

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

*Torts*

**QUESTION**

Peters, a suburban homeowner, decided to resurface with bricks the concrete area surrounding his pool. He purchased from Homeco, a local home improvement store, a concrete cutter manufactured by Conco, which had a blade manufactured by Bladeco. He then took the concrete cutter home and assembled it following the instructions provided by Conco.

The blade that Peters purchased was clearly labeled “Wet.” Although no instructions or warnings came with the blade, Conco included several warnings throughout the instructions to the concrete cutter stating, “If using a wet blade, frequently water the blade and surface being cut to avoid risk of blade degradation.” No other warnings relating to the blade were included with the concrete cutter.

Peters began cutting the concrete with the concrete cutter without using water. Less than five minutes into the job he noticed that the cutter was vibrating excessively. He turned the machine off by hitting the “kill switch” located near the blade at the bottom of the cutter, with his right foot. The cutter’s handle did not have a “kill switch.” After carefully examining the concrete cutter and blade, Peters became convinced that nothing was wrong and continued to operate it. Nevertheless, within seconds, the concrete cutter again began vibrating violently.

As Peters reached with his right foot to hit the “kill switch” again, the blade broke into pieces, forced off the cutter’s safety guard, spiraled into Peters’ right foot and caused permanent injuries.

On what theory or theories might Peters recover damages from and what defenses may reasonably be raised by:

1. Conco? Discuss.
2. Bladeco? Discuss.
3. Homeco? Discuss.

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ANSWER A

PETERS V. CONCO

THEORIES

A. PRODUCT LIABILITY - STRICT LIABILITY

Peters may choose to sue Conco in strict liability for the damages that he received from the use of their product. To prove this, Peters must be the proper plaintiff, Conco must be a proper defendant, there must be some defect in the product and Peters must have suffered some injury because of that defect.

1. **PROPER PARTIES.** The plaintiff in a strict liability products action may be anyone who is injured by the product. Peters was injured, therefore he is a proper plaintiff. A proper defendant may be any manufacturer or seller of the particular defective product - anyone who touches it during its chain of creation to distribution. Here, Conco is the manufacturer of the concrete cutter, and a proper defendant.

2. **DEFECTIVE PRODUCT.** The product may be defective in its design, manufacture, or warning. Here, there may be two problems with this cutter:

a. **DESIGN.** In determining whether the design of a product is defective, the court will look to two tests. The first is the reasonable consumer expectation test, and the second is the feasibility of alternatives test. Using the consumer expectation test, the court will examine whether a reasonable consumer would expect the product to perform as it did. Here, the cutter performed badly - vibrating to such a degree that Peters, had to turn it off. Then, the cutter blade broke apart, seriously injuring Peters' foot. Consumers would expect that when using the proper safety precautions, such injury would not occur, unless the product was defective. The problem under this test is whether the reasonable consumer would have used this product as Peters did (without water), and what the proper safety procedures would be (discussed below under DEFENSES). If the court finds that the defect fails the consumer expectation test, this will be a design defect.

If the court chooses to use the feasibility of alternatives test, the court will examine whether there were any other safer designs available at the time that this product was manufactured. Later developments will not satisfy this test. Additionally, these alternatives must have been feasible, that is, they must not have been prohibitively expensive given the risk of injury. In this case, it seems feasible to have placed a kill switch on the handle of the cutter as well as by the blade (or instead). Such a switch would be safer to reach in the event that the

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cutter began to operate in an unsafe manner. Kill switches exist on other types of machines like lawnmowers and edgers and trimmers (on handles).

The risk involved here is a serious one: permanent injury to the body of the user or bystanders, from a machine that is sturdy and sharp enough to cut cement. The balancing of this with the seemingly low cost and simple burden of a safer kill switch position, weighs in favor of the consumer. The court would probably find that this design test is met as well.

b. **WARNING.** There may also be a defective or inadequate warning available with the cutter. To establish this, Peters must prove that the warning given did not adequately inform and alert him of the risks involved, and that Peters would have read and heeded such a warning if it had been properly included. In effect, he must establish that the lack of warning was the actual cause of his injuries.

Here, there was no warning at all included with the blade, although there were several warnings as to the proper use of the blade included throughout the other cutter instructions. The blade itself said only "WET," and did not warn of the danger involved in not using water with it. Given the low burden on Conco of including more specific warnings regarding the blade, or putting a warning sticker onto the blade itself, and the seriousness of the danger, the court is very likely to find this warning inadequate. Further, the other included warnings only stated that the blade may "degrade" and not that it would then break into pieces - seriously injuring the user at that time. This warning was inadequate.

