

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

This case is based upon *Sperry-New Holland v. Prestage*, 1993 WL 85472 (Mississippi Supreme Court). The court affirmed a judgment of \$1.6 million (reduced to \$1 million because of a finding of 35% comparative negligence) against Sperry-New Holland. The court held that the risk-utility test was the appropriate test to use in design and warning cases.

Butch could sue Sperry-Hutchinson for defective design and/or failure to warn. One of the key issues is whether or not the court would employ a consumer expectations test or a risk-utility test in assessing whether or not the product was defective. A related issue is the effect of Butch's knowledge of the danger: would it bar or significantly reduce his chance of recovery?

I. Which Test, Consumer Expectations or Risk Utility, Would be Used?

The key issue in a products liability case is whether or not the product was defective. That is the issue here: in the absence of a grate (or more effective warnings concerning the danger), was the combine defective, *i.e.* unreasonably dangerous? To decide that issue, courts have used one or the other<sup>1</sup> of two tests: (1) did the product meet the expectations of the ordinary consumer; or (2) was the utility of the product outweighed by the risk that it posed?

A. The Consumer Expectations test

The court might use a test based upon the "reasonable expectations of the ordinary consumer." What this means isn't entirely clear. On the one hand, the court might look at what some hypothetical reasonable consumer would think about the product. On the other hand, it might look to what this particular consumer (Butch) actually knew about the risk.<sup>2</sup> An additional variable is whether or not the test is framed in a purely cognitive form (did the consumer *know* about the risk) or in a more operational form (did the consumer actually *appreciate* the risk that was posed). Butch would prefer to avoid a consumer expectations test since it would stand a significant risk of being hurt by the consumer expectations test, since he might be found to have known of the danger. Although there has been criticism of the "consumer expectations" test because it resembles the "patent danger" test (*Gray v. Manitowoc*), it still might be employed here.

B. Risk/Utility test

Butch would prefer that the court employ the *risk/utility* test, which compares the cost of making the product safer with the expected benefit in terms of injury reduction. In many

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1. Some courts use both, in the alternative. For example, in *Barker v. Lull Industries* the California Supreme Court allowed the plaintiff to establish a defect by either test, at his option.

2.

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. 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. If risk-utility is viewed as essentially the same as the negligence test, then there is no real point in talking about strict liability. On the other hand, a strict liability standard may allow the admission of evidence that the product is unreasonably dangerous *now*, even if at the time it was (reasonably) believed to be safe. There is nothing in the facts that indicates that there has been a substantial change in the information available about this particular product which would lead to a different conclusion today than what appeared reasonable in 1969. Thus, I don't believe strict liability would be of much use.

D. Did the Combine Lack an Adequate Warning?

In addition to claiming that the combine was defective in design, Butch might also claim that the product was unreasonably dangerous because it lacked adequate warnings about the danger of being sucked into the auger. 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.

1. Was the Warning Prominently Displayed?

There was a warning in the owner's manual, but Butch could argue that it wasn't prominently displayed. After all, no one expects the operator to look at the owner's manual before each use of the combine. Instead, some sort of warning might have been placed near the point where the injury occurred. However, it may be that Butch was well aware of the danger, either from the standpoint of observing how the grain is moved by the auger, or from knowledge of other accidents, etc.

2. Did it Adequately Describe the Danger?

The owner's manual tells the operator to keep hands and clothing away from the machinery, but it doesn't really describe the risk that is posed. Perhaps an adequate warning would describe how loose clothing could pull the operator into the mechanism. Again, however, Butch would probably be relatively aware of why it was smart to stay away from the auger.

3. 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. The instructions seem adequate in terms of telling the owner to stay away. On the other hand, perhaps the problem with the owner's manual is that it didn't really describe an effective means of clearing clogs, thus leaving operators like Butch vulnerable to the type of accident that occurred.

II. What is the Role of Contributory Fault?

Sperry would undoubtedly argue that Butch himself was responsible for the injury. He violated the owner's manual by keeping the machinery running while he was attempting to clear

the clog. He also may have been careless in reaching across the tank in order to clear the clog. Exactly how this fault is to be categorized may have a significant bearing on the ultimate recovery.

