable cost.

b. The evidence in this case

In this case there appears to be a viable claim that the rim was defective because it was insufficiently strong to withstand the repeated pounding that it took. Under the *consumer expectations* test, we would ask whether the reasonable consumer would expect that the rim would withstand this kind of treatment. Since the bike was apparently made for this kind of treatment, I think the answer would be yes.

Was the product misused? The defendant might still suggest that the abuse of the tire rim was a misuse of the product. Misuse will prevent the imposition of liability if the manufacturer could not be expected to foresee the use to which the consumer would put the product, nor could he reasonably be expected to plan around it. Here, however, the advertising clearly demonstrates that repeated stress on the rim would be expected. Moreover, even the bending of the rim back into shape does not fall outside of the use that the product would be expected to be put to. Whether or not this conduct constitutes *contributory negligence*, of course, is another question.

Under the *risk/utility* test, the question would be whether it was cheap enough to provide a stronger alloy, relative to the likelihood of injury. Since manufacturers are now using a stronger alloy, that is pretty good evidence that the change would be worthwhile.[2] If the risk/utility test is used in this jurisdiction, the Paltins have a good chance of establishing a design defect.

3. Warning

Even if the product was not defectively designed, the Paltins could argue that the product was defective in lacking an adequate warning of the dangers of riding on a rim that had been subjected to lots of stress. There was a warning that the tires should be properly inflated. But there was no warning about the consequences if the tires were not properly inflated. In addition, there was *no* warning about the rims and their susceptibility to collapse or cause injury if they were repeatedly bent.

B. Causation

In addition to establishing the existence of a defect, the Paltins would also have to establish that the defect was a proximate cause of their injury. That means establishing that the defect was both a "but-for" cause of the injury and was a proximate cause. Since here the injury would not have occurred but for the weakness of the metal in the rim, that test is met. In addition, the kind of injury that occurred—the rim's jagged edge cutting into the plaintiff—is the kind of injury that could be expected.

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[2]Use of this evidence depends upon whether this jurisdiction permits introduction of evidence of post-accident design changes. Some jurisdictions apply the principle of FRE 407 (used for negligence cases) to bar the admission of evidence of post-accident design cases.

C. Contributory Fault

The plaintiff's recovery may be reduced (or even barred), depending on the jurisdiction, if he has himself been at fault. Contributory fault on the part of the plaintiff generally takes one of two forms: negligence and assumption of risk.

1. Negligence

A plaintiff is negligent if he fails to behave as a reasonably prudent person would in the same or similar circumstances. Here Perry Paltin, a 12-year-old, used a pair of pliers to straighten out a rim that was repeatedly banged up from collisions with the ground. He installed a new tire and tube over a piece of the rim that was jagged, and overfilled a tire that had been deflating frequently. None of this behavior seems particularly egregious on the part of a 12-year-old, particularly where he was using the product for the kind of rough riding for which it was purchased. I don't believe a jury would find him to be significantly at fault. If they did, his recovery would probably be reduced by the percentage of his individual negligence. (Some jurisdictions do not even consider contributory negligence to be a defense to products claims based on strict liability.)

2. Assumption of Risk

A different defense arises where the plaintiff voluntarily encounters a known risk. To prove that Perry Paltin assumed the risk that his front rim would collapse and injure him, Tryco would have to establish that Perry subjectively appreciated the danger of his conduct and then proceeded to encounter it anyway. That doesn't seem likely in this case. However, if assumption of risk were established, in some jurisdictions it will bar the claim. (Many other jurisdictions simply treat assumption of risk as a form of contributory negligence.)

D. Other Defendants

Before assessing the effects of having a multi-party case, it is important to address any other potential defendants.

1. Range

Range might be found negligent in failing to maintain a good racing surface. In addition, their supervision may have been lacking in that Perry was allowed to repair the rim with inadequate tools. Nonetheless, it does not appear that Range will be able to pay for much of the injury. The decision as to whether to settle with them will depend upon the analysis of joint tortfeasors, *infra*.

2. Tire manufacturer/dealer

It is unclear from the facts whether or not there was anything wrong with the tire that Perry purchased just before the accident. It does appear to have deflated rather quickly after it was purchased, but that may reflect the poor rim rather than anything wrong with the tire. If Perry attempted to establish liability on the part of the tire manufacturer, he would have to show that the product was defective in some way. Perhaps he could show that there was inadequate warning of the effect of poor tire inflation. However, in any event it is not clear that there is a causal connection between whatever might have been wrong with the tire and the accident. Would it have made a difference if the tire had stayed inflated?

3. The dealer (Sports-N-More)

Under § 402A of the Restatement, liability was assessed against *sellers* of products that were unreasonably dangerous. Modern reform statutes (which have passed in many jurisdictions) remove the dealer from liability if he only acts as a pass-through distributor of the product. Unless Sports-N-More made an express warranty (*e.g.*, a salesman guaranteeing the safety of the bike) or was negligent in the set-up of the product, Paltin will ordinarily be limited to a claim against the manufacturer, Tryco.