Peters must also prove that he would have heeded the warning, however. Peters carefully followed all instructions in putting the cutter together. He stopped the cutter immediately when it began to shake, carefully inspecting it. He did not resume use of the cutter until he was convinced that there was nothing wrong with it. He did not use water on the blade, nor on the surface, although the instructions recommended that he do so. It is very likely that Peters did not because he did not understand the graveness of the risks involved if he did not use water. Given the careful nature of his use, and his adherence to the other instructions, it is very possible that he would have heeded a more explicit warning regarding the blade. When he stopped and checked it, he could have read the sticker (for example) and been reminded of the need for water. If Peters can establish this, he will have proved an inadequate warning.

3. **INJURY.** Since Peters was severely and permanently injured by the blade when it broke off, he will establish this element to the court's satisfaction.

**B. PRODUCTS LIABILITY - NEGLIGENCE**

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In order to establish a claim against Conco in negligence, Peters must prove duty, standard of care, breach, causation, and damages, plus any defenses.

1. DUTY. Manufacturers have a duty to protect their customers from injury.
2. STANDARD OF CARE. The standard that they owe those customers and others is to avoid unreasonable risks caused by the product. They must take the care that a reasonable person would take to avoid injuries.
3. BREACH. If Conco has failed to take reasonable care to avoid such injuries, then they have breached this duty. Custom and Industry practice will help to establish this. For example, if other manufacturers of like products consistently provide more thorough and careful warnings, or include kill switches on the handles of their products, there will be a breach. Since other tools like lawnmowers, jackhammers, weed trimmers, edgers, and the like often have such switches on their handles, this is probably a breach of Conco's duty. This is especially true given the feasibility of the alternatives discussed.
4. CAUSATION. Conco's breach must be the actual and legal cause of Peters damages. The actual cause can be established by use of the "But for..." test. But for Conco's breach in not including an adequate warning, or in placing a kill switch on the handle, Peters would not have been injured. This seems to be accurate here (incorporating by reference above discussions). Legal cause requires that this plaintiff be foreseeable, and that the type and extent of the injuries also be foreseeable.

Peters is the purchaser and user of the product, and he is the person who was injured. He is foreseeable to Conco, who is aware that anyone who buys and uses their product could possibly be injured by it. Peters was injured by the blade breaking apart, something that the instructions made slight attempts to avoid. Further, a safety guard had been installed on the cutter, presumably to avoid injury to users in checking the blade, and in using the machine. Peters' injuries were caused by the blade fragments spiraling into his foot. This is very foreseeable as far as both the type of injury and the extent (permanent physical damage) incurred. Conco's breach is also the legal cause of Peters' injuries.

5. DAMAGES. As above, Peters will have no trouble establishing that he has been injured and has suffered damages.
6. DEFENSES. These will be discussed below in I.D.

### C. INTENTIONAL TORT - BATTERY

A battery is defined as the offensive or harmful touching of another with intent to do so. Here, there doesn't seem to have been any intent to injure Peters by any of the defendants, but if a court found such intent, Peters may also recover in this cause of action.

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D. DEFENSES

There are basically two defenses that Conco can raise in defending the suit by Peters:

1. **ASSUMPTION OF THE RISK.** Conco could argue that Peters purchased a dangerous product for use in a dangerous job, and he cannot now complain of injuries he received while performing this dangerous job. In order to be successful, this defense requires that the plaintiff have made a knowing and intelligent assumption of the risks involved in the activity. Since, Peters was not even aware of the seriousness of the risks here (inadequate warning assured this), he cannot reasonably be said to have assumed the risk that the blade would break apart and seriously injure his foot.

2. **CONTRIBUTORY NEGLIGENCE.** Conco may argue that Peters was also negligent in the way that he operated the cutter (without using water as instructed), and that he therefore, contributed to his own injuries. This defense is entirely unavailable in actions of strict liability, however, and Conco may only raise it in connection with the Negligence (and intentional tort) claim. The court will examine whether Peters acted with the care that a reasonable person would have taken under the circumstances. If he did, this defense will fail. If he did not, this defense will be effective. In some jurisdictions this defense will act as a total bar to any recovery by Peters (in this claim only) - these are jurisdictions that have not altered the common law. In others, Peters may still recover if he was negligent depending on the courts finding as to the degree of that negligence. Some of these jurisdictions will allow recovery if the plaintiff is less than 50% at fault, and others will allow him to recover if he is less than 100% at fault (Pure comparative fault).

