MEE Question 3

Six months ago, a man visited his family physician, a general practitioner, for a routine examination. Based on blood tests, the physician told the man that his cholesterol level was somewhat elevated. The physician offered to prescribe a drug that lowers cholesterol, but the man stated that he did not want to start taking drugs because he preferred to try dietary change and "natural remedies" first. The physician told the man that natural remedies are not as reliable as prescription drugs and urged the man to come back in three months for another blood test. The physician also told the man about a recent research report showing that an herbal tea made from a particular herb can reduce cholesterol levels.

The man purchased the herbal tea at a health-food store and began to drink it. The man also began a cholesterol-lowering diet.

Three months ago, the man returned to his physician and underwent another blood test; the test showed that the man's cholesterol level had declined considerably. However, the test also showed that the man had an elevated white blood cell count. The man's test results were consistent with several different infections and some types of cancer. Over the next two weeks, the physician had the man undergo more tests. These tests showed that the man's liver was inflamed but did not reveal the reason. The physician then referred the man to a medical specialist who had expertise in liver diseases. In the meantime, the man continued to drink the herbal tea.

Two weeks ago, just before the man's scheduled consultation with the specialist, the man heard a news bulletin announcing that government investigators had found that the type of herbal tea that the man had been drinking was contaminated with a highly toxic pesticide. The investigation took place after liver specialists at a major medical center realized that several patients with inflamed livers and elevated white blood cell counts, like the man, were all drinking the same type of herbal tea and the specialists reported this fact to the local health department.

All commercially grown herbs used for this tea come from Country X, and are tested for pesticide residues at harvest by exporters that sell the herb in bulk to the five U.S. companies that process, package, and sell the herbal tea to retailers. U.S. investigators believe that the pesticide contamination occurred in one or more export warehouses in Country X where bulk herbs are briefly stored before sale by exporters, but they cannot determine how the contamination occurred or what bulk shipments were sent to the five U.S. companies. The companies that purchase the bulk herbs do not have any control over these warehouses, and there have been no prior incidents of pesticide contamination. The investigators have concluded that the U.S. companies that process, package, and sell the herbal tea were not negligent in failing to discover the contamination.

Packages of tea sold by different companies varied substantially in pesticide concentration and toxicity, and some packages had no contaminants. Further investigation has established that the levels of contamination and toxicity in the herbal tea marketed by the five different U.S. companies were not consistent.

The man purchased all his herbal tea from the same health-food store. The man is sure that he purchased several different brands of the herbal tea at the store, but he cannot establish which brands. The store sells all five brands of the herbal tea currently marketed in the United States.

The man has suffered permanent liver damage and has sued to recover damages for his injuries. It is undisputed that the man's liver damage was caused by his herbal tea consumption. The man's action is not preempted by any federal statute or regulation.

1. Is the physician liable to the man under tort law? Explain.

2. Are any or all of the five U.S. companies that processed, packaged, and sold the herbal tea to the health-food store liable to the man under tort law? Explain.

3. Is the health-food store liable to the man under tort law? Explain.

3) Please type your answer to MEE 3 below

Â

Â

When finished with this question, click Â to advance to the next question.

(Essay)

======== Start of Answer #3 (1418 words) ========

1. At issue is whether the doctor breached his duty to his patient in his treatment regarding cholesterol. It is most likely that he did not breach his duty.

A cause of action for negligence requires the proof of four elements--An existing duty, a breach of that duty, causation (both actual and proximate), and damages. A duty exists to all foreseeable plaintiffs and is a responsibility to act in a particular manner (or refrain from acting in a particular manner) so that others around you are not harmed. A breach of that duty exists when a person does not live up to the standard of acting that is required by his duty. Both of these are at issue here, while causation and damages are not at issue because there is no breach of the doctor's duty.

Here, the doctor had a duty to act like an average member of his profession in good

standing in his community. Historically, this was a local standard, but is slowly moving towards a more national standard due to the issues presented at trial with presenting expert witness proof. What this duty means is that the doctor must possess the reaosnable amount of care, intelligence, and skill of the average member of his community. Included in this duty is the duty to reasonably inform a patient about information that may be deemed material or important to the average patient (referred to as informed consent).

The doctor here was described as a general practitioner, and thus must possess the skill and knowledge of the average doctor in the community. This is the duty that the doctor must have lived up to.

As to breach, He seems to have told his paitent that he could prescribe a drug that would help his cholesterol and was knowledgeable that the drug would be better than natural remedies and dietary change. He informed his pateint that the drug would work better and that there might be some risks with the natural remedies. As a further precaution of care, he told the patient to come back in three months for another check up. At this check up, he continued to monitor blood levels and noticed that there were issues that were beyond his level of genralized expertise. Thus, he referred the man to a specialist.

