

JULY 2002 TORTS QUESTION

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as “the modern, safe means of controlling allergy symptoms.” Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her Doc (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because “this pill is the best-known method of controlling allergy symptoms.”

Bud, Sally’s brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally’s eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally’s medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

ANSWER A TO ESSAY QUESTION 5

Sally will bring products liability actions against Mfr. based on strict liability, negligence, intentional torts and warranty theories.

Strict Products Liability

A strict products liability prima facie case requires a manufacturer or (dealer) of the goods, an unreasonably dangerous product that could have been made safer with adequate warning, a foreseeable user of the product and a foreseeable use of the product that results in injury.

Mfr. is the manufacturer of the prescription allergy pills. The pills were rendered unreasonably dangerous by Mfr's failure to include a warranty that there was a remote risk of permanent loss of eyesight associated with the use. Sally was a foreseeable user because she was an allergy sufferer who read the Mfr's advertisement. Sally was injured because she suffered a substantial loss of eyesight as a result of using the pills, with eventual, total loss of eyesight.

Mfr's Defenses

Mfr. will first assert that the allergy pills are available by prescription only and they had informed doctors of the remote risk (Doc here was aware of the risk), and they were entitled to rely on Doc as a learned intermediary that would adequately warn patients as part of his prescription analysis and treatment.

This will not succeed as Mfr. directly advertised the availability of the allergy pills as "the modern, safe means of controlling allergy symptoms" directly to Sally. Sally relied on the advertisement in requesting Doc to prescribe the pills.

Next Mfr. will assert Sally assumed the risk by taking the prescription pills. This will surely fail. Sally was not aware of the risk, much less willing to take it.

Finally, Mfr. will assert Sally had a duty to mitigate her damages. If a person unreasonably fails to seek medical care that could prevent or lessen damages, the defendant will not be liable for that preventable danger.

Here Sally had the opportunity to undergo surgery to replace a cornea. Her brother Bud was a willing and compatible donor and the surgery would likely

have been a complete success. Additionally, Sally's insurance would have paid all expenses.

Because Sally was fearful she was unwilling to undergo the surgery. The issue is whether Sally was reasonable in that fear and whether Mfr. should be liable for her resulting complete loss of eyesight.

Normally a defendant is liable for all a plaintiff's injuries caused by the defendant even if the extent is more serious than expected. It is likely though that a jury would find Sally unreasonable under the circumstances here because of the low risk, the likelihood of success and the full coverage by insurance. Mfr. will be liable for some damages for Sally's loss of eyesight but not for permanent and total loss.

Mfr. Negligence Products Liability

Sally must establish Mfr. owed her a duty of care, that they breached that duty and the breach is the actual and legal cause of her damages.

Duty

Mfr. owes a duty of care to all foreseeable users of its product. All allergy sufferers are foreseeable users; Sally is owed a duty.

Standard of Care

Mfr. owes Sally a standard of care of the reasonably prudent manufacturer of prescription drugs.

Breach

Mfr. breached its duty to Sally by failing to provide a warning with the allergy pills Mfr. was aware of a remote possibility of risk of permanent loss. The burden of providing a warning is minor compared with the magnitude of potential harm. Mfr.'s failure to provide this warning was a duty breach and resulted in Sally's injury.

Actual Cause

The facts state that the allergy pills were a direct cause of Sally's loss of eyesight.

Legal/Prox Cause

It is foreseeable that a failure to include a warning could result in injury. Sally is entitled to rely on the presumption that she would have heeded the warning had she been informed.

Damages

Sally suffered permanent total loss of eyesight in both eyes.

Defenses

In addition to those described above under strict liability, Mfr. will assert contributory negligence. They will assert that Sally failed to use a reasonable standard of care to prevent injury to herself. This defense will not succeed. Sally was not aware of the risk of danger and this defense is not successful if her only negligence is in failing to discover the defect, here the lack of warning.

Intentional Tort Battery

Sally will assert that Mfr. acted to cause a harmful or offensive contact.

