NOTE: This Grading Outline presents the notes the professor consulted as he graded students’ answers to this examination. This outline is not a comprehensive statement of all possible issues that could be addressed in response to this examination, nor should this outline be understood as indicating the only sequence in which claims or issues could have been addressed effectively.

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QUESTION I

SNEAKER FREAKS AT SERRAMONTE CENTER

Peter Payne v. SCC -- For personal injuries.

Negligence: Failure to take action to protect Payne from foreseeable risk of overnight crowd of sneaker freaks.

Foreseeability of risk arguably present, as SCC knew of crowds coming and reasonably could anticipate dangers to crowd members. Either knew of drinking or should have as reasonable shopping center operator.

Duty limited relative to Payne as trespasser, licensee, or invitee? Probably is invitee, so regular duty of care analysis applies. Also, in California per Rowlands same analysis applies.

Breach shown based on Hand formula, as risk of some harm large, foreseeable magnitude of loss also large, and burden of setting up a system to prevent harm low.

As affirmative duty issue, even if reject Hand formula (as burden is interference with freedom not to act), P can argue special relationship present, imposing duty on SCC to take protective measures relative to foreseeable crowd member such as him.

Special relationship/duty arises out of SCC’s exclusive ability to control safety of the premises, e.g., by setting up the recommended system, hiring guards, closing access at night, or other measures.

Custom of use of precautionary system elsewhere serves as evidence of due care, per T.J. Hooper case. Also, common use of security guards at malls.
Causation: Actual causation as but for failure to take protective action, harm probably would not have occurred as crowd would not have been present.

Legal causation: As direct causation, injury occurred on the premises at the time of concern, i.e., when a crowd present; the crowd is the force SCC allowed to be set in motion.

As foreseeability causation, as in Weirum (in California), danger from actions of crowd members is the foreseeable intervening cause SCC should have been taking action to prevent in the first place.

Indivisible injury results from SCC’s negligent failure to act, plus FLI’s negligent action, so joint and several liability imposed per American Motorcycle Association.

Defense: Assumption of risk, as Payne knew that SCC was allowing crowd to gather and also knew of danger some crowd members presented.

Primary assumption of risk, as Payne agrees that SCC will not make the situation any safer than it obviously was? On this basis, no recovery at all, for no breach of duty toward Payne as a crowd member.

Secondary assumption of risk: Even if one did breach affirmative duty to make situation safer from foreseeable hazards of third persons’ misconduct, Payne arguably was careless for his own welfare in showing up, staying, and interacting with the drinking teens. On this basis, per Li, recovery can be reduced.

Peter Payne v. FLI -- For personal injuries.

Negligence: Duty to conduct promotional practices to avoid creating foreseeable unreasonable risks to prospective customers.

Payne may argue breach of affirmative duty by FLI in manner similar to SCC’s alleged breach. A weaker argument as to FLI, however, because FLI does not control the Center premises and could not prevent a crowd from assembling nearby, but SCC could do so? But FLI could use the same wristband system considered by SCC.

Signs arousing excitement and encouraging rush to store, in context of knowledge of crowds camping out, arguably invited dangerous conduct unnecessarily. Per Hand formula, breach of duty of care.

Actual causation: But for this negligence, crowd arguably would not have shown up and acted hostilely toward Payne. FLI may respond that customary sneaker freak activity would have occurred regardless of the signs. Burden on Payne to prove actual causation as more probable than not.
Legal causation: As foreseeability causation, as in Weirum, danger from actions of crowd members is the foreseeable intervening cause that should have been taking action to prevent in the first place.

Defense: Assumption of risk arguments same as above.

**QUESTION II**

LUMMER 990

Jane Johnson v. LMC -- For personal injuries

Negligence: Was ordinary care exercised in the design of the L-990, specifically the adequacy and durability of the brakes?

JJ will argue that availability of strong, durable brakes for large trucks is strong evidence that LMC did not make use of available technology for adequate brakes for this heavy passenger car. Under Hand formula, burden is low if alternative designs are available.

Possibly res ipsa loquitor analysis applicable, too.

Causation issues not problematic on facts as given.

Strict liability: Design defect in use of this type of brakes, prone to failure?

Under consumer expectations approach, JJ should have strong argument that ordinary consumer would expect vehicle’s brakes to work when applied in normal use and within a few months of vehicle purchase.

Under risk-utility approach, JJ can show availability of alternative design—such as truck strength brakes—diminishes utility of the design chosen by LMC.

Causation readily shown, on but for basis and per either direct causation or reasonable foreseeability of harm if brakes fail.

Negligence: Failure to warn of problem or recall cars after LMC learned of it in March, months before JJ bought the car.
Under Hand formula, burden is low of giving warning to the few—under 20—purchasers, informing them of known inadequacy of the brake type. Per Vasallo, "a continuing duty to warn (at least purchasers) of risks discovered following the sale of the product at issue."

Strict liability analysis possible re lack of warning, too.

Jane Johnson v. DW – For personal injuries

Strict liability: Imposed on retailer as in marketing chain, on same grounds as against LMC.

No negligence claim re product design, but arguably a duty to warn if DW learned of the brakes problem.

Mark Mason v. LMC -- For property damage to his car

Strict liability: Design defect in use of this type of brakes, which even when working as intended are inadequate to slow down vehicle as quickly as commonly needed? Perhaps a manufacturing defect explains incident, though no evidence suggested here? Or were warnings/instructions not specific enough?

Strict liability extended to bystander per court decisions.

Under consumer expectations approach, MM has strong argument that design is defective, as consumer—including other drivers on the freeway—would expect a car to be able to stop in ordinary distance when brakes properly applied, as here.

Under risk-utility approach, MM can show availability of alternative design—such as truck strength brakes—diminishes utility of the design chosen by LMC.

Negligence: Unreasonable risk created toward other drivers on the road, and their cars, if design does not allow vehicle to slow down as quickly as commonly needed.

Mark Mason v. DW (or other retail dealer who sold to Kirk) -- For property damage to his car

Strict liability: Imposed on retailer as in marketing chain, on same grounds as against LMC.

Mark Mason v. KK -- For property damage to his car
Negligence: Evidence appears weak that KK drove or braked carelessly. Can res ipsa
loquitur be used to aid MM’s case?

Ordinarily not occurring without negligence; auto in exclusive control of KK; no
input by MM. Last factor may be weakest, as MM entering KK’s lane, but no
indication he did so carelessly or had any reason to know the L-990 needs lots of
room to slow down.

Strict liability: Per Restatement Section 520 factors, is use of L-990 an abnormally
dangerous activity? As suggested in Comment i, not a matter of common usage to
operate a “motor vehicle of such size and weight as to be unusually difficult to control
safely.”

Can the risk of collision be eliminated by the exercise of reasonable care?
Arguably not, given its great weight and the unusual precautions demanded of a
driver in order to brake safely.