

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

The facts of this case were drawn from *Smith v. Yamaha Motor Corp., U.S.A.*, 5 A.3d 314 (Pa.Super. 2010). In that case the trial court granted summary judgment for the manufacturer, but the plaintiff got the summary judgment reversed on appeal.

The principal claim would be against Yamaha for a defect in the Big Bear ATV's design or in the failure to warn. The manufacturer would assert several defenses, including product misuse, contributory negligence, and possibly a statute of repose.

Product Liability Claims

The primary task in establishing product liability is to show (1) that the product had a defect at the time it left the manufacturer's hands, and (2) that this defect proximately caused (3) the plaintiff's injur(ies).¹

1. *Potential Defect Claims.* The easiest type of defect to prove is to show a manufacturing defect, which imposes strict liability upon the manufacturer. The expert's report in this case suggests that the problems with the ATV were not related to the process of manufacture, but rather with design and possibly warning.

Design Defect. There are different tests used by jurisdictions in determining whether the design of the product was defective. Some employ a consumer expectations test, which looks to what a reasonable consumer would expect in terms of product safety. It is hard to tell what a reasonable consumer would expect in terms of product stability. Clearly the user didn't expect in this case to lose his balance, break the fender, and have the ATV flip him. On the other hand, some degree of danger is associated with this type of riding, and there are no specific expectations regarding product safety.

Another prominent test is based on the comparison of risk and utility. The question is whether the design of the product is one that poses an unreasonable risk of harm to the user in comparison to the sacrifice in utility (either in terms of product performance or increased cost) in making the product safer. Jurisdictions differ on whether this comparison is made based upon what was known or should have been known at the time the product was designed (a true negligence test) vs. making the comparison with the benefit of hindsight (a form of strict liability). In this case it doesn't appear that there is a significant amount of new information about the risk associated with the product, and thus the difference in the way the test is applied does not appear to be significant.

Our expert Wright is prepared to offer an opinion about the reasonableness of the design, but we will first need to get Wright's testimony admitted. Most jurisdictions now follow the more

¹Manufacturers may also be held liable if the product is accompanied by an express warranty concerning product safety that is breached. Here however there does not appear to be any such promise in this case.

permissive standard for admissibility announced in *Kumho Tire*, which followed the *Daubert* opinion regarding the admissibility of scientific expert testimony. So long as our expert is qualified to provide testimony regarding product design standards, his testimony should be helpful. On the other hand, Yamaha is likely to have experts of its own who will point out the drawbacks of any engineering modification that Wright proposes. For example, Wright says that the flexible fenders were dangerous, but Yamaha may point out that rigid fenders create their own safety problems, and add weight that decreases the utility of the vehicle. It would be for a jury to weigh the competing claims of the experts.

Another issue regarding the design defect claim is whether or not the product must be designed for contemplated use. Yamaha would argue that the injury occurred from misuse, and that the obligation to provide a safe design is limited to the uses that were contemplated. However, a safe design includes not only contemplated uses, but also reasonably foreseeable misuses. In this case, while misuse may be relevant for determination of contributory fault (see below), it is not beyond the scope of what is reasonably foreseeable.

Warning Claim. Alternatively, Smith could argue that the ATV was defective because it lacked adequate warning of the danger. Adequate warnings must (1) be sufficiently visible or conspicuous or accessible so that the user is aware of them; (2) must explain the danger posed by the product; and (3) give instruction on how to avoid the danger. In this case there was a warning in the user manual about descending hills in reverse, but it didn't explain what was at stake. The user might think that it would harm the motor or cause otherwise modest harm; permanent injuries weren't mentioned. Nonetheless, the problems with proximate cause (discussed below) may defeat this claim.

2. *Proximate Cause.* The defect must be both (i) a but-for cause of the injury; and (ii) a legal cause. These two requirements would be relatively easy in the design defect claim, because Wright's expert testimony would likely show that the ATV should have had a safer design that would have prevented this type of injury. On the other hand, the warning claim would be challenging. It states that Smith was an experienced ATV rider. Is there any evidence that he actually read the warning that was provided; if so, why did he ignore the instruction not to descend hills backwards? If he didn't read the warning, what evidence is there that a more robust warning would have changed his behavior?