Mfr.'s act was intentional in that they knew with substantial certainty that there was a remote risk of eye damage. They intentionally did not include a warning. The harmful or offensive contact was Sally's loss of eyesight.

Damages as discussed above.

Mfr. will assert the defense of consent. Sally will argue Mfr. exceeded the scope of her consent by failing to include the warning that eye damage could result.

Because Mfr. knew of the risk and intentionally failed to warn Sally may prevail here as well.

Additionally Sally will assert warranty theories.

Express Warranty

Mfr. advertised “modern safe means of controlling allergy symptoms.” No disclaimers are given in the facts, but disclaimers not valid as to express warranties anyway.

Sally will be entitled to recover here as well.

Implied Warranty of Merchantability

Implied in all sales of goods is the warranty by a merchant seller – here Mfr. – that the goods conform to reasonable standards of the use for which they are designed. While remedies could be limited here, they couldn’t be eliminated and disclaimers are deemed unconscionable when personal injury results.

Implied Warranty of Fitness for Particular Purpose

Sally may bring this action against Mfr. or Doc or both. Sally was seeking relief from allergy symptoms. While there is no evidence she did get relief for allergy, it isn’t reasonable that the loss of eyesight accompanies such relief. Sally will seek damages from Doc for negligence in prescribing the pills. Sally must show duty, breach, causation and damages.

Doc’s Duty to Care and Standard of Care

Doc owes Sally the duty of a member of good standing practicing medicine in a similar area. It is minimally the duty of a reasonably prudent professional. If Doc is an allergy specialist he will be held to a higher standard.

Sally is owed a duty as a reasonably foreseeable plaintiff. As Doc’s patient, Sally is clearly owed a duty.

Breach

Doc breached his duty to Sally by failing to give her informed consent about the allergy pills he was prescribing.

The standard of breach here is judged two ways:

- 1) What a reasonable person would have wanted to know about the risk;
- 2) What Sally would have wanted to know.

Causation

If a reasonable person wouldn't have consented or Sally wouldn't have consented if the risks were known and if the risks did in fact occur, Doc's breach was the actual and prox cause of injury.

Sally said she had not been warned and would not have consented to take the pills if she had known of the risk. Perhaps Sally had a[n] unusually high sensitivity to concern over eyesight. It doesn't really matter why she wouldn't have consented.

The lack of warning was the actual cause and prox cause of breach.

Damages are discussed above.

Doc will raise same defenses as above.

Doc and Mfr. will each seek contribution on the negligence claims.

ANSWER B TO ESSAY QUESTION 5

Sally v. MFR – Strict Products Liability

Sally may assert a claim of strict products liability against manufacturer. Manufacturers are held strictly liable for products they put into the market in a defective condition creating an unreasonable risk of injury or danger to the consumer. In this case, Sally has the burden of showing that the allergy medication produced by Manufacturer (Mfr) were [sic] defective when it left Mfr's control and the defect created an unreasonable risk of danger or injury to the consumer.

Failure to Warn

A product may be properly deemed "defective" for the purpose of strict liability if the manufacturer fails to place proper warnings on the product. If consumer warnings may be affixed to the product at relatively low cost to the manufacturer, it may be held liable on a products liability for failure to do so.

Here, Mfr will assert that its medication presented a remote risk of permanent eyesight. Inherent in almost all medication is the risk of some sort of unwanted side effect. Mfr will claim that the "remote" nature of the risk means that the product did not pose an unreasonable risk of danger or injury. However, the degree of harm that may be incurred by takers of Mfr's allergy medication is significant. Permanent blindness is a serious debilitating condition. As such even a remote risk may be something a reasonable person may not be willing to assume. As such, it is likely the court will find that the allergy medication produced by Mfr posed an unreasonable risk of danger or injury due to the fact that Mfr failed to place in warnings in its advertisements or on its packaging. Although the facts do not indicate the cost involved in making such warnings, it is unlikely that a label on a package or a statement in advertising is so cost prohibitive to warrant excuse from its duty to warn. As such, Sally will be able to prove that the allergy medication produced by Mfr is defective for failure to make adequate warnings.

