Two student answers (Question 1) from the Spring '03 Torts exam

QUESTION 1

I would advise our client Joe Bertagnolli (B) that he has a potential product liability claim against the manufacturer of the belt (AEC) for possible design defect, and may have a claim against General Chemical (beyond merely worker's comp) if we can prove that GC acted with intentional disregard for B's safety. I would not advise our client to sue Linden State Hospital.

CLAIMS

AEC

The strongest claim (and the deepest pocket probably) is a product liability claim against AEC for a defect in shuttle belt. Manufacturers of products are generally held liable for three types of defects. The shuttle belt disaster here was probably not a defect in the general manufacturing of the belt because there is nothing to indicate that this belt was out of specification with any other belts on AEC's product line. This is not to our client's advantage because if the belt disaster was caused by an out of spec belt, AEC would be held to a strict liability standard and we would not have to prove negligence. Another type of defect is the failure to warn a consumer about a potential hazard the product poses. We might be able to argue that AEC it would have been relatively simply to just place a warning on the belt listing the "lock out" procedure (instead of sending out a "safety update" years later). However, the
strongest defect claim we have against AEC is a design defect claim. If we argue that there
was a defect in the basic design of the actual belt, a jury will have to determine what standard
to apply in determining the actual design defect. Some jurisdictions use a negligence test in
that if the manufacturer is found to have failed to use reasonable care in designing the
product when a reasonable person would have taken additional safety precautions, the
manufacturer is liable. Another test used by some jurisdictions is a consumer expectations test
that is more subjective and hard to discern, based on what consumers generally expect from a
product of similar type. A third type of test used by jurisdictions is the risk utility test. This is
similar to a negligence test in that it uses a cost benefit analysis to determine whether or not
the risks posed by the product were greater than a reasonable person would have permitted,
by looking at increasing cost of the product and decreasing its utility - the twist to this test,
however, is that it can be turned into strict liability (good for our client), if it can be shown that
there exists now some new knowledge about the product's safety and design that was not
known to the manufacturer at the time, but that the manufacturer should have known. This
imputes knowledge on the manufacturer and holds him strictly liable for what he should have
known about the product's safety when he designed it. In our case I would argue that the AEC
should have known that both the east and west ends of the belt need protection. Why protect
one end and not the other? A jury may also find that the design of the the separate parts
making up the belt was defective - including the unguarded wheels, unprotected steel cables,
and the minimum clearance between the shuttle belt and the walls of the mine. Whatever test
our jurisdictions uses, a jury may find that several parts of the shuttle belt were designed
dangerously and therefore AEC should pay his fair share of B's damages.

GC

Our client may also have a claim against his employer, GC, for intentional disregard for his
safety in. Generally employers are immune from liability because they pay into a worker's
compensation system which prevents its employees from suing for negligent acts in exchange for automatic payment when employee is injured. However, the exception to employer immunity is invoked when the employer commits and intentional tort. Here we have clear evidence that GC was made aware of the danger posed by the safety belt in 1992 by AEC’s manual advising of lockout procedure. Therefore we can prove actual knowledge of a dangerous condition. Additionally, GC intentionally disregarded not only the warning from AEC, but also B’s repeated request for the lockout procedure before he began shoveling on the belt. The fact that the shift supervisor threatened to fire B if he did not go ahead without the safety procedure is not simply failing to use reasonable care but instead carrying out employer orders to basically threaten the employee. We have a good chance that the employer will not be immune from liability here.

Linden State Hospital

It is doubtful that our client could make a strong claim against Linden State Hospital, even though Linden State has waived immunity from liability for damages resulting from negligence of its medical hospital employees. Section 1-39-108. It is pretty clear from our research that the hospital doctors acted reasonably when performing the eleven surgeries on B’s leg, as well as provided "excellent care". However, if we could prove that any of the doctors who worked on our client failed to advise him of alternative options to surgery (like complete amputation, a one-time surgery which would have cost less than a cumulative 11 surgeries), we may be able to assert a medical malpractice claim. But this would also require us to prove by expert testimony that any of the doctors who worked on our client did not use reasonable care in treating him, and our research points to just the opposite. Another consideration here would also be that the state is liable for the negligence of any of its state hospital employees up to one million dollars. Our client’s damages are one million dollars but it is doubtful the percentage of fault, if any, attributable to the state hospital would be great, therefore we may not want to
include the hospital as a defendant.