The one area that might be concerning is that he failed to tell the patient to stop drinking the tea or abort his new diet, even though the doctor knew he was on the new diet. But, taken as a whole, it is fairly apparent that the doctor did not breach his duty

because he informed the patient of risks and the patient willingly continued. Had the original advice of the doctor been followed, the man would likely have not had any issues.

2. At issue is whether the five US companies are liable to the man under tort law. While liability exists under strict products liability principles, causation is going to be difficult to prove.

Under stricts products liability law, a merchant is strictly liable for the products it provides to customers that end up causing harm or damage. Strict products liability requires a showing that a merchant provided goods and left the hands of the store with a defect that is unreasonably dangerous and that that defect caused harm to the plaintiff. As to food stuffs and consumables, the generic descriptions of manufacturing defects, design defects, and warning defects do not apply. A provider of foods is just strictly liable for harms caused by the foods.

It is clear that the five manufacturers are merchants--they process, package, and sell this herbal tea to retailers. For all intents and purposes, they are the "makers" of this particular type of tea. Each of these merchants provided these goods to retailers...this meets the part of the test where they must ship out a product and place it into commerce in some manner. It went to retailers for customers to purcahse. Further, it must have left the hands of the manufacturer with the defect. The government agency determined that it is likely that the goods passed through the manufacturers' hands while defective--it must be assumed that the pesticides were placed on the tea while it

was grown instead of being picked up otherwise. Even if it was assumed that it was picked up after the fact, this would have occurred in the temporary storage warehouses in Country X. Thus, the test is met for the prodcut to have left the hands of the defendant with the defect.

This defect was certainly unreasonably dangerous because it had the temperament to cause extreme harm to plaintiffs. Damage to liver and blood cell counts was rampant from drinking this tea. Therefore, damages are also easy to prove from this plaintiff.

The only remaining issue is causation--strict products liability does not have the proximate causation limitations that a normal negligence action has, but the defective condition must have caused the injury in fact. Here, the injury in fact was caused by the tea, but it is difficult to pinpoint a particular defendant with whom to charge. Under the but-for test, no particular defendant can be responsible here because the plaintiff bought multiple brands of tea from the five manufacturers and the government does not know which manufacturer is mostly or wholly responsible. It appears to claim that at least all five manufactureres are at least partially responsible.

Thus, this is a perfect scenario in which to use the *Summers v. Tice* shifting of the burden to defendants. When it can be pinpointed that a group of persons was responsible for causing a harm, the burden can be shifted for the defendants to apportion the harm between them. Assuming the Plaintiff can meet the burden and the court allows this, he will recover from any defendant which cannot exculpate itself.

It should be noted here that res ipsa loquitor cannot be used to establish duty or breach because this is a strict products liability action---no negligence is at issue.

3. At issue is whether a middle man provider of goods can be held responsible under strict products liability rules. The answer is that yes, here, the retailer can be held liable.

Under stricts products liability law, a merchant is strictly liable for the products it provides to customers that end up causing harm or damage. It does not matter that a merchant was a maker or merely a provider of goods from up the chain. Further, it does not matter under strict products liability that middle man may have inspected goods in a reasonable fashion to check for defects.

Strict products liability requires a showing that a merchant provided goods and left the hands of the store with a defect that is unreasonably dangerous and that that defect caused harm to the plaintiff. As to food stuffs and consumables, the generic descriptions of manufacturing defects, design defects, and warning defects do not apply. A provider of foods is just strictly liable for harms caused by the foods.

Here, it is clear that the retailer is a merchant--they sell the goods to consumers and sell many other types of goods. They sell all types of the herbal tea as evidenced by the man's purchase of many types of tea. The defect existed when the product left the hands of the retailer because it has been determined by the government that the pesticides came from Country X (most likely). This pesticide contamination caused the

product to be unreasonable dangerous to consumers and caused many to fall ill and have permanent damage to their livers and possibly to their blood. Their health was adversely affected. Thus, the elements of a merchant providing an unreasonably dangerous product that caused harm can all be easily met.

Left is causation. Here, however, causation is easy to prove. But for the potential-defendant retailer providing the goods to the man, the man would not have been harmed. Thus, causation is very easy to establish here. Taken together, this makes the health-food store liable even though it is merely a middle man. A reaosnable inspection would not have cured this defect as it is a matter of strict liability.

It can be noted that if the retailer is in fact found liable, it may seek contribution from its joint-tortfeasor defendant manufacturers for any portion that it may owe to the plaintiff. It may also seek indemnity (potentially under a contractual arrangement) that it has with its suppliers up the chain.

======== End of Answer #3 ========