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Jerry v. Down Under (MFR)Product Liability

A P may sue a commercial seller of a defective product if P can prove that the product left D's defective in manufacture, design or warning. Privity has been abrogated and generally any foreseeable may sue under the following theories:

1. Negligence - to prevail P must prove duty, breach, causation and damages

Duty: Mfr's such as Down Under have a duty to inspect, discover, correct all defects and warn of all risks. A distributor or retailer's, such as Moon Drugs, duties may vary depending on the product and circumstances.

Breach: There are 3 types of breaches: 1. mfr defect - product did not leave mfr as intended, 2. design defect - product as intended, but poses unreasonable danger to consumer, which could be avoided by a reasonable/feasible alternate design, 3. warning defect - failure to warn or inadequate warning. Breach may be established by the consumer expectation test to show that the product's safety falls below the expectation of the average consumer or the risk/utility test to establish that the risk of the product outweighs its benefit or utility.

Down Under had a duty to warn of the risk of sleepwalking. They failed to do so. This was reckless considering the dangers associated w/sleepwalking. Down Under breached their duty and the product is defective in warning.

It is also arguable that the benefit of the drug outweighs the risk. If it does not, arguably the drug is defective in design as well provided there are feasible alternatives available that have less dangerous side effects.

Causation: But for mfr's failure to warn, the accident might not have occurred. It's foreseeable that absent a warning, a consumer would encounter an unexpected risk and get injured.

Damages: Damages include personal injury (gash over his eye) and property damages, if any (doorjamb?), pain and suffering (dizzy for weeks), lost wages, because the collateral source rule will not allow defendant to offset any benefits from P's insurance or employer. Fran may sue for loss of services and loss of consortium. It has been held that a mfr's recklessness could even result in punitive damages. P may also sue for

Defenses available are contributory negligence, comparative negligence and assumption of risk. Down Under will argue that because P did not read the warnings, he assumed the risk and therefore contributed to his own injury. However, this will fail, because the side effect was not listed and even if P had read the warnings, he could not have assumed a risk of something he wasn't aware of. Defenses will fail.

In case the drug was recommended by P's doctor, doctor would be learned intermediary and would have duty to warn patient, however mfr probably wouldn't have warned dr of sleepwalking either and, as discussed, P apparently learned about drug in magazine.

2. Warranty

Express Warranty - a statement or promise by a commercial seller creates an express warranty that becomes part of the basis for the bargain

The drug was represented in the magazine ad by mfr to cause drowsiness and sleep. This is an express warranty. Presumably, despite the sleepwalking it did possess those qualities. Therefore no breach of express warranty.

Causation/Damages/Defenses supra to negligence

Implied Warranty of merchantability - the product is of fair and average quality and fit for its ordinary purpose

The product did not contain adequate warnings. Hence, the product falls below fair and average quality. This constitutes a breach in implied warranty.

Implied Warranty of Intended Use - the product is fit for its intended use and the buyer relied on the sellers recommendations

There are no fact to suggest that Jerry intended to use the drug for anything but its intended use. Therefore, no breach here.

Causation/Damages/Defenses supra to negligence

Note : Rule split on privity in warranty actions: majority: family/householdmembers, min: all foreseeable P's

Under a claim of warranty one may recover purely economic loss under specific circumstances. N/a here.

3. Strict Liability in tort

A commercial seller who places a defective product in the stream of commerce is strictly liable for personal injury and property damage caused by its foreseeable use. To prevail P must proof that D is a commercial seller, D placed a defective product in the stream of commerce, the product left D in defective manner, P is a foreseeable, P used product in foreseeable manner, Causation, damages

Down under is a mfr, a commercial seller who put the product in the stream of commerce w/o adequated warning causing damage to a consumer, a foreseeable P, who used the product in a foreseeable manner. Failure to warn of sleepwalking caused damages to P.

Down under is SLIT.

Damages supra to negligence

Defenses include assumption of risk and misuse of products. There are no facts to support those defenses as discussed supra.

Jerry v. Moon Drugs (Retailer/Pharmacy)

Product Liability

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Moon Drugs is a retailer. It is not clear whether P got the drug off the shelf, in which case retailer has no duty to warn (mfr) does, or whether they were acquired through the pharmacy in which case the pharmacist may be considered a 'learned intermediary' meaning that the pharmacist (under R3 might be considered a 'distributor') would have the duty to warn and the mfr would have a duty to inform the pharmacist of the risk in which case he could pass on the information to the consumer. However, it has been held that the learned intermediary rule does not apply to where the consumer takes an active role in the selection of the drug, as appears to be the case here. In addition, the drug was advertised in a magazine, where P apparently learned of it first. Hence, mfr, should have included the appropriate warning there, which he apparently did not.

Hence, Moon drugs did not breach a duty to P.

Moon drugs may be held jointly and severally liable, as a retailer, however, because Moon Drugs did not breach a duty, may sue mfr for indemnity or if for any reason found liable, contribution..

2. Warranty

Express Warranty - a statement or promise by a commercial seller creates an express warranty that becomes part of the basis for the bargain
n/a here.

Implied Warranty of merchantability - the product is of fair and average quality and fit for its ordinary purpose

as above

Implied Warranty of Intended Use - the product is fit for its intended use and the buyer relied on the seller's recommendations

as above. n/a

3. Strict Liability in tort

A commercial seller who places a defective product in the stream of commerce is strictly liable for personal injury and property damage caused by its foreseeable use. To prevail P must prove that D is a commercial seller, D placed a defective product in the stream of commerce, the product left D in defective manner, P is a foreseeable user, P used product in foreseeable manner, Causation, damages

Moon Drugs is a commercial seller who placed a defective product in the stream of commerce (defective warning), it was defective when it left D's control and P was a foreseeable user P who used the product in a foreseeable manner. The product caused damages to P as above.