DEFENSES

Statute of Limitations and Repose
AEC may claim no liability based on the time of accrual of B’s claim under a statute of repose (if Linden has one). A statute of repose regarding product liability sets an outer limit on the amount of time that a manufacturer can be held liable for a defective product and usually does not allow the statute of limitations to be tolled for things like infancy or fraudulent concealment. Generally product liability for defective products extends for the "usual safe life" of the product which is usually six or twelve years, depending on the product. In our case, this may present a problem because the belt was made in 1986 and B’s injury occurred approximately 19 years later, and B’s claim for injury came two years after. In addition, AEC sent the warning to GC and therefore may claim that GC was responsible for implementing the recommended safety procedure. AEC may also want to argue that it was not the belt design but instead the installation of the equipment by GC when it received the parts for the rail track and installed the equipment in 1986.

GC may argue statute of limitations has run on any intentional injury claim, we would have to research what the statute of limitations is for this type of workplace injury (ONLY if it is found to be an intentional one). GC may argue contributory fault and assumption of risk (discussed below), or general negligence on the part of the shuttle belt operator, who controls the movement of the shuttle. If the shuttle operator negligently operated the belt, and the jury finds that the accident was caused by mere negligence of this operator, then there will be worker’s
compensation (employer immunity) and our client won't be able to recover any damages in court.

Contributory Negligence/ Assumption of Risk and Settlement
The defendants in this case will want to argue both contributory negligence, and assumption of risk. Linden State follows a modified comparative fault plan in that contributory negligence is not a bar to recovery unless B is found to be more negligent than the defendant. But B can still be equally as negligent as the defendants (or less negligent), and get a full recovery. Any damages allowed are simply diminished in proportion to the proportion of fault attributable to B. Section 1-1-109(b). The defendants will want to argue that B assumed the risk of injury from shoveling the belt. After all, he was told that he was shoveling an unsafe area. (However he had never shoveled the belt before!) This argument would not be fruitful because B was fearful of losing his job unless he shoveled the belt, meaning that the risk he assumed would be secondary reasonable - the defendants were negligent (or intentionally responsible) but B I would argue it was reasonable for B to assume the risk because he was told he would be fired. The defendants may also want to argue that B was simply negligent when he was shoveling the belt. Maybe he failed to use some type of protective gear. (This would be weak given his employer's own refusal to implement the lockout procedure). If they do argue contributory fault or assumption of risk, and even if the jury did decide that the risk assumed was reasonable in this situation, as long as B is not found to be more negligent that the defendants, he can still get a full recovery, with a reduction for any percentage of fault attributable to B. Section 1-1-109(b) and (c)(ii)(d)

Damages
The state of Linden implements pure several liability when there are multiple defendants. This means that each defendant is only liable for his proportion of the total fault. Section 1-1-109(c)(ii)(e). For example, since the total amount of damages the jury would award is one million dollars, a defendant would only have to pay his fair share of that one million. If AEC is found to be only 10% at fault, then it would only have to pay $100,000 to B, no more. This also means that B may not be able to recover the total amount of one million if there happens to be an insolvent defendant. Linden state does allow the jury to consider the damage award to include non-economic as well as economic losses resulting from injury.

Miscellaneous

Although Linden's statute does not make any provision for settlement credit, I would look into what happens if we encourage the employer or the manufacturer to settle. This would affect our plan of attack at trial. Does Linden state use the dollar reduction method, (more plaintiff-friendly) by reducing the amount the non-settling defendants have to pay by the actual amount settled for, or does the state use an equal share or percentage reduction. A percentage reduction would not benefit our client because he may not get a full recovery if we settle with one defendant whose liability was for example, 80%. We would only then receive 20%!
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Mr. Bertagnolli (B) has possible claims against General Chemical Corporation (GCC), John Westbrook (W), Bill Louderback (L), AEC, and Linden State Hospital. However, none of these cases will be easy and they each present significant problems that could limit B’s recovery.

