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WHAT PRODUCTS LIABILITY CLAIMS MAY PAUL BRING AGAINST DISHWAY?

Paul (P) may claim several theories against DishWay (DW) under strict products liability, including strict products liability, negligent products liability, warranty theories, misrepresentation and intentional products liability.

Paul may be able to recover under strict products liability for a design and warning defect, negligent products liability and express warranty and implied warranty of merchantability

Strict Products Liability

To establish strict products liability, P has to prove that DW was a commercial supplier, who manufactured a defective product, the defective product actually and proximately caused P's injuries, and P suffered damages.

Commercial Supplier

A commercial supplier is a manufacturer, retailer, wholesaler, seller or assembler but not causal seller. Privity is not required as users and consumers can recover for strict products liability againsts a commercial supplier

Here, Dishway developed a NEW dishwasher powder that it named UltraKlean. Thus, Dishway is a manufacturer, and will be will be considered a commercial supplier

Thus, DW is a commercial supplier and this element is satisfied.

Defective Product

The courts will use 3 ways to determine if a product is defective: manufacturing defect, design defect and warning defect. P will have to prove that DW manufactured a defective product to recover.

Manufacturing Defect

A product has a manufacturing defect is it left the manufacturing process different and more dangerous than the other products made properly.

Here, the facts state that there was no flaws in DW's manufacturing process.

Thus, UltraKlean (UK) has no manufacturing defect.

Design Defect

A design defect exists if the product was made within the manufacturer's specifications

but it has an inherently dangerous quality.

The courts will use 2 tests to determine if a product has a design defect: consumer expectation test, and risk utility test.

DishWay knew the cleaning agent could cause severe stomach pain if ingested, but this is true of all detergent products

Consumer Expectation Test

Consumer expectation test determines if the product is defective because it failed to perform as safe as a reasonable consumer expects it to perform.

Here, DW made a dishwasher powder that it advertised as a safe product. A reasonable consumer would expect a dishwashing product to be safe enough to clean dishes but also safe enough to not cause severe stomach pain, so severe that it would result in hospitalization someone being hospitalized. DW would argue that all dishwashing product cause stomach pain if ingested. However, this argument would fail because P did not ingest Ultraklean but merely washed a pan after preparing a meal. Moreover, DW should have known that the residue was not detectable to the eye, alerting a consumer not to ingest it.

Thus, UK failed to perform as safe as a reasonable consumer would expect a dishwashing product to perform.

Risk Utility Test

The risk utility test provides whether the product could have been made safer without undue cost and delay to the consumer. The test will look to see if there is a "reasonable alternative design".

Here, during product development, DW tested UltraKlean on some surfaces but not on aluminum because there was no indication that it would work differently on aluminum than on other surfaces. Although it is not unusual for dishwasher powders to leave a harmless amount of residue on different surfaces. P would argue that DW could have made the residue from the product more detectable so he can avoid using the pan.

Thus, UK may have a design defect under the Consumer Expectation test for failing to perform as safe as a consumer using dishwashing product would expect.

Warning defect

A warning defect exists if the product fails to warn of the risks of the product that are not apparent to the user

Here, DW's instructions on the product only stated that the product should not be ingested. Also, UltraKlean did not have a warning stating to avoid aluminum pans. Although there was no indication that UltraKlean would work differently on aluminum,

suggesting that a warning is not necessary, this argument would fail because the residue is not apparent to the user because it is not detectable to the eye.

Thus, DW failed to warn P of the risks

Causation

Actual

P must show that the product was the actual cause of his damages, that but-for the defective product, he would not have suffered his injuries. Also, the product must have left the manufacturer in the defective condition.

Here, P purchased a box of UltraKlean from DishWay. P used the pots to prepare a meal, shortly after finishing the meal, P experienced severe stomach pain. Lab test results revealed the cleaning agent in UltraKlean caused P's stomach pain.

Thus, there is actual causation

Proximate

Proximate causation is if P's injuries is the normal incident of andwith in the increased risk created by defendant's conduct. Foreseeable misuse will not be a supervening cause that will cut off defendant's liability.

Here, P used to wash some aluminum pots, and the next day P used several of those pots to prepare a meal. Using an aluminum pan was no misuse of the product on P's part, he washed the aluminum pots with UK, then he waited a day which should not have mattered, especially if there was residue from the product P could not have avoided it anyway because it was not detectable. It is foreseeable that P would use a product for dishwashing that was advertised for this purpose.