Depending on the jurisdiction, Peters may still be able to recover even if a court finds him negligent in failing to use water.

PETERS V. BLADECO

THEORIES

Bladeco is the manufacturer of the actual blade that caused Peters injuries. They will be liable to Peters in the same manner as Conco, with a few exceptions.

A. STRICT PRODUCTS LIABILITY

Bladeco will only be liable to Peters if he can prove that the actual blade was defective. If not, they will not be liable under this theory because that means there was no defect when they supplied the blade, and that they did not place a defective product into the stream of commerce. However, they may have been responsible for a defective warning on the blade since that was within their control to supply. If the court finds that they should have supplied the label, they

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will be liable here. If the court finds that it was reasonable for them to rely on Conco to supply such a label, no liability will attach.

**B. NEGLIGENT PRODUCTS LIABILITY**

This analysis is the same as for Conco. If Bladecco was negligent in the manner in which they designed, manufactured or labeled the blade with a warning, they will be liable to Peters. They are subject to the same duty, standard of care and breach analysis. The one exception here is that it may have been reasonable for Bladecco to rely on Conco to supply the needed warnings. If so, there will be no liability for them, unless the blade was actually designed or manufactured defectively.

**C. DEFENSES**

The same exact defenses will apply to Bladecco, and this incorporates by reference the previous discussion.

**PETERS V. HOMECO**

**THEORIES**

Again, much of the analysis for this defendant is the same as the previous two, and this discussion incorporates those by reference. However, the following changes apply to Homeco.

**A. PRODUCTS LIABILITY - STRICT LIABILITY**

Since any manufacturer or seller is liable to Peters for a defective product, Homeco, who sold him the product, is also liable and to the same extent. Homeco may seek indemnity from the other defendants, but they will be entirely liable to Peters as well. Peters must establish (in addition to the above elements discussed) only that this cutter was defective when it left the store. If so, recovery here is proper.

**B. PRODUCTS LIABILITY - NEGLIGENCE**

To hold Homeco liable under this theory, Peters must establish that the store failed to inspect the product where a reasonable person would have done so, or that they inspected it and then failed to discover the defect where a reasonable person would not have failed to do so. The court will consider things like previous complaints from customers regarding the instructions, warnings or kill switch, and the history Homeco has had in dealing with Conco. If there has been nothing in that history to alert Homeco of the need for an inspection, they were not negligent in failing to conduct one. If there has been such information, they will be expected to have done an inspection (and to have discovered the defect if a reasonable person would have done so).

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C. DEFENSES

All of the same defenses apply to Homeco as above, and are hereby incorporated by reference. Additionally, Homeco may be able to seek indemnity from the other two defendants if their conduct was more negligent than Homeco's. Indemnity seems appropriate in this case.

CONCLUSION

In sum, Peters seems likely to recover from all defendants on the various causes of action his damages to some degree.

ANSWER B

1. Peters v. Conco

Strict Liability in Tort

A manufacturer of a product who places the product into the stream of commerce may be held strictly liable in tort for injuries to persons or property caused by a defective product. Privity with plaintiff is not required. Any foreseeable consumer or user of the product may recover for injuries caused by the defective product. (McPherson).

A product may be defective in design, manufacture or have proper failure to warn of known or reasonably known defects or dangers. A manufacturer must inspect, discover and correct defects. Strict liability is imposed if a commercial seller of a product (manufacturer, distributor, retailer) places the product in the stream of commerce. This liability may also be imposed on component manufacturers.

Design Defect

A product is defective in design if it fails to perform within the reasonable expectations of the foreseeable user based on its intended use. Here, Peters will claim that there are two manufacturing defects on the concrete cutter. First, the failure to have a "kill switch" in a readily accessible location makes the product unreasonably dangerous. Second, the cutter's safety guard was defectively designed since it is foreseeable that if a blade breaks into pieces the safety guard should sustain the impact.

Failure to Warn

Peters will also claim that the failure to give proper warnings of the precise dangers involved in using a "wet" blade without water made this cutter defective. He will argue that although the instructions contained several warnings about the use of water, the instructions did not provide the risk of harm to allow a user to proceed with necessary caution.

