Sample Answer - Hypothetical No. One[1]

Dana (D) v. XYZ Corporation (XYZ)

[Dana was physically injured as a result of use of a chattel manufactured by XYZ. In most jurisdictions,] product liability actions against a manufacturer of a product that causes injury to a person may be brought under 4 general theories: negligence, warranty, strict liability, and misrepresentation.

NEGLIGENCE

The first cause of action that D will bring against XYZ is for negligence. Here, D must establish that XYZ had a duty of care, that XYZ breached that duty, and that this breach was both the factual and proximate cause of D's physical injury.

[Duty]

A manufacturer is liable for injuries to foreseeable plaintiffs caused by a product that was [not] reasonably safe for foreseeable use. … Common law used to require privity between the manufacturer and the plaintiff, but modernly that is no longer the case ….

Negligence [liability requires] foreseeability with regards to those being injured …. While the paintgun is generally intended for use in competitions on marked areas with other paintgunners, it is certainly foreseeable that the gun will be used outside of such circumstances, such as at home, and will injure someone there, such as Dana. It is also foreseeable that it will be used, as here, by paintgun novices who are inexperienced with its hazards. [Therefore, I conclude] that Dana was both a foreseeable plaintiff … and [that the] use [of the gun by Tony was foreseeable.]

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[1] Composite of two student essays with minor edits by Professor.

[Breach]

With duty established, the court will assess whether the manufacturer used the appropriate amount of care in [manufacturing,] designing [and warning about hazards associated with use of] the product.

[*Negligent Manufacturing*]

With regards to negligent manufacture, the maker of a product is expected to use the appropriate standard of care with regards to … manufacturing processes, etc. to avoid making an unreasonable unsafe product. The fact pattern here contains no evidence to suggest that the paint gun deviated from the intended design for the product; hence there is no cause of action for negligent manufacture.

Negligent Design…

Manufacturers owe a duty to [design products to] avoid exposing foreseeable plaintiffs to unreasonable risks of harm. The standard of care for a manufacturer is the [reasonably prudent manufacturer, in the same or similar circumstances.]

To determine whether XYZ fell below this standard of care, … Hand's balancing formula [would] ask whether the burden of designing the product in a more safe manner would have been less than the probability of harm combined with the severity or magnitude of the harm. Here, Dana will argue both the magnitude of the harm and its likelihood were known to XYZ, as evidenced by XYZ's attempt to design a paintball "to avoid the risk of serious eye injury." Furthermore, D would argue that serious eye injury is a harm of [such] great magnitude … that XYZ fell below the standard of what a reasonably prudent expert in the field of manufacture would do, [because XYZ] put the product out to the public … knowing it posed a high risk of [serious] harm.

[It is uncertain] whether the manufacturer used the appropriate amount of care in designing the product. The manufacturer should use the most reasonably safe design, of all available, technologically-feasible alternatives, taking into account the Hand analysis so that the economic burden of the design does not make the product unmarketable ….

It appears that XYZ attempted to design alternative paintballs so as to avoid eye injuries. It is, however, uncertain as to whether XYZ exercised due care in that experimentation. The facts only say that XYZ was unable to develop an alternative design that would allow the paintball to function usefully. Questions the [trier of fact] would ask are whether XYZ used the industry standards with regards to such design efforts, and to what extent XYZ invested resources to find a safer design.

Here, XYZ may contend that [although it was] aware of a slight risk of harm, it in fact took every precaution they could to make sure that this did not happen. XYZ would argue that it had designers experiment with alternative designs, and that the design they did come up with was "state of the art" and that there was no other way to make the product. Thus, XYZ would argue that it had acted as any reasonably prudent manufacturer would in its shoes.