E. Joint Tortfeasor Issues

The immediate question of this case, and perhaps the most difficult one, is the effect of a settlement (if any) on the prospects for the further case against Tryco. Two questions need to be answered: first, what would happen if the jury found the Range *and* Tryco at fault for the injury? Would Tryco be jointly and severally liable or only liable for their percentage share. Second, what would happen if Range settled for part of the damages, and then a judgment were recovered against Tryco?

1. Joint and Several Liability

Jurisdictions differ on what to do about joint and several liability. Most jurisdictions would make Tryco jointly and severally liable, regardless of the percentage of Range's fault, so long as Perry was free from contributory fault. If Perry is found at fault, some jurisdictions would make the liability several rather than joint. Thus, if Tryco were found 30% at fault, Range 50% at fault, and Perry 20% at fault, Tryco would only be liable for 30%. On the other hand, some jurisdictions would make Tryco pay whatever was uncollectible from Range. The statutes and caselaw of this jurisdiction would have to be carefully scrutinized.

2. Effect of Settlement

The jurisdictions also differ on how to treat settlement. For example, if Range offered the full $50,000 in settlement, some jurisdictions would simply reduce Tryco's liability by that amount; some would reduce it by the percentage share that Range was found at fault, and some would reduce it by a one-half share. Again, I would be extremely cautious in entering into any settlement agreement for fear that I would lose more of the potential for recovery than if I proceeded to trial. Since the chance of Perry being found at fault are rather small, I would not want to risk a potentially large recovery by a premature settlement.

II. Warranty Issues

It is possible that Perry could make a separate claim based upon the existence of an express warranty. Showing the kids flying through the air on the Trail Cruiser may have warranted that it was safe to use the bikes for that purpose. Ordinarily, this would be virtually identical to the consumer expectations test stated above. However, if the jurisdiction still permits a separate claim based on warranty (some jurisdictions like Washington have collapsed them into a single cause of action) or if the standard for product defect is more onerous because of modifications to the liability standard in tort, then a claim in warranty might be considered. Another advantage might be the effect upon issues relating to joint and several liability.

QUESTION 2

Heather's claim could be based either upon a design defect or upon a failure to warn. Each claim needs to be considered.

Design defect. Estro 80 is a product potentially subject to strict liability for defects in design. As discussed above, most jurisdictions have adopted either the consumer expections or the risk/utility test for design defects. Under the consumer expectations test, the issue is whether the product meets the reasonable consumer's expectations for product performance and safety. Here, arguably, Estro 80 did not meet the reasonable consumer's expectations since it apparently caused kidney failure. I think Heather would probably meet the test for a design defect if the question is simply whether a reasonable consumer would expect that oral contraceptives would cause kidney failure. It is true that Heather was aware of some adverse consequences, but arguably she was not aware of the devastating effects. Alternatively, if the risk/utility test is used, then the question would be whether there is an acceptable alternative that would reduce the risk of injury without interfering unreasonably with the utility of the product. Since our expert points out that lower doses of estrogen might still be adequate to perform the job without creating the risk of hypertension-related diseases, that would be strong evidence in our favor.

Failure to Warn. As a second line of attack, Heather could argue that the product was defective because it failed to warn of potential side-effects. Ordinarily, prescription drugs are subject to a special warning requirement based on the "learned intermediary" doctrine. The prescription drug company's obligation is only to inform the physician, who is charged with the responsibility of monitoring the patient's condition and prescribing accordingly. There is some authority, however, for a requirement that users of birth control pills be warned directly, since the product is used over such a long period of time, and there is not always an individual review of the suitability of the product for the patient.

Strict Liability v. Negligence. Some jurisdictions (*e.g.* California in *Brown v. Superior Court*) have held that prescription drugs should only be held to a standard of negligence. In other words, the plaintiff must prove that *at the time of manufacture or marketing* the defendant had enough knowledge (or should have had enough) to redesign the product or provide adequate warnings. Strict liability would take advantage of the knowledge acquired up to the time of trial. In this case the evidence about birth control pills was available at the time of manufacture and marketing, so that rule shouldn't make a lot of difference.

Causation. The plaintiff must also establish that her injuries were proximately caused by the failure to warn or the defect. Here Heather appears to be well situated to show that if she had known about the risks of high blood pressure and its sequelae, she could have acted to protect herself. She could have reported the high blood pressure sooner to Dr. White, or possibly would have chosen another method of contraception.

Overall, I think Heather's chances against Estronomical are pretty good. If Estronomical attempts to include Dr. White as an additional defendant, it might affect Heather's decision to sue, but it shouldn't affect Heather's ability to recover from E.