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Products Liability

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Gonzaga Law School

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

Rheem should be concerned about a product liability claim based on either a design defect or a failure to warn. In addition, some attention should be given to the effect of contributory fault and worker's compensation.

A. Was the Design of the Water Heater Defective?

Most product liability claims are based upon a claim that the injury was caused by a *defect* in the product. If the product contains a *manufacturing defect*, strict liability will be applied. Here there doesn't appear to be a manufacturing defect in the water heater; rather, a claim could be based upon the fact that the *design* of the water heater didn't contain a mechanism to prevent a fire such as the one that took place.[1] Carrizales ("C") could claim that, without a stand such as the one required in 1975, the water heater was unreasonably dangerous.

1. What Standard Should Be Applied?

One of the main difficulties in a design defect case is identifying the standard that will be applied in determining whether the product was "unreasonably dangerous" or defective. Several possibilities are available.

a. Consumer Expectations test

The court might use a test based upon the "reasonable expectations of the ordinary consumer." Unfortunately, this test is not very well defined; it is sometimes defined conservatively, in terms of whether or not some hypothetical reasonable consumer would actually be aware of such a risk; it also could be defined by what the consumer in this case actually knew about the risk.[2] On the other hand, it might be defined more generously, in terms of whether the average consumer, even if dimly aware of the risk, actually *appreciated* the risk that was posed. For example, in *Keller v. Welles Dept Store* the parents were allowed to establish that a gasoline can without a childproof cap violated their reasonable expectations even though they knew in the abstract that it was possible for children to play with the container and spill gasoline. In this case C might similarly argue that although he had some awareness of the pilot light, he didn't appreciate the way in which it would ignite the gasoline fumes.

b. Risk/Utility test

Another possible test would be the *risk/utility* test, which compares the cost of making the product safer with the expected benefit in terms of injury reduction. In many ways this is similar to a negligence test, in that a balancing test is applied. However, a key question is what kind of knowledge base is used for the comparison: what is known today or what was known at the time the product was manufactured? This issue is addressed below.

c. *Barker v. Lull*

Some jurisdictions (e.g. California) use a combined or alternative test: the

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1. We are assuming in all of this (per the facts) that, but for the lack of a stand elevating the pilot light above ground level, the fire would not have occurred.

2. One criticism of the "consumer expectations" test is that it could be equated witht the discredited "patent danger" test: if the plaintiff was aware of the danger, then there is no liability regardless of how easily the danger could have been remedied. *Gray v. Manitowoc.*

plaintiff can recover if the product *either* defeated the reasonable expectations of the consumer *or* failed under a risk/utility test.

2. Strict liability v. negligence: What is the Role of "State of the Art" Evidence?

Many jurisdictions are in a state of confusion over whether or not strict liability or negligence should be applied to design defect cases. The major issue is whether or not the product should be judged by what is known *today* about the product; or instead by what was known *at the time of manufacture* about the product. Under a pure negligence test, the only evidence that is admissible is what was known (or should have been known) at the time the defendant was making the allegedly negligent decision. On the other hand, under strict liability the focus is supposedly on the product itself, rather than on the person who designed or manufactured it, and the test is applied based upon what we now believe to be an appropriate design of the product.

C would obviously benefit from a standard that incorporated today's knowledge; the standards adopted by the industry, and then by the government, would consider a water heater without the stand unreasonably dangerous. On the other hand, Rheem would want a standard that is closer to a true negligence test, which would exclude knowledge that was gained after the product was designed.

A key issue will be the admissibility of the information about the adoption of the ANSI standard and the CPSC regulation. Under a pure negligence test, neither would be admissible, since they concern post-accident conduct. Jurisdictions have split over whether or not subsequent design changes are admissible; some jurisdictions hold that the logic of FRE 407 applies to changes in design, while others hold that, since the focus is on the *product* rather than the person, FRE 407 shouldn't be extended.

Even under a negligence standard, however, Rheem should be concerned about the fact that the danger posed by this case was (or should have been) well known to Rheem; it was clearly foreseeable that such accidents took place, and the fact that it is not infrequent is demonstrated by Streisel's personal experience. It will be hard for Rheem to argue that a reasonable person would have ignored the danger in designing a hot water tank, even in 1966.

B. Did the Water Heater Lack an Adequate Warning?

C might fail to establish that the product was defective in design, but still claim that the product was defective because it didn't possess adequate warning of the potential danger. One of the chief advantages of this theory is that it doesn't involve the expense (5%) of actually changing the design.

1. Negligence or Strict Liability?

As with the design issues, jurisdictions are split over whether to use a negligence test or strict liability. It would be important to know whether or not knowledge about the risk learned subsequent to manufacture would be admissible. However, since the risk was presumably known at the time of manufacture, it would be less significant than the changes in design noted above.