[In this regard, a court might instruct the jury to take into account] … the acceptable level of risk, … that a [reasonably prudent manufacturer would create.] [A] risk/utility analysis, compar[es] the utility of the product with the risk of injury. Here, the paint gun has only marginal social utility - play - and it is unlikely that a court would find that such utility would absolve a defendant of liability for any injuries resulting from a poorly designed product (like courts are likely to do with other unavoidable unsafe products such as certain medicines, where the utility of saving lives might outweigh the occasional injury caused by the drug.) It is even possible that in [these] circumstances a court might [permit the trier of fact to] find that the risk of injury is so high that the product should not be manufactured, given its limited utility.

If the [trier of fact] finds that XYZ did not exercise reasonable care in [its design] efforts, then XYZ will have breached its duty. With[out additional] facts in that regard, it seems probable that XYZ met their design standard of care.

[*Negligent Warning*]

There is also a duty to provide proper warnings regarding ways to use the product so that such use is reasonable safe. Warnings should address foreseeable misuses, or uses that may cause injury. Such warnings should be conspicuous and adequate to prevent misuse leading to injuries. Manufactures are not required necessarily to prevent that use which a reasonably intelligent person should know to avoid, but if the burden of providing a warning regarding that use - in this case a label on a box - is small and the risk/magnitude of injury high, [a trier of fact would] likely conclude that a [better] warning should [have] be[en] given.

Here, XYZ gave a warning, but it seems likely that a [trier of fact would] find that it lacks conspicuousness (10 pt font) and adequacy (while the warning addresses protective eye-covering, it does not adequately explain that the risk is the paintball hitting the eye.) An adequate warning addressing those two issues would have been given by a reasonable manufacturer and would have been little burden. Hence, the company likely failed in its standard of care here.

[<u>Causation</u>]

[*Factual Cause*]

As to causation, Dana would argue that "but for" [XYZ's negligent design and failure to warn of known dangers], the harm would not have occurred… [It is arguable that had the gun been designed to avoid eye injury, or the warning better calculated to gain attention and alert Tony to the risk, this injury would not have occurred. We are told that Tony had no intention of hurting his mother, and that he was a novice and thought that the paintball would break harmlessly. Had Tony known of the risk, he might never have fired directly at his mother's face.]

[*Legal or proximate cause*]

Proximate cause is met because that some harm would occur was clearly foreseeable. Although XYZ may try to argue that Tony's use of the gun was a

nonforeseeable misuse, which would [constitute a superseding cause and thus] break the chain of causation, this would not likely be successful because organized paintball competitions are commonplace events and the facts indicate that such injury was in fact contemplated by XYZ before they put the product on the market.

[Damage

Bodily injury is established.] Dana would seek to recover for lost vision to her right eye, including pain and suffering, loss of earning capacity and income and medical expenses.

[Defenses]

XYZ may try to raise the defense of comparative negligence. Here, XYZ would try to show that T had operated the paintball gun in a negligent manner by firing at his mother's face. This argument would not likely be successful, as the gun was made to shoot at other people, and that it would occasionally be shot at someone's face is clearly a foreseeable use/misuse.

[Nevertheless, the contention that the injury occurred as least in part as] a result of T and A's own negligence may have some merit, and if the [trier of fact] agrees, damages would be equitably apportioned accordingly.

WARRANTY

There are two types of warranties [generally at issue in product liability actions]: express and implied. (Implied warranties can further be broken down into merchantability for ordinary purposes and fitness for a particular purpose.) … These warranties are covered by the UCC.

Express Warranty

Here, D may try to state a cause of action for breach of express warranty. [To prevail on this theory], D must show there was an [express promise or] affirmation of fact [relating to the goods] that became a basis of the bargain. If [so, and] there [was] deviation from [an express warranty] which cause[d] injury, the warrantor [may be] liable

[in tort as a result of] breach of that express warranty.

In this case, XYZ placed an express warranty on the outside of the box the GIJ came in stating that it was "completely safe for ordinary use." D would argue that the warning printed on the side of the box stating that the product is safe for ordinary use [was an express warranty] and became a basis of the bargain. When the purchaser knows of the warranty, it is presumed to have become a basis of the bargain.