3. *Damages.* Smith's injuries are quite serious. Since he suffered substantial physical injury, he would also be entitled to the non-economic injuries such as pain and suffering, sleep disorder, etc. On the other hand, there's no evidence of reckless disregard of safety that would justify an award of punitive damages.

Defenses

Yamaha would argue several defenses.

Contributory Fault. The primary form of contributory fault is contributory negligence—Smith's failure to use the care that a reasonable person would use for his own safety. In this case Smith was trying to descend the hill backwards, which a reasonable person arguably would not do. In addition, Smith wasn't wearing the face mask on his helmet. Arguably a reasonable person would have turned around to descend the hill, and would have used the face mask. Most jurisdictions use a form of contributory negligence that simply reduces the damages that Smith would otherwise be entitled to. They permit the "apple" of negligence to be compared to the "orange" of strict liability. Alternatively, Yamaha could argue that Smith assumed the risk of injury. Since ATV riding is a risky recreational sport, in some jurisdictions it would add another form of "fault" that would operate to further reduce his damages. It is possible (but unlikely) that his voluntary choice to encounter this risk would be a potential bar to recovery, but that is typically applied only in cases where the plaintiff voluntarily assumed a known risk (such as skydiving or a demolition derby) and

the risk that harms the plaintiff is one that was known and voluntarily assumed. Here Smith didn't know about the potential for getting his foot caught and flipping over, so I don't think it would operate as a bar to recovery. As noted, however, it might reduce his recovery in addition to any finding of contributory negligence.

A few jurisdictions have rejected the idea that the plaintiff's negligence can be compared with the defendant's liability for selling a defective product. This requires the jury to make an all-or-nothing judgment, which in turn may cause some forms of behavior on the part of the plaintiff to be characterized as product misuse rather than contributory negligence.

(I don't think his alcohol or oxycontin use would affect his recovery; it doesn't seem to be a proximate cause of the injury; it wasn't some lapse of judgment that caused him to descend the hill backwards; it seems like that was a technique he regularly employed.)

Statute of Repose. The ATV was about 13 years old when it caused the injury. Some jurisdictions employ a limitation on recovery that requires the injury to occur within the "useful safe life" of the product, or else the action is barred. In Washington, for example, Smith would have to show by a preponderance of the evidence that the useful safe life for ATVs is longer than 12 years -- something he should be able to do.

Helmet Manufacturer?

Even though Smith's injuries were apparently exacerbated by the absence of a face mask on the helmet, that doesn't appear to be a defect in the helmet as a failure on the part of the user. Perhaps a more effective warning should have been included with the helmet, but the same difficulties would accompany a failure-to-warn claim against the helmet manufacturer as are discussed above in the context of a warning claim against Yamaha.

QUESTION 2

The facts of this case were drawn from *Powers v. Taser Intern., Inc.*, 217 Ariz. 398, 174 P.3d 777 (Ariz.App. Div. 1, 2007). In that case the jury returned a verdict in favor of the defendant on claims for defective design and failure to warn, and the appellate court approved the instruction imposing a negligence standard for failure to warn cases.

I would anticipate that Powers would bring a claim against Taser alleging that the M26 was defective in its design and/or failed to warn about the potential for broken bones.

Express Warranty. Before addressing the tort claims, the potential for an express warranty claim should be explored. If in its product description Taser gave the impression that the M26 was safe, then that may create liability even if the product is not defective. However, the statements that Powers might rely upon ("less-lethal") and "deployed on more than 3000 persons with no long-term effects" fall short of making a guarantee of safety. On the other hand, there may be statements made by sales representatives that come closer to promising safety. If so, Taser could be held liable for breaching an express warranty.

Product Defect. The more likely claims would be that the product contained a defect that caused Powers' injury. Power might allege that the product contained a *manufacturing* defect--that is, that the product did not meet the design specifications. For example, it is possible that the particular M26 used on Powers delivered a higher voltage or electrical charge, and this excessive voltage caused the injury. The facts don't appear to support this theory, but if it were viable it would permit Powers to recover on the basis of strict liability; that is, no showing of negligence on the part of Taser is

required.