Duty

As mentioned above, Mfr had a duty to warn of the damages inherent in its product.

It breached that duty when it failed to make such warnings. In order to recover, Sally must show that she is a foreseeable plaintiff to whom that duty was owed.

Under the majority test, a plaintiff is foreseeable if she is in the “zone of danger” created by defendant’s conduct. Here, any person who received a prescription for the allergy medication produced by Mfr was within the zone of danger created by the risk involved in taking the pills. As such, Sally is a foreseeable plaintiff within the zone of danger under the majority approach.

A minority of jurisdictions follow the Andrews approach which holds that all plaintiffs are “foreseeable.” As such, Sally would be a foreseeable plaintiff under this approach as well.

Causation

Once Sally has shown that the allergy medication was defective when it left the control of Mfr and Mfr breached a duty owed to her, she must then establish that the defect was the actual and proximate cause of her injuries.

Actual Cause – But for Test

Sally should have no problem proving the defect caused by failing to adequately warn caused her injury. The facts state that Sally would never have taken the pills if she had been warned of the possible side effect of blindness. Therefore, but for Mfr’s failure to warn, Sally would not have ingested the pills and subsequently lost her eyesight.

Proximate Cause – Foreseeability Test

Even though Mfr is the “but for” cause of Sally’s injury, Sally must also prove that her injury was foreseeable. Here, Mfr was well aware of the risk presented by its allergy medication. Mfr should have been aware of the fact that its failure to warn would cause users of the medication to unwittingly subject themselves to the risk and some of them would in turn suffer blindness. Here, Sally actively sought a prescription for the pills. There was no warning in the advertisements nor on the package and therefore Sally took the medication unaware of its incumbent risks. As a result, Sally lost her sight. Her injuries were foreseeable and therefore proximately caused by Mfr’s breach of duty in failing to warn.

Mfr may assert that Doc's failure to inform Sally of the risks involved in the use of the medication was a supervening factor operating to relieve it of liability. A supervening factor is one that is unforeseeable and extraordinary. It is well established that ordinary negligence in the world is foreseeable and not extraordinary. Consequently, Doc's failure to warn is not a supervening factor because his conduct amounts to negligence and is not so extraordinary or unforeseeable as to amount to a supervening factor. As such, Mfr's conduct survives proximate cause analysis.

Damages

Lastly, Sally must prove that Mfr's failure to warn resulted in damages to her. As mentioned, Sally went blind and so damages are easily established.

Sally v. Mfr – Products Liability – Negligence

In the alternative to strict products liability, Sally may also pursue under a negligence theory. The analysis would be the same as for products liability; however, Sally's burden with respect to breach of duty would be different. In pursuing a negligence claim, Sally must show that Mfr was negligent in its production of the allergy medication or failure to include a warning. In other words, Sally must show that Mfr could have taken reasonable steps to prevent the harm caused. Once shown, the analysis would proceed for causation and damages as stated above. Here the facts support equally a theory of negligence and strict liability. Because strict liability is an easier approach to pursue, Sally will likely proceed under this theory.

Breach of Warranty

Express Warranty

Sally may also assert that Mfr breached an express warranty made in its advertisement claims that the allergy medication was the "modern, safe means of controlling allergy symptoms." Sally may assert that the risk imposed means that the medication is not in fact "safe," and therefore Mfr's representations otherwise are unfounded.

Misrepresentation

In addition, Sally may assert that Mfr engaged in intentional misrepresentation. Sally will claim that Mfr's omission with regarding to the risks amounts to a misrepresentation of safety with knowledge of the falsity of the communication. In addition, Sally will claim such communication was made with the intent that consumers rely. Sally, as a consumer, relied on the representation of product safety and was injured. As such, she can proceed under this claim as well.

Defenses

Contributory Negligence and Comparative Fault are NO DEFENSE to Strict Liability and Intentional Misrepresentation

Mfr cannot assert any contributory negligence or comparative fault of Sally as a defense to her strict liability and intentional misrepresentation claims.