Claims Against GCC, W and L

The claim against GCC could be barred because of immunity due to worker’s compensation. If an employer provides worker’s compensation, in order to allow a recovery for injured employees, this usually prevents the opportunity to file a suit against the employer for the damages. This immunity usually also extends to other employees that are acting within the scope and duty of their employment for the company. However, this immunity is a creature of statute and did not exist at common law. Sometimes the statutes allow recovery for certain actions of the company or its employees such as when their is willful or wanton conduct present and the activity extends beyond mere negligence that occurs in the course of employment. This immunity for employers is also not extended in the case of intentional torts. But if the statute does provide immunity for actions of the company and employees then recovery is barred against those entities even if negligence was present and the injured party could otherwise prove their case in court. In this situation more research would be required to see exactly what the worker’s comp immunity statute in Linden allows.

The conduct GCC, W and L may exceed the immunity provided by statute in this
situation because of the negligence that was present in the work orders given to B. To further examine this it would also be necessary to see what was GCC's official response to the "safety update" provided by AEC. If the company recognized that a danger existed in the west end of the mine and instructed supervisors of the mine that the cable should be locked out when employees were working in the vicinity then this may still provide them with immunity. If GCC acted reasonably in warning their employees of the dangers and was also meeting the industry standard of providing for employee protection in areas of the mine where the cables were uncovered then their immunity would probably remain intact.

However, if W and L were not heeding the warnings and instructions provided by GCC and went beyond these instructions when the gave B his work orders, they could be seen as working outside their course and scope of employment with GCC. This could open them up as possible defendants in this situation. And their fault could be seen as substantial by a jury since they did provide that B could be fired if he failed to follow their instructions. This possibility will make it necessary to look at GCC's policies concerning work around the exposed cable to see if W and L deviated from the employer's standard. Even if GCC did not officially adopt a procedure that would require "locking out" the belt or preventing employee activity in the cable area when it was capable of operation, GCC could be seen as being negligent if it did not properly make the employees aware of this procedure. This would benefit us because it could open up GCC to liability. However, the Linden statute (1-1-109 (c) (ii) (e)) limits each party only to several liability so each party in the lawsuit will only be responsible for their percentage of fault, so there would not be a benefit to having a deep pocket in the case. And again this liability could still be limited by immunity.

If the immunity statute does allow an action against GCC, W, or L (or any combination of these defendants), the Linden statute (1-1-109 (b)) does use contributory fault as limit to the recovery that will be allowed by B. This statute is a 50% statute would allow B to recovery as
long as he was not more at fault than the percentage fault of all of the other actors combined.

His percentage of fault could be found to be equal to that of the other defendants and he could still recover. But the damages allowed will be reduced by the amount of fault assigned to him by the jury. This statute does require the jury to be instructed to determine applicable damages and assign a percentage of fault to each of the other actors in the claim before considering the fault of the plaintiff. The jury then assigns the plaintiff a contributory percentage and then uses it to reduce the damage awarded on a percentage basis. This statute will certainly cause any damages awarded to be reduced in this case and it is possible that a jury could determine that B was more than 50% at fault when compared to the other actors and this would bar the claim altogether. A jury will certainly find that B contributed to the situation because it appears that he had an opportunity to avoid the injury by waiting until the supervisors and the union made a determination on the proper course of action in this situation. It is possible that after they discussed the situation that B would not have had to work in the area without the cable being locked out. It is also possible that B's actions would be seen as an assumption of risk since he did have the possibility of avoiding the work until a final determination was made he could have been acting negligently this in combination with the supervisors or company's negligence would be treated the same as contributory negligence. So B's actions will limit any possible recovery it will determined by the jury how great of an effect it will ultimately have.

A final problem in this particular part of the case could arise because GCC's, W's and L's activities giving rise to the claim occurred over 2 years ago. The statute of limitations in Linden may have expired for this type of action. It is quite common that a jurisdiction provides at least a 3 year statute of limitations but it would be necessary to see if the statute may prevent an action from even being filed against these defendants.
Claims Against AEC