Design Defect. The more likely claim is that the design of the M26 was unreasonably dangerous because it can actually break bones in cases like Powers. Some jurisdictions use a consumer expectations test for design defects, and if that were the case here, it is unclear how such a test would be applied. The ordinary consumer doesn't have expectations regarding a weapon like the M26. Since it is a "non-lethal" way of disabling law enforcement detainees, it is expected to be debilitating, but not to cause permanent injury. Again, it's not clear whether the consumer would have meaningful expectations regarding product safety. On the other hand, most jurisdictions use a risk/utility test, either by itself or as an alternative to the consumer expectations test. The risk/utility test is a form of the negligence test--that is, it compares the risks posed by the product to the cost of making the product safer (or doing without the performance characteristics that would have to be sacrificed in order to avoid the risk). Here Powers might claim that the M26 poses an excessive risk of serious injury, illustrated by this case, and that either the voltage should be lowered or some other modification should be made to avoid injuries like this.

A key question in applying the test is whether or not the judgment of reasonableness of the design (the weighing of risk vs. utility) is made based upon what was or reasonably should have been known at the time of design and manufacture (in other words, a true negligence test), or whether the comparison of risk vs. utility is made based upon what we now know about the product (typically referred to as a strict liability or hindsight test). The Restatement (2d) § 402A assumed strict liability for product liability claims, but the Restatement (3d) proposed a true negligence test for design and warning claims (as distinguished from the strict liability test applied to claims of manufacturing defects). Jurisdictions differ as to whether the hindsight/strict liability test should be used in order to protect consumers from unforeseen risks of harm, or instead a true negligence should be used in order to limit the liability of manufacturers to harms which they could reasonably have prevented.

If a negligence test is used, it would seem unlikely for a jury to conclude that Taser failed to use reasonable care in its design or testing of the product. On the other hand, even if a strict liability test is imposed, Powers would still have to show that a reasonable person would change the design in light of the new information regarding the effect on people with severe osteoporosis.

Duty to Warn. A similar analysis would be used if Powers alleged that the product was defective because it didn't warn about the potential for some users to be harmed because of their brittle bone structure. Typically the failure to warn claim is easier to establish because of the negligible cost to the manufacturer of providing an enhanced warning. An analogy would be the case in which the manufacturer of a deodorant was sued for failing to warn about the allergic reaction that some users will have (*Kaempfe*). In that case the judgment against the defendant was reversed by the appellate court, holding that the duty to warn only applied where there was an identifiable group of users as to whom the warning would be effective. Since the typical allergy victim would only discover that he or she belonged to that group *after* using the product, a warning would serve no purpose. Similarly, here the plaintiff did not know that he had severe osteoporosis, and thus was "allergic" to products like this. On the other hand, Powers might argue that even if the warning did not alert the user to the likelihood that he would have a particularly adverse reaction, it might affect the user's decision whether to expose himself to the product at all.

Proximate Cause. In addition to showing that the product was defective, the plaintiff in a products liability case must show that the defect proximately caused the injury. Proximate cause consists of but-for causation and legal cause. If the jury found that there was a manufacturing or design defect in the product, then Powers should be able to show that, but-for the defect, he would not have been injured. Similarly, the legal cause prong of the proximate cause test would be relatively straightforward.

On the other hand, if the warning is found to be inadequate, Powers would still be required to show that a more robust warning would have changed his behavior. Powers watched the training

videos, but are there additional warnings that accompany the product? Where is the point at which a better warning would have changed Powers' behavior?

Damages. Powers appears to have significant injuries caused by the spinal fracture. He will have significant wage loss (unable to continue work as a sheriff), medical expense, and non-economic loss (pain and suffering). The difficulty Powers faces in proving his case on the merits is offset by the significant damages he could recover if he prevailed on liability. However, I do not anticipate that there would be any exposure to punitive damages, since Taser doesn't appear even to have been negligent, much less guilty of the more egregious disregard of safety that is necessary to permit the award of punitive damages.

No contributory / comparative fault. I don't see any basis for asserting any contributory fault on the part of Powers, nor is there any evidence that a third party (such as the employer) would be assigned any fault. An assumption of risk argument is very weak if the plaintiff encountered the risk as part of their ordinary work assignment. On the other hand, there is likely to be a significant worker's compensation award that would affect the calculation of damages.