[Both A and T read the warranty, albeit quickly. Although this was not at the point of sale, many express warranties are read only just before a consumer item as sold is opened. Reading the warranty under these circumstances would likely qualify as a “basis of the bargain,” as the gun could have been returned had the warranty been unsatisfactory.]

[Dana would further argue] that this [warranty] was breached because the gun was not safe for ordinary use. XYZ will argue that ordinary use in this situation means on the paintball field with experienced players wearing proper equipment, and that shooting it at people in the house is misuse. But ordinary use applies to what the product is used for. Dana will argue that it is used for shooting people, it is irrelevant where location-wise, and that her injury clearly indicates it is not safe for such use.

XYZ [might also] argue that this language was not an express warranty, but was instead mere "puffing" or an expression of an opinion as to the safety of the product. That argument would not likely be successful, however. It seems probable that the [trier of fact] will find that it is foreseeable and ordinary that a paintgun will be shot outside of a playing field and that an unprotected person would be shot.

Implied Warranty of Merchantability

D would also seek to state a cause of action for breach of the implied warranty of merchantability. A "merchant" who is in the business of selling the product as part of his ordinary trade may be liable for breach of an implied warranty of merchantability …. The implied warranty of merchantability [means that the merchant impliedly promises that]

the product is "fit for the ordinary purpose to which it is put."

[To prevail on this theory], Dana must show that the product was unsafe when put to an ordinary and foreseeable use. Here, D would argue that shooting the gun at someone else was a foreseeable and ordinary use. Because of the resulting eye injury, and the foreseeability of such injury that was acknowledged by XYZ, D would argue that this warranty was breached. [XYZ would argue that,] because organized paintball competitions are commonplace events and paintball guns are often used by players in the form of a contest that mimics military conduct, [ordinary use did not include shooting at another person's face at close range in a home. Dana would appear to have the better argument here, as use of a paintball gun can not reasonably be understood to be restricted to organized events, despite reference on the package to "players."]

The Implied Warranty For Fitness For A Particular Purpose

The warranty for fitness for a particular purpose is not applicable here because Able did not discuss with XYZ any particular, non-ordinary purpose for which he intended to use the gun [and Able did not rely on the skill and expertise of XYZ to select the GIJ.]

[<u>Defenses</u>

Disclaimers]

Under the traditional contract action for breach of warranty, [and] under the UCC implied warranties [can] be disclaimed. However, because this is a cause of action in tort, the law is less favorable towards disclaimers. Although implied warranties can be disclaimed in some states, the general rule is that limitations on damages and disclaimers are only valid if they are not unconscionable. [L]imitations on damage in the form of physical harm are prima facie unconscionable.

[Moreover,] at least as to the implied warranty of merchantability because as a matter of public policy, we have decided that the manufacturers of [unfit and unsafe] products should not be able to define the extent of their own liability.

Here, the court would likely find that the disclaimer, because placed on the side of the box resembles more of an adhesion contract, and something that the consumer agreed to likely without even viewing it first. Such was certainly the case here, where the facts do not indicate that Able read and understood the disclaimer before purchasing the product.

[*Privity*]

In addition, XYZ would attempt to argue that because [it was] not in vertical privity with D, as … D [did not] purchase the GIJ, [it] could not be liable to her for breach of warranty. This defense would likely fail …, however, given that vertical privity is [generally] not required to prove this tort liability.

As to horizontal privity, it depends on the jurisdiction's stance on liability to third parties, because Dana [was neither the purchaser nor the user of the gun.] Jurisdictions vary but almost all extend protection [of warranties] to members of the purchasers household.

STRICT LIABILITY

D would also try to bring a cause of action for strict products liability. The rule here is that when one in the business of selling chattels sells or otherwise distributes a defective product, they are liable for harm to persons or property caused by the defect. Thus, D must show that there was a defect, and that the harm was caused by this defect.

Under the Rest. 3d, there are three different ways to establish a defect: manufacturing defect, design defect, and warning defect.

