

Essay Question No. 7

Answer this question in booklet #7

Harley had recently purchased a 2003 model Polecat Aggressor 3000 snowmachine. The Aggressor 3000 had what Harley considered a cool, retro design, with fat chrome tailpipes coming out of the side of the machine, which angled up toward the driver. On his first trip with the Aggressor 3000, his companions noticed that, after a bit of riding, he seemed punch-drunk, and that his speech had become slurred. He became separated from his group when he decided to do some “highmarking” (in which the snowmachiner drives his machine straight up a steep slope to see how high he can go before the machine gives out).

A few minutes later, Harley’s friends could hear his machine running as he sat looking up the mountain. They were surprised that he simply continued to sit there as he was buried by a sudden avalanche. Harley’s friends radioed for help and tried to dig him out, but were unable to get to him in time to prevent his death.

Harley’s estate has now brought an action against Polecat, asserting two tort causes of action: negligent product design and strict liability for defective product.

In support of its negligence and strict liability claims, Harley’s estate plans to submit testimony from Andy Mann, an expert in ergonomics. Mr. Mann, who has master’s degrees in industrial design and engineering, worked for 20 years as an industrial products designer for major manufacturing concerns throughout the United States, designing equipment ranging from hand-held drills to ATVs and snowmachines. He has published frequently in various trade journals, including a recent article in “Workplace Safety” (a non-scientific trade magazine for industry executives) in which he reviewed the safety records of various types of forklifts. This article concluded that forklifts with the emissions pipes in the rear were safer than forklifts with side emissions pipes, because, in the latter forklifts, the driver was forced to breathe in too much carbon monoxide, causing drowsiness and inattention.

Mr. Mann intends to testify that the tailpipe design of the Polecat Aggressor 3000 forces the rider to breathe in carbon monoxide (CO) from the exhaust, which causes disorientation and slowed reactions. In support of his testimony, he conducted a study of the Aggressor 3000 for this litigation. In the study, he ran various brands of snowmachines in his garage, with a CO monitor in the place where he guessed a rider’s

head would be. On this basis, he determined that the Aggressor 3000 displayed a level of CO three times higher than the other machines.

On what evidentiary grounds could Polecat make a motion to exclude this testimony? Analyze and evaluate the chances for success of such a motion.