Contributory Negligence and Comparative Fault Available for Negligence

Although contributory negligence and comparative fault are available defenses under negligence, the facts do not indicate that Sally was negligent in taking the medication and so Mfr will not be able to assert these claims.

Assumption of Risk

Assumption of risk is a defense to strict liability if defendant can show that plaintiff went forward in face of a known risk. Mfr may try to assert assumption of risk in that Sally actively sought and procured a prescription for the allergy medication and thereby assumed the risk involved in taking the new medication. However, Sally's conduct was in response to Mfr's advertisements and as mentioned above, such advertisements did not contain any warnings of the risks. In addition, the packaging did not contain any warnings. Crucial to the defense of assumption of risk is the element of "knowledge" on the part of the plaintiff. Here, Sally clearly did not have knowledge of the risk of blindness and therefore cannot be said to have assumed the risk.

Duty to Mitigate

A plaintiff has a duty to mitigate her damages. In other words, plaintiff must act to minimize her loss. Failure to do [so] limits the liability of a defendant for any

aggravation of injury caused by the failure to mitigate. Here, Mfr may attempt to limit its liability for Sally's blindness by pointing to her refusal to engage in the cornea transplant operation that could have been accomplished with minimal risk and no cost to her. Sally opted not to go through with the surgery out of her fear of the operation. Plaintiff's duty to mitigate is judged by the reasonable person standard. If the court determines that Sally's decision not to undergo the surgery was not reasonable, Mfr's liability for damages will be seriously curtailed. However, because the mitigation at bar involves major surgery, it may be likely that a reasonable person would not choose to undergo the risk involved. Even though the risk is stated to be minimal, this is not the same as involving not the same as involving no risk at all. In fact, Sally may well point to the "remote" risk realized by taking Mfr's medication as grounds for her decision not to undertake any further risks with her health and well-being. Depending on the court's determination of the reasonableness of Sally's decision, Mfr's responsibility for damages may or may not be reduced.

Sally v. Doc – Negligence

Sally may assert a claim against Doc in negligence for his failure to warn Sally of the risks involved in taking the allergy medication.

Duty

Here, Doc had a duty to conform his conduct to the reasonable doctor in good standing in the professional community in which he is situated. This means that if Doc fails to act as a reasonable doctor in good standing in his community, he will be held to have breached his duty of care.

Breach of Duty – Failure to Inform

Doctors have a duty to obtain informed consent of their patients with respect to medical treatment. The duty to "inform" is judged by what a reasonable patient would want to know in making health care decisions. This standard is judged from the patient's perspective, not the doctor's. It is irrelevant that the average doctor would not make a disclosure if the court finds that a reasonable patient would want to know the relevant information at bar.

Here, the risk of blindness is information that a reasonable patient would want to know in deciding whether or not to take medication. This is supported by the fact

that Sally states that she would never have taken the medication had she known of the risks. Therefore, Doc's failure to advise is a breach of duty.

Causation

Here, the facts indicate that Doc's failure to warn was both the actual and proximate cause of Sally's injury. Similar to Mfr, Doc cannot point to Mfr's failure to provide a warning as a supervening cause that relieves him of proximate liability. Doc was aware of the risk and therefore had a duty in his own right to warn Sally. His failure to do so caused Sally to take the medication uninformed and she suffered injury because of it.

Damages

As mentioned above, Sally's blindness amounts to sufficient damages for recovery.

Defenses

Contributory Negligence & Comparative Fault

As mentioned above, the facts do not support a defense on grounds of contributory negligence or comparative fault as Sally manifested no signs of her own negligence in taking the medication.

Assumption of Risk

Doc's claim of Sally's assumption of risk will fail for the same reasons stated above with respect to Mfr.

Duty to Mitigate

The analysis with respect to Doc's liability for damages and any claim based upon Sally's failure to mitigate will proceed in the same manner as discussed above with respect to Mfr.