Manufacturing Defect

The first is manufacturing defect, which is when the product came off the line wrong and strayed from its intended design. Here, we have no facts to indicate that there was a manufacturing defect.

Design Defect

To determine if the product design itself is defective, there are four commonly used tests.

[1.) <u>Rest. 3d, Sec. 2(b)]</u>

Here, Dana would be required to show that there was a reasonable alternative design, [and that the omission of that design made the gun not reasonably safe.] XYZ here would argue [the impossibility of finding] a reasonable alternative [design.] However, in some states [including California], and even in the comments to the Rest. 3d, even though a reasonable alternative design is often a requirement to finding a design defect, there really is no synthesized rule and there are times when [the impossibility of finding a RAD] should not preclude recovery even if it is a "requirement."

Therefore, this argument would not prevail if the court determined that regardless of the lack of an alternative design, the product was [not reasonably safe as designed.]

[For the sake of discussion, if the court permits Dana to claim a design defect in the absence of a RAD, we go on to analyze whether the GIJ was "not reasonably safe" owing to the manufacturer's adopted design, and therefore, defective.]

2.) … <u>The risk-utility test</u>

The risk-utility balancing test is merely a detailed version of Judge Learned Hand's negligence calculus. Under this test, the court looks to whether the utility of the product is greater than the risk of harm posed. [Unlike negligence actions, however], under strict liability, courts look to the product itself rather than the conduct of the defendant. This is a balancing test, and the court will consider several factors.

[[S]ome factors relevant in risk-utility analysis are:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.]

Here, because the product is made to look like a gun and is used in pseudo-military combats, the utility of the product does not appear that high. However, many toys do not appear to have utility other than the pleasure of using them and the fun derived from them, and so the court must consider this.

The risk of harm was great. [And, the probability of harm does not appear to have been slight, as XYZ itself considered it." Yet, as previously discussed, if] the design that XYZ came up with was "state of the art" and … there [truly] was no other way to make the product, then the risk of injury would need to be so high that the product should not be manufactured. [The commonplace nature of paintball competitions suggests that eliminating paintball guns based on the risk of eye injuries would be unwarranted.]

[This seems particularly true because Tony could have avoided the harm by exercising some modicum of common sense; the risk of shooting a hard projectile directly at his mother's face does not seem to be a risk that Tony could not have appreciated, even without any express warning. XYZ, perhaps, could have reasonably anticipated general public knowledge of the danger inherent in any such activity.]

Therefore, [although] the [trier of fact] may find that under this test, there was a design defect [a court permitting a jury to do so might essentially be putting the use of paintball guns in jeopardy.]

3.) Consumer Expectations Test

This test asks whether the product, [was as safe as the ordinary consumer would expect] when used as intended or in a reasonably foreseeable manner…. Here, Dana would argue that [although] the product is used to shoot at people, [and] any reasonable consumer might expect injury to result, … loss of entire eyesight is not an expected consequence. XYZ would argue that the ordinary consumer would expect that some injury may result from shooting, [and that an average consumer would not expect to be able to safely shoot at another's unprotected face at point-blank range.]

Because of what the product is used for, the [trier of fact] would likely find that the product does comport with reasonable consumer expectations, because the [ordinary] consumer [would not expect a paintball gun to be able to safely] shoot someone else in the eye … [and the gun was fit for its ordinary purpose. This very conclusion was reached in a case involving above-ground swimming pools.

A warning could have made the gun safer. That issue is discussed below.]

4.) Hybrid test

[Some jurisdictions, like California] use the so-called "hybrid" test to determine whether a product was defectively designed.] This test is a hybrid of tests 2 and 3, and says that if either is met, then there is a design defect.

Warning Defect

Here, the question is whether [XYZ could have issued a better warning or instructions] and whether the … inadequacy of the warning [or instructions] made the product not reasonably safe. Regardless of whether D would be able to show a design defect, here, D would likely be able to show that the product was defective for failure to provide adequate warning.

