

BABY CUSHION PROBLEM

Resnicks v. Retailer, Manufacturers

Products liability — design defect and warning defect (note can't sue Grandma under this theory because she's not a seller of the goods in question).

R's are a foreseeable consumer (even though it was a gift). Everyone in chain of sales is potentially liable.

Design defect:

Under consumer expectations test, argue ordinary consumer doesn't expect a pillow to smother someone. Do you need an expert to explain this? Maybe. People are generally familiar with pillows and what's inside them, versus the theory of pellet size, etc. might not be well known. The manufacturer/retailer might argue that the defect is open and obvious: pillows necessarily are made of soft material and so can suffocate a child if the child is left alone on them. If the court allows this test, there's probably a jury question.

Under risk/utility, high probability of serious harm — 19 deaths. Manufacturers will argue still a small risk, given the high number sold. Is there a feasible, safer alternative design? Arguably a solid foam, feather, clay, etc. pillow is an adequate substitute even if doesn't mold as well, vs. the whole point of the pillow is that it molds well enough to hold a baby. The voluntary recall would be admissible evidence under s/liability.

Under Restatement 3rd approach, the problem is the reasonable alternative design requirement. Are any of the above substitutes a RAD? Arguably not. Even if they're not, isn't the product still defective, so much so that it should be taken off the market? You could try to argue under comment d that this was a manifestly unreasonable design, and so should be found defective even if no RAD exists. The utility of the product is slight, and so it should not be produced at all.

Warning Defects:

- 1) Failure to permanently attach label to pillow.

It is clearly foreseeable that care providers, baby-sitters, and friends will be watching children and have a need to be continually warned. The risk/utility balance easily raises a jury question. The defendants will counter with the likelihood that parents will cover the pillow and any warning with a pillow case: One was used by the Resnicks and this probably undercuts the causation element. The cushion should probably warn that never to cover the warning with a pillow case.

Was the warning inadequate because it didn't warn of the risk of death? Probably a good jury question. The Resnicks would argue they would have discarded a

pillow with such a warning. The friend might testify that she never would have purchased it. Note how such a severe warning essentially raises the overall design of the product as being defective. Alternatively, the Resnicks could argue the pillow should have warned that it was to be used only for sitting the child up while attended, never for sleeping, because of the risk of suffocation. Consider explicitness of the warning, means used to warn, comprehensibility, clarity and conspicuousness. See E = MC3

Causation:

The first causation issue is the existence of SIDS. The manufacturers will argue that the baby died because of SIDS, not the pillow, so the P can't show their product was MLTN at least a substantial factor. On the other hand, you have the existence of 19 deaths attributed to the pillow by a government agency — the fact that the government thinks the pillows were responsible may strengthen the argument that it's more likely than not (by inference), even though all alternative theories cannot be conclusively disproven.

Not clear Rs can identify the manufacturer. Rs could argue alternative liability, in that all manufacturers used the same bean bag design, analogizing to Summers. In reality, this becomes an argument for market share liability, because with ten manufacturers, one of which had 50% of the market, a court would be reluctant to apportion damages equally among them even if all created a defective product. Can market share liability be used? If try to join all manufacturers of the pillow, will Ps run up against problems of fungibility of product, i.e., not all pillows worked the same way? The price differential among them seems to indicate there might be some variation in construction, but maybe not. If they all used the same defective design, it might work if P could get a large percentage of them before the court. On the other hand, the manufacturers might raise the existence of other causes of suffocation (SIDS, etc.) and the lack of any "signature" disease or death caused by the pillows. The details of opt-out, etc. would vary by state. We are told that a substantial percentage is made by Acme — who else would the P have to join? Could the P avoid the whole problem by suing the retailer, and have the retailer figure out which manufacturers to sue?

Scope of liability: manufacturers will argue tearing off tag and leaving baby alone constituted unforeseeable misuse. However, warning shows they expected risk of leaving baby alone, plus propping them up makes them more likely to be left somewhere. Using a pillowcase is foreseeable as well.

Damages - Discuss wrongful death damages for the loss of a young child.
Consortium and burial expenses.

Possible Defenses

Comparative Fault

Tearing the tag off or covering up the tag with a pillow case. Is this a failure to discover or guard against the defect?

Grandmother's forgetfulness probably not imputable to the parents. She is not an employee. Could the manufacturers name the grandmother as a third party defendant based on negligence? If the Resnicks knew of grandma's forgetfulness, they could also be contributorily negligent in leaving the baby with her.

Comparative fault application.

Possible shifting responsibility to the parents argument under scope of liability. See the pillow case theory.

Could also bring under negligence. Untaken precaution? Not pulling pillow once had 19 deaths? Not testing more extensively? The problem is you don't have a lot of facts to work with.