A. Was Butch Contributorily Negligent?

If the jury finds Butch to be guilty of contributory negligence, then the jury would either reduce the award, or in some cases, bar recovery. Some jurisdictions still have a modified comparative fault system that will bar any recovery if the plaintiff's fault exceeds 50% of the total. On the other hand, most jurisdictions (at least for product liability purposes) use a pure comparative fault system that would allow him to recover, but would reduce the damages in proportion to the amount he was found to be at fault.

B. Could This Be Assumption of Risk?

Assumption of risk applies when the plaintiff knows of the risk and then voluntarily chooses to encounter it. To some extent this restates the issue of whether or not the court will use a consumer expectations test or a risk-utility test; if Butch clearly understood the risk, and if he had more or less come to terms with it at the time he was using the product, then it could be said that the product met the consumer expectations test. In the alternative, it could be said that he voluntarily accepted a known risk. On the other hand, if Butch can plausibly claim that he didn't *appreciate* the danger that was posed, or if he didn't realize that it could be eliminated through a modest improvement to the design (adding the grate) then he could be said not to have assumed the risk.

Treatment of assumption of risk, if it were to be found in this case, depends on the jurisdiction. Some treat it as an absolute bar (relatively rare); most would make it a percentage reduction of recovery in the same way as contributory negligence.

III. Worker's Compensation and Joint Tortfeasors

Sperry would obviously defend in part by relying upon the availability of worker's comp. This injury occurred while Butch was working for his father. Presumably Butch would be covered by worker's compensation, and Red would similarly enjoy an immunity from suit based upon employer negligence. This would mean that Butch would potentially face a reduction in his recovery if the employer's "share" is deducted from the liability of the manufacturer. Jurisdictions differ on how to handle this problem. It depends in part on how the jurisdiction handles joint and several liability. Some jurisdictions have replaced

IV. Would a Statute of Repose Apply?

The product was sold in 1969 and the injury occurred in 1992. Thus, there was a 23-year gap between the sale of the product and the accident. Some states have adopted a statute of repose that would eliminate liability if the cause of action doesn't accrue within the product's "useful safe life." However, even if this jurisdiction had such a statute, it is doubtful that the jury would find that the useful safe life of a combine was less than 23 years. Combines are probably used for longer periods of time and the product would be expected to perform safely for at least that long.

V. Conclusion

Overall, I think there is a good chance that some recovery could be had. I would investigate the effect of comparative fault, and I would find out what effect the worker's comp. coverage might have. While the chance of establishing liability is no better than 50-50, the damages are large enough to warrant taking the risk.

QUESTION 2

The critical issues in this case are

- (1) is the danger so obvious that it doesn't require a warning? and
- (2) is it likely that a more prominent warning would have been heeded?

I. Does the Danger Require a Warning?

was designed and manufactured. The John Deere Co. conducted field experiments with a grate, but it was never put into production.

The following warnings were in the operator's manual and/or on the combine:

- Remember a careful operator is the best insurance against an accident.
- Extreme care should be taken in keeping the hands and clothing away from moving parts.
- Stop machine to adjust and oil.
- When mechanism becomes clogged, disconnect power before clearing.
- Keep hands, feet and clothing away from power driver parts.

Although Butch acknowledged that he had seen the owner's manual and may have read those warnings, he didn't remember any of them. Besides, the custom of combine operators was to use a stick to free a clogged auger. It was helpful to keep the machinery running while this operation was being carried out, because the motion of the auger (once the clog was loosened up) would aid in clearing the ~~auger channel of the clog.~~

You are a new associate working for ~~the law firm that Butch came to for advice.~~ <sup>a personal injury firm.</sup> Assume for purposes of analysis that Butch's damages would be set at \$1 million (including economic and non-economic damages). Since you recently took a course in product liability law your employers would like your thoughts on whether there is a sufficient likelihood of recovery to warrant taking the case. What would you tell them?

QUESTION 2 (40 points)

You are a law clerk at the Evergreen State Supreme Court. The judge for whom you clerk has been assigned by the Chief Justice to write the opinion in a case involving product liability issues. The case is *Glittenberg et al. v. Doughboy Recreational Industries et al.* It is a consolidated case comprising several personal injury suits brought against manufacturers of above-ground swimming pools. Some of the pools included a warning in the owner's manual concerning the danger of diving into the pool, but none of the pools placed a permanent warning label on the pool itself so that it could be seen by anyone who was about to dive in. All of the plaintiffs suffered paraplegia or quadriplegia from striking the bottom of the pool after diving in. In each case the trial court granted summary judgment in favor of the manufacturer, but in some of the cases the intermediate court of appeals reversed and remanded the case for trial. Now the cases are consolidated, presenting the state supreme court with a single issue: is there a triable issue with respect to whether a pool could be found unreasonably dangerous because it lacked a permanent, visible warning of the danger of diving in?