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Conco's Defense Strict Liability in Tort

Conco will counter that the defense of assumption of the risk precludes Peters' recovery. When Peter noticed the cutter was vibrating excessively he turned the machine off. Conco will argue that at that point Peter should have been aware that there was a problem with his use of the cutter. They will assert that when Peters began to use the cutter after his initial observation and awareness, he assumed the risk of his being injured.

Further, Conco will argue that its instructions clearly and adequately warn of the dangers in using a "wet" blade dry. Conco will be held strictly liable in tort based on the failure to provide an adequate kill switch (design defect).

Negligence - Product Liability

Peters will also assert a negligence theory of recovery. A manufacturer will be liable in negligence if a duty is owed, the duty is breached, and the breach actually and proximately causes plaintiff's damages.

Duty

A manufacturer owes a duty to all foreseeable users to manufacture a product as a reasonable manufacturer under the same or similar circumstances. Conco owed a duty to Peters.

Breach

This duty is breached if the product is defective in design or manufacturer. Conco breached this duty.

Causation - Actual

But for the defect in failure to warn, design and manufacture, Peters would not have been injured.

Causation - Proximate

It was foreseeable that if a blade breaks and the safety guard fails, a user's foot will be injured. It is foreseeable that insufficient warnings will result in injuries to a user.

Damages

Peters suffered damages. His foot was permanently injured. Absent a defense, Conco is liable to Peter in negligence.

Conco's Defenses to Negligence



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Contributory Negligence

Conco will claim that Peters failed to act as a reasonable person when he continued to use the cutter after noticing the vibrations. In a traditional jurisdiction, Peter's contributory negligence will be a complete bar to his recovery. In other jurisdictions (e.g., California) the rules of comparative negligence will allow an apportionment of damages.

Conco's Breach of Implied Warranty/Express Warranty

Peters will argue that Conco breached the implied warranty of merchantability and the implied warranty of fitness for intended use. Further, Peters will claim breach of express warranty based on any manufacturer's warranty expressly given by Conco.

Conco's Defense

Conco will claim that Peters used the cutter in an inappropriate fashion, i.e., without water. Conco should prevail on the warranty claim, based on Peters' misuse of the product.

2. Peters v. Bladeco

Strict Liability

Defined Supra

Peters will argue that Bladeco manufactured a product, albeit a component part, which was placed in the stream of commerce. As such they are liable to him as a foreseeable consumer.

Failure to warn

Although the blade was marked "Wet" Peters will assert that the blade should have been supplied with independent warnings. Since the cutter was sold unassembled, the dangerous component parts should have been provided with warnings. Bladeco will assert the defense of assumption of the risk. Peters will prevail based on duty to warn, thereby imposing strict liability on Bladeco.

Negligence - Product Liability

Defined Supra

Peters will bring a negligence suit against Bladeco based on an alleged breach of duty to manufacture a product that does not present an unreasonable risk of harm to a foreseeable user. Peters will assert that the blade actually and proximately caused his injuries.

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### Bladeco's Defenses to Negligence

Bladeco will assert the defenses of contributory and comparative negligence since Peter failed to use the wet blade properly per instructions with the cutter. They will also raise the defense of assumption of the risk. Depending on jurisdiction, Peter will either be barred from recovery, or his recovery will be apportioned according to culpability.

### Express and Implied Warranty

Defined Supra. Discussed Supra.

### Contribution and Indemnity

Bladeco will seek either indemnity or contribution from Conco, if they (Bladeco) are found liable. Bladeco will argue that they should be indemnified by Conco since Conco manufactured the cutter, and Conco is simply a component manufacturer. If Conco cannot get indemnity, then they can sue Bladeco for Contribution.

### 3. Peters v. Homeco

#### Strict Liability in Tort

Defined supra.

A retailer will be held strictly liable in tort if they sell commercially an unreasonably dangerous product. As discussed, supra, the cutter was arguably defective in design and for failure to properly warn. Therefore, Homeco will be held liable.

#### Negligence

If Homeco simply sold a packaged, sealed product to Peter, then they should not be liable in negligence. Homeco did not have duty to inspect or make safe the product, unless they knew or should have known of its defective condition.

#### Express/Implied Warranty

Based on the facts given, Homeco will not be liable under warranty theories.

Homeco will be entitled to indemnity from Conco. Generally, the manufacturer must act as a surety for its products absent any intervening and superseding events. If the product was in a defective condition when it left Conco, and has not been altered prior to purchase by Peters, then Homeco is entitled to indemnification.