Thus, P's injuries were a normal incident of his injuries. There is proximate cause

Damages

P may recover for personal injuries and property but not for pure economic losses

Here, P suffered severe pain after finishing his meal that he prepared on the aluminum pots clean by UltraKlean. P can recover for the cost of his hospitalization but not for missing work or other economic loss.

Defenses

Assumption of Risk

P will not recover if he assumed the risk of the harm of defendants conduct.

Here, P did not assume the risk(by disregarding a specific warning not to use aluminum pans, which was not there) he merely used the product expecting it to be safe for the purpose. UK was a new product therefore P did not know the risks of using it on aluminum pans.

Contributory Negligence

DW cannot use contributory negligence as a defense against P because P's use of the product was not unforeseeable

Negligent Products Liability

Duty

To prove negligence, P will need to show duty, breach , causation, damages.

The court will use the *Cardozo and Andrews test* to determine which plaintiffs are foreseeable. *Under Cardozo*, P must be in the zone of danger created by the defective product. *Andrews* state that all plaintiffs who suffered injury are foreseeable.

Here, P was in the zone of danger when he used the dishwasher powder manufactured by DW. P did not know that a potentially dangerous amount of UltraKlean residue tended to remain on aluminum cookware after a wash cycle. P was injured by UltraKlean because he suffered severe stomach pain that required hospitalization.

Thus, P is a foreseeable plaintiff

Standard of Care

A reasonable prudent commercial supplier is the standard of care used to determine the duty of care owed. Here, the court will look at the size, location and situation in the circumstances.

Here, DW has a duty of care as a reasonable prudent commercial supplier.

Breach

Standard of Care

A reasonable prudent commercial supplier is the standard of care used to determine the duty of care owed. Here, the court will look at the size, location and situation in the circumstances.

Here, DW failed in his duty of care as a reasonable prudent commercial supplier by not providing a safe product for consumers like P. UK was a new dishwasher powder., DW relied on "there is no indication that it would work differently on aluminum products". A reasonable prudent manufacturer would do its due diligence especially on an unproven product to ensure its safety on different surfaces before it calls it a "revolutionary safe Product".

Thus, DW breached his duty of care

Causation

see above

Damages

see above

Defenses

see above

Warranty Theories:

Express Warranty

An express warranty states a guarantee patently and directly to consumers.

Here, the company advertised widely that UltraKleasn was "a revolutionary, safe product with the most powerful cleaning agent ever"

This advertisement accurately represented that UltraKlean contained a new cleaning agent that made the product more effective than other dishwasher powders. P would argue that the product was not only warranted to be "safe" but also "effective". However, it failed to live up to its express warranty by causing him injury requiring hospitalization.

THus, DW breached its express warranty in its advertisement of UK.

Implied Warranty of Merchantability

An implied warranty of merchantability is when merchants that manufactures a good of the kind, believe the good is of the quality that is fit for the ordinary purpose for what was made.

Here, UK is a new product and it is of a 'powder', merchants would consider a product such as this to be safe and effective, not to cause bodily harm after normal, foreseeable use by a consumer.

Thus, UK failed to perform against the warranty of merchantability.

Implied Warranty of Fitness for Appropriate Purpose

If the a seller has the judgment and knowledge about a product, and a buyer relies on his judgment and skill to purchase the product, and it failed to perform for the appropriate purpose then it is a breached of this implied warranty..

The facts do not specifically support this.

Misrepresentation

Misrepresentation states that a defendant misrepresented a material fact, and he knew the material fact was false

and intended that P rely on the material fact, and P reasonably and justifiably relied on the fact, and P suffered damages

Here, DW knew UK could produce severe stomach pain if ingested, but it was no misrepresentation because it is true of all detergent products if ingested. DW also did not know that a potentially dangerous amount of UK residue tended to remain on aluminum cookware after a wash cycle. It accurately represented that UK contained a new cleaning agent that is more effective, but not necessarily more safe>

Thus, DW not liable for misrepresentation

Intentional Products Liability

Intentional products liability exists if the defendant had the intent to inflict bodily harm with its product or substantial certainty that it would cause bodily harm.

Here, there are no facts supporting that DW intended to harm P or that DW knew its product had a substantial certainty if used to cause harm.

Thus, DW is not liable for intentional products liability

CONCLUSION: Paul may be able to recover under strict products liability for a design and warning defect, negligent products liability and express warranty and implied warranty of merchantability

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