Your judge would like you to draft a short memo reviewing the alternatives. What would you tell her?

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER on each bluebook, that you have read these instructions, and that you are otherwise ready to begin.

This exam will last 3 HOURS. Outline your answers first, and then REREAD each question to be sure you haven't missed anything.

DOUBLE-SPACE your answers in the blue-book.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question, and if necessary, book number, *e.g.*, "Question 1, Book 1"; "Question 1, Book 2"; "Question 2" etc.

You are welcome to use abbreviations, but indicate what they are, *e.g.*, "Andropov (A) would sue Brezhnev (B). B may be liable to A because ... ."

Plan on spending at least 10 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

Each question has been assigned a point total, and the exam as a whole has a point total of 140. Spend the amount of time on each question reflecting its relative worth.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE: DO NOT DO THINGS THAT TEND TO IDENTIFY YOURSELF.

DOUBLE SPACE!

GOOD LUCK!

QUESTION 1 (100 points)

On June 28, 1992, John Paul "Butch" Prestage lost his lower leg in a combine manufactured by Sperry-New Holland. At the time of the accident, Butch worked for his father, Edgar "Red" Prestage, Sr. Red farmed land owned by his sister and employed Butch to, among other things, operate a used Model 985 combine manufactured by Sperry-New Holland in 1969. Red purchased the combine (used) from Greenwood Ford Tractor Sales, Inc. in 1978.

Butch operated the combine more than anyone else in his family and used the combine on the day of the accident to harvest wheat. Under normal operation of the combine, after wheat is collected, a threshing mechanism is engaged to separate the wheat heads from the straw. After the threshing of the wheat takes place, the wheat heads are dumped into a grain tank which empties into a truck. At the bottom of the grain tank, a discharge auger churns to facilitate the wheat's movement. This discharge auger looks similar to a horizontal screw which, when turning, moves the wheat from one end of the tank to the other. There is a V-shaped guard covering this spinning auger which can be adjusted to compensate for different types of grains. Wheat is not a very fluid grain, especially when damp, and requires as much space as possible to flow properly. As designed, the maximum distance the auger guard could separate from the tank bottom is 4 inches and the minimum space is 2 inches.

In addition to the discharge auger in the tank bottom, a leveling auger spins at the top and dispenses the grain throughout the tank. This auger has a guard over the top of it and needs to be operated only while the combine is harvesting wheat. It does not need to be operated when the wheat is simply being threshed.

On the day of the accident Butch had finished harvesting wheat and had begun threshing it. He left the leveling auger on, however, as was the custom on the farm, to check for loose belts, ball bearings, etc. which might need to be replaced. As Butch walked to the back of the combine, he noticed that the grain tank had clogged. To unclog the tank, Butch climbed a ladder on the back of the combine to a flat section of the machine which overlooked the grain tank. The wheat heads and straw had clogged in the discharge auger, and Butch, as was the custom on the farm, looked for a long stick he kept to free the debris. Usually, Butch would be in the cab when the discharge auger jammed and he would only need to step out of the cab, grab the stick in front of him and jab the debris until it came free. Because Butch had been checking the rear of the machine for repairs and climbed up the back of the combine, however, he had to lean across the tank and rest on the leveling auger guard to reach his stick. Butch was wearing an untucked pullover jersey which became tangled on a bolt on the leveling auger. The auger wound his shirt up and pulled him into the tank. He hypothesized that the shirt tightened around his neck because he passed out upon entering the tank and awoke to find his foot and leg under the guard and mangled by the discharge auger. After a few minutes, Butch freed himself and got to the combine cab. From there, he drove to his truck, changed vehicles, drove to his parents' home nearby and was immediately taken to the hospital by his mother. Butch's left leg needed amputation below the knee.

Butch knows an engineer, Gary Robinson, who used to work for a company that made farm machinery. Robinson would testify that Sperry could have put a grate in the bottom of the tank at a minimal cost which would have prevented Butch's injury. However, Robinson concedes that no manufacturer used a grate of this type during the time period that the combine