B's claim against AEC will be a product liability claim. This claim also provides significant challenges for B. Product liability claims can be based on problems that occur from the products manufacture, design, or a failure to properly warn of the dangers the product may present. In this case there does not appear to be any manufacturing flaw with the product. The shuttle belt seems to have been operating in accordance with its design specifications. Therefore, B's claim will have to center on the possible design or warning flaws of the product. The treatment of liability due to flaws in product design varies according to jurisdiction. Some jurisdictions apply a reasonable consumer standard. This standard looks to see if the product operated in a way in which a reasonable person would expect it to according to its design and uses, these jurisdictions apply negligence standards to cases involving product design problems. Other jurisdictions use a Learned Hand type test whereby they examine the costs or making the product safer versus the benefits that the improvements would provide and this requires a negligence standard to be applied also. This is applied in some areas as a Risk-Utility standard. Some jurisdictions use a variation of the Risk-Utility standard that allows newly discovered information about the product to be taken into account in the case (Imputed knowledge or 20/20 hindsight) and when this is done a strict liability standard will be applied to the case. In cases asserting a failure to warn of dangers of a product a negligence standard is applied by courts and it must be determined if the warning would have caused the plaintiff to have taken a different course of action.

In B's situation it will be difficult to prove either design defects or that a warning would have changed his actions. The product does not appear to have been poorly designed. In all other areas of the mine there are barriers between the cable and the workers, so it appears almost certain that there are safer alternatives available for the operation of the west end area of the mine. In fact this lack of providing the same protection that is available in other parts of
the mine could be used to show negligence by GCC in the claim against them. So there are
guards against this type of injury available. Perhaps the guards could not be used in this part
of the mine for some operational reason and in this instance we may be able to show that AEC
was at fault for not providing guards for this special operating procedure. However, it seems
doubtful. It appears that the only possible chance B has of proving a design defect, regardless
of the standard used in this jurisdiction, is if we can find a local expert that will testify that AEC
should have provided a guard for this area of the mine that was not otherwise available. By
the way expert testimony will also be helpful in showing GCC and its supervisors were
negligent in the previous claim. The guards were apparently available GCC just failed to
provide them in this area of the mine, therefore it resorts back to a negligence case against the
mine rather than a case against AEC.

It will also be very difficult to show that a failure to warn would have helped in this
situation. B was well aware of the danger of the situation, yet he still proceeded. A warning
clearly posted in the area or on the machine would not have made him any more aware. And
AEC did provide a warning to the mining company, this could be used to show that the duty to
warn employees then passed to GCC.

Finally, this part of the claim could also be barred by a statute of limitations problem. A
statute of repose may also be applicable if this machine was covered and was determined to
be beyond it useful operational life.

Claim against Linden State Hospital

The final claim that may be available to B is a medical malpractice claim against the
hospital that provided treatment to him for his injuries and finally amputated his leg. Linden
does allow suits to be filed against the state for medical malpractice so the claim is possible
and the statute also allows recovery up to 1 million dollars for a single occurrence. However,
the standard of care in this situation would be that the doctor would be required to provide
reasonable care to B. This would include providing all of the material facts regarding his condition that a reasonable person would want to know and also making him aware of alternative therapies available. From the information available it does not appear that the attending physician provided B with a great deal of information about his condition and alternatives. The fact that 11 surgeries were performed may be a sign that the doctor was not pursuing the best method in this situation, however, multiple surgeries are often required for injuries such as this. If it is determined that other alternatives were available to B then this claim could be valid. Or if B did not give informed consent to some treatments that may have worsened the condition. However, it is very damaging that he received a second opinion stating that he had received "excellent care" and it would have been impossible to save the foot. If a local expert could be found that would have an opposing view of the situation this could be used to bolster our claim, but this would become a battle of the experts and it would be up to the jury to decide which expert was the most reliable.

Once again the statute of limitations could affect this situation, but since B's care for the injury is arguably continuous it should not bar this claim.

Conclusion

B will have a difficult time establishing any of the possible claims available in this situation. It appears that some of the defendants could be excused from the action for immunity, statute of limitations, or statute of repose. Also each of the claims may pose significant problems in proving that the defendants were liable. The statute of Linden is also defendant friendly and if any of the defendants are excused from the action yet found to be liable for part of the damages this will reduce B's recovery. Having a deep pocket in this case appears to be no advantage, the statute does not allow for reallocation if a defendant cannot meet their obligations. And each defendant is only liable for their individual percentage of liability. Worker's comp may be the only recovery available for B in this situation.