Moon Drugs is strictly liable in tort along w/mfr and may sue mfr for indemnity as discussed above.

Damages/Defenses as above

Fran v. Down Under and Moon Drugs

As discussed above, Fran may sue both, mfr and retailer for loss of services and of consortium on behalf of herself and her children.

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Question 2

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Horace v ConradFraudulent Misrepresentation

Fraudulent misrepresentation is when one knowingly misrepresents a material fact which induces the plaintiff to rely upon it and in reliance upon the misrepresentation suffers damages.

Here Horace was in the Minnerva Gallery when he saw a piece that he liked entitled, "The Formula." Conrad then came upon to Horace and knowing the piece was only worth 800 dollars he told Horace that it was an original worth 6,500. Since Horace bought the piece in reliance upon Conrad's information he relied upon it. Horace has a valid claim and will prevail and should recover the benefit of the bargain. His damages will be 6,500 - 800 (the represented price - value) 5,700. Horace should also make a claim for punitives because in fact this was intentional.

Horace v Minnerva GalleryVicarious Liability

One party may be vicariously liable for the acts or omissions of a third-party if they have a special relationship.

Here we have a special relationship, we have an employer (Minnerva Gallery) and an employee (Conrad) so it would be in Horace's best interests to sue for the deep pockets to recover his money or more.

Negligence is usually imputed to an employer where intentional torts are less likely unless the employer knew of them. An employer may also be directly liable under negligent supervision or hiring if the facts give rise to this. There are no facts that give rise to any direct liability on the part of the employer.

Respondeat Superior

An employer may be liable for the acts or omissions of an employee if they are acting within the course and scope of their employment. There are several times where an employee may deviate from his course and scope, these are known as frolic and detour. A frolic is a severe deviation from the course and a slight deviation is a minor deviation. Also according to the going and coming rule an employer is not liable for the employee driving to and from the place of employment and their home.

Here we have Horace and employee of Minnerva Galley selling a piece of art beyond its value. The question is was this act within the course and scope of his employment. It was not a negligent act therefore Minnerva Gallery will not have any ties to negligence being imputed to them.

This tort that Conrad committed was fueled by fraud and deceit, the facts don't give rise that the gallery practices this type of business normally or was aware of this. The facts also don't give rise to who received the money for the art. If the gallery received the benefit of the fraudulent misrepresentation by their employee then they would be required to give the money back for the piece of art. If they did not receive the money above and beyond what the art was worth, then they can claim joint and several liability with Conrad. Most likely if they did not receive the money they can claim indemnification and contribution against Horace.

Mr. Minnerva v Jericho

Defamation

Mr. Minnerva can claim and prevail under defamation if he can prove that it was false and defamatory, made intentionally or negligently, published by a third party and understood by a third party and it could be applied to Mr. Minnerva and he suffered damages because of the false and defamatory statement.

Intentional

It is clear that Jericho acted intentionally rather than negligently.

False

The facts state that the Minnerva Gallery was a reputable art gallery, nonetheless Jericho placed an ad in the local trade magazine describing Mr. Minnerva personally, as a fraud with a long history of shady dealings. Since regardless of the reputation of Mr. Minnerva Jericho still published the ad it is clear that this is false.

Defamatory

The ad appeared in a local trade magazine and was harmful to his reputation, lowered his esteem and diminished his reputable standing in the local trade community. Therefore this element is satisfied.

Publication by a third party

Jericho placed an ad in a trade magazine, it was written therefore it was libel, since all libel is libel per se special damages are not required to recover for general damages. Mr. Minnerva may have to pursue libel per quod if on its face it is not libelous but the facts give rise to it describing him personally. If Mr. Minnerva needs to prove that it refers to him if any issues about being libelous on its face he can use innuendo to bring in extrinsic evidence to be successful. Slander per se is by word of mouth any relations to imputations to a crime and fraud is definitely a crime but the best course is through libel.

Since it is libel per se damages are presumed.

Understood by a third party

A reasonable person reading this local trade magazine would find it libel on its face especially since it goes against what Mr. Minnerva is known for.

Damages

Since it is on its face libelous damages are presumed and Mr. Minnerva does not have to prove special damages

Defenses

Jericho cant claim truth, he does not have any absolute privileges because he is not in a court and these arent legal proceedings. If this was an opinion than he could claim fair comment privilege but this is more like a fact. He is not a public figure therefor actual malice standard under Ny time v sullivan would not be necessary to prove. Also according to gertz he does not have to show negligence because this act was unintentional. These defenses will fail and Jericho will be on the hook.

The trade journal may or may not be liable for defamation but it would be harder for Mr. Minnerva to prove. Mr. Minnerva would have a valid claim against the trade journal just as it does against Jericho. See discussion supra

Assault

Assaulty is intentionally placing another in reasonable apprehension of receiving immient harm

The facts dont state is Mr. Minnerva was in apprehension of receiving an imminent harm but a reasonable person in the same situation would be in apprehension as someone came forward to shove them. Therefore Jericho will be liable for assault.

Battery

Battery is the intentional harmful or offensive touching of another.

When Jericho shoved Mr. Minnerva he acted volitionally and intended to harm or at

lease commit an offensive touching. Therefore he will be liable for battery.

Conversion

Conversion is the intentional serious interference of the chattel of another, where one exercises dominion over the chattel.

When Jericho acted volitionally and pushed Minnerva and broke the vase Mr. Minnerva was holding through transferred intent he will be liable for compensatory damages and the value of the vase.

Mr. Minnerva v Local Trade Magazine

END OF EXAM