Here, D has the best possibility of succeeding. First, the warning on the box was extremely small. The box for a paintball gun is probably reasonably large. It probably has lots of writing and a creative design or picture. The smallness of the warning may have made it inadequate. Second, the warning only refers to "players." It only tells them to wear protective eye wear. D was not a "player" she was thrust into a situation. She did not have a gun of her own. T and D could not be said as playing a game. Maybe a bystander who happens to stand close to a paintball match thinks it is ok not to wear eyewear because the warning only says the players have to wear it. According to our facts, if that bystander was close enough, he or she may be hit with a paintball and could lose his or her eye. Therefore, D will probably succeed on the warning defect.

[Dana will also be entitled to the so-called “heeding presumption” with respect to the adequacy of the warning provided by XYZ. If Dana can show that XYZ could have provided a better warning, then Dana will be entitled to a presumption that Tony would have heeded it. This presumption is, however, rebuttable. XYZ might point to the fact that both Able and Tony ripped open the GIJ box and rushed to load and fire the gun. This may be contended to show that Tony would not have heeded a better warning.

On the other hand, the fact that the box stated “Ready to Use: Simply Load and Fire” invited such haste. Moreover, we are told that Tony had no wish to hurt his mother, and there is every reason to believe that he would not have shot her with the paintball at such close range had he been properly warned.

As to other aspects of the causation analysis, please refer to the discussion of factual and legal or proximate causation above with respect to the negligence analysis.

As stated above, the injury to Dana’s eye constitutes physical harm sufficient to trigger tort liability.]

Defenses

XYZ may assert that D was not the purchaser or a user of the product---her husband bought it and her son fired it. However, under strict liability there is liability to anyone harmed by a defective product.

XYZ will say that Tony did not follow the warning not to use the product with eye covering, and that when Tony shot his mother in the face, he [created] the risk that she would be injured. Because in CA, comparative responsibility is also a defense to strict products liability, XYZ may try to raise that as a defense, and if the court found that A and T had been [negligent] … damages would be apportioned accordingly.

MISREPRESENTATION

[In a product liability action], there are three [potentially applicable misrepresentation theories]: fraudulent, negligent and innocent. All three involve a [false] representation [of a material matter], made with the intent to induce reliance, [actual and justifiable reliance, and consequent detriment.]

Innocent [misrepresentation is a form of] SL when a product [that] does not perform as claimed [causes physical harm.] This [theory is set forth by the Second Rest. In Section 402B] and is similar to [express] warranty theory. If a statement was made [to the public generally] and relied on, whether or not negligent or intentional, and the product didn't live up to that statement to which the plaintiff relied on, [then] there is an actionable [innocent] misrepresentation [if physical injury resulted.]

[The statement that the gun was "completely safe for ordinary use" was not true, at least insofar as "ordinary use" can be construed to mean shooting Dana.

Actual reliance on the statement that the gun was "completely safe for ordinary use" and that it was "ready to use" is more problematic. A and T did skim the label. If the label had stated that the gun was NOT ready to use without precautions, or that is was NOT completely safe when used to shoot at a person whose eyes were unprotected, then the outcome might have been different.

There is also a question whether reliance in these circumstances would be reasonable. Whether Tony could have reasonably relied on a statement that the gun was "completely safe for ordinary use" when shooting his mother in the face is arguable. However, as mentioned above, we are told that Tony had no intention of hurting his mother, and we are told that he thought the paintball would break harmlessly on contact.]

Negligent misrep requires [all of the elements mentioned above, and, in addition, breach of] a duty to speak [to speak with care.] Here, D owed a duty to anyone in the family or household of the purchaser, and bystanders [to speak with care to avoid a foreseeable and unreasonable risk of physical injury arising out of use of the GIJ.] D represented the gun as completely safe for ordinary use. If D knew or should have known that if that rep was false, and that injury could result, and if [all of the other elements discussed above are satisfied, then XYZ could be held liable to D for negligent misrepresentation.]

Fraud… requires scienter---P would have to show that D knowingly … made false representations that the gun was safe. [There are no facts to support that theory here.]