Multiple plaintiffs? Unlike many product liability claims that involve multiple victims of the same product defect, suggesting the potential for a class action or other complex litigation mechanism, Powers' case appears to be unique and would therefore present no opportunity for joining with other plaintiffs or pursuing a class action.

PRODUCT LIABILITY SPRING '11 FINAL—CHECKLIST

QUESTION 1

- | | |
|--|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Failure to Warn |
| <input type="checkbox"/> | <input type="checkbox"/> (1) Was warning Conspicuous ? |
| <input type="checkbox"/> Claim v. Yamaha | <input type="checkbox"/> (2) Was Danger adequately described |
| <input type="checkbox"/> Express Warranty ? | <input type="checkbox"/> (3) Did it show how to avoid danger? |
| <input type="checkbox"/> Any actual promise of safety? | <input type="checkbox"/> Arguably #2 was inadequate |
| <input type="checkbox"/> | <input type="checkbox"/> Proximate cause will be a problem |
| <input type="checkbox"/> Manufacturing Defect? | <input type="checkbox"/> |
| <input type="checkbox"/> If so, SL | <input type="checkbox"/> But-for cause |
| <input type="checkbox"/> But no evidence of Mfg. Defect | <input type="checkbox"/> Legal cause |
| <input type="checkbox"/> Design Defect | <input type="checkbox"/> Prox. cause easy if design defect |
| <input type="checkbox"/> Consumer Expectations Test | <input type="checkbox"/> |
| <input type="checkbox"/> How wd reas. expectations be defined ? | <input type="checkbox"/> Damages would be substantial |
| <input type="checkbox"/> | <input type="checkbox"/> Would punitive damages be plead? |
| <input type="checkbox"/> Risk/Utility test | <input type="checkbox"/> |
| <input type="checkbox"/> Jx. differ on what standard to use | <input type="checkbox"/> Contributory fault |
| <input type="checkbox"/> But not very relevant here | <input type="checkbox"/> Jx. likely to compare apples to oranges |
| <input type="checkbox"/> Expert's testimony | <input type="checkbox"/> Is product misuse a separate defense? |
| <input type="checkbox"/> Admissible under Kumho ? | <input type="checkbox"/> Would oxy / alcohol use be relevant? |
| <input type="checkbox"/> Yamaha's expert likely to rebut | <input type="checkbox"/> Was failure to use face guard negl.? |
| <input type="checkbox"/> Design for reasonably foreseeable misuse | <input type="checkbox"/> Statute of repose / Limitations |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> Helmet mfr? |
| <input type="checkbox"/> | <input type="checkbox"/> |

QUESTION 2

- | | |
|---|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Failure to Warn claim |
| <input type="checkbox"/> Express Warranty | <input type="checkbox"/> Even small risk outweighs small burden |
| <input type="checkbox"/> Nothing so far suggests promise of safety | <input type="checkbox"/> Same debate over use of hindsight |
| <input type="checkbox"/> Tort claim for Product Defect | <input type="checkbox"/> |
| <input type="checkbox"/> Mfg Defect? | <input type="checkbox"/> " Allergy " cases? |
| <input type="checkbox"/> If so, strict liability | <input type="checkbox"/> Is "allergic" person likely to identify ? |
| <input type="checkbox"/> | <input type="checkbox"/> Proximate Cause a problem for Powers |
| <input type="checkbox"/> Design Defect | <input type="checkbox"/> Did Powers actually read warnings? |
| <input type="checkbox"/> Policy Debate | <input type="checkbox"/> |
| <input type="checkbox"/> Consumer Expectations Test | <input type="checkbox"/> Damages would be substantial |
| <input type="checkbox"/> Risk/Utility test | <input type="checkbox"/> No punitive damages likely |
| <input type="checkbox"/> Will " hindsight " knowledge be applied? | <input type="checkbox"/> No contributory / comparative fault |
| <input type="checkbox"/> Rest.2d vs. Rest.3d | <input type="checkbox"/> No basis for a class action |
| <input type="checkbox"/> | <input type="checkbox"/> |
| | <input type="checkbox"/> |

Exam Number _____