2. Was the Warning Adequate?

To be adequate a warning must meet three tests: it must (a) be prominently displayed; (b) it must identify the danger posed; and (c) it must explain how to avoid the risk. If the warning fails any of these tests it is inadequate and subjects the manufacturer to liability.

a. Was the Warning Prominently Displayed?

There was a plate on the water heater, but the facts state that it was small.

C could argue that a danger of fire, which this appliance posed, should have been more prominently displayed, particularly in view of the fact that those who encounter the danger would do so without thinking about the water heater. That is, they would have to have seen it well in advance, so that they would be aware of it during emergencies like the one that C confronted.

b. Did it Adequately Describe the Danger?

A second flaw in the warning is that it didn't contain any description of the danger posed: that flammable vapors could be ignited by the pilot light. Instead, it mentioned the fact that it was gas-fired; the average person probably wouldn't realize that the consequence of bringing flammable vapors into proximity with the heater could produce a fire or explosion.

c. Did it Explain What to do to Avoid the Risk?

The final task of a warning is to tell the user what to do to avoid the risk. Here it would have been necessary for C to stay away from the water heater when he was carrying flammable vapors. No other solution would seem to be workable. No instructions were given on what to do.

3. What about a post-sale warning?

Even if the product contained an adequate warning given what was known or should have been known at the time of manufacture, Rheem is still under a duty after sale of the product to warn buyers of the product if a reasonable person would have done so. In this case Rheem could have easily sent a large warning sticker to all purchasers of its pre-1976 water heaters containing the warnings described above. It would have cost very little, and would have been in lieu of the 18-inch stand that was used in the post-1976 models.

C. Would Contributory Fault Be Relevant?

Rheem might want to argue that C was partially at fault in causing the accident, but it would be tough to argue that the danger was so obvious that he should have thought of it during his emergency. To say this would make it all the more incumbent upon Rheem to notify users of this danger in the first place. I don't think contributory fault would be a strong defense.

D. Worker's Compensation

Rheem might also argue that part of the blame should be placed upon the employer for setting up an operation that contained this risk. However, it is unclear what effect such a finding would have. Jurisdictions are split on how to handle worker's comp.; some deduct the employer's fault from the liability of the manufacturer; others hold that it is inconsistent with the principles of worker's comp. to engage in a fault-finding process.

It would also be important to know whether the worker's comp. benefits would reduce the award against Rheem, or instead would have to be reimbursed in the event that Rheem were found to have produced a defective product.

E. Would a Statute of Repose or Statute of Limitations Apply?

Since a product liability statute was passed in this jurisdiction, it may contain a statute of repose. Such a statute makes a manufacturer liable only if the injury occurred while the product was still within its "useful safe life." Typically statutes create a presumption of a 12-year useful safe life, but the presumption may be overcome by evidence that a longer period is more appropriate. Here the length of time was 22 years, but I should think that a water heater would be expected to serve a much longer period than 12 years. I don't think the statute of

repose would be helpful. In addition, a statute of limitations might apply, since the summons and complaint were "just received" (May 1992) and the injury occurred more than three years ago (April 1989). If the statute of limitations is three years, and if the complaint were filed more than three years later, then the claim would be barred.

F. Punitive Damages

Finally, I would be a little bit worried that in addition to compensatory damages, punitive damages might be requested. Although Rheem was within industry standards at the time of the injury, it could be argued that they exhibited a callous disregard for safety in failing to follow-up on the new standards and issue a warning. I don't think the chances are very good of a punitive damage award, but we should be aware that it could be asked for.

G. Conclusion

Overall, I think an offer of $200,000 would be a good start. It would certainly be enough to indicate we are serious, and unless there is a good defense (like SOL), the chances of recovery are (in my judgment) better than even.

QUESTION 2

I would have two comments:

(1) *Design Defect.* This quotation makes a mixture of a statement of fact (that negligence will become the standard for design defect) and a statement of value (that risk-utility balancing is the only sensible way to decide design defect cases). In my opinion, the authors are correct to a large extent in saying that the distinction between strict liability and negligence in design defect cases is very elusive (if not illusive). On the other hand, there is an important question about whether manufacturers should be held liable for products that turn out to be more dangerous than anyone originally anticipated. Use of a pure negligence test makes it more likely that a manufacturer will escape liability so long as a reasonable person would not have known of the danger. On the other hand, that sticks the innocent consumer with a loss that was not bargained for. Thus, there should be some role for "strict liability" in the sense of making the manufacturer, rather than the consumer, bear the loss when unexpected risks arise.

(2) *Overall significance in the Product Liability Reform Movement.* I would further advise my client that the importance of this issue should not be overstated relative to the cost of product liability insurance; even if a pure negligence test were adopted, it would not change the outcome in the vast majority of cases. Attention should also be paid to such issues as punitive damages, modification of the collateral source rule, statutes of repose, etc. Those topics would also need to be addressed, and they do not appear—at least in this excerpt.