Torts Tutorial Chapter 9 – Product Liability

INTRODUCTION

This program is designed to provide a review of basic concepts covered in a first-year torts class and is based on DeWolf, Cases and Materials on Torts (http://guweb2.gonzaga.edu/~dewolf/torts/text). You have accessed the tutorial for Chapter 9, "Product Liability." Prior to doing these exercises you should read the relevant material in DeWolf, Cases and Materials on Torts. A brief overview of this Chapter is provided below.

OVERVIEW

Ch. 9. Product Liability

Product liability was initially limited by contract law, which was very picky about establishing privity between consumer and defendant; frequently manufacturers were separated from victims by an intermediate seller, which defeated plaintiff's claim. Eventually the privity requirements were scrapped, and tort law came to dominate. In addition to traditional negligence remedies, courts moved to a form of no-fault recovery wherever the product was *defective*, such that the product became unreasonably dangerous. Defects come in three varieties: (1) manufacturing defects, e.g. a toaster with a short circuit or a tire with a separated tread (product is "out of spec"); (2) design defects, such as a can of Drano that doesn't have a childproof cap ("bad spec"); and (3) warning defects, e.g., a can of hairspray that doesn't warn that the spray is flammable. In cases of alleged manufacturing defects, strict liability is applied; that is, if the product deviates from the

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manufacturer's specifications, it doesn't matter whether the manufacturer could (or could not) have prevented the injury through the use of reasonable care. In the case of alleged design defects there is divided authority about what test should be used. Some courts may use a strict liability test (i.e., looking to whether the product is unreasonably dangerous in light of what we now know about the product) while others employ a true negligence test (i.e., given what was known or should have been known *at the time*, did the manufacturer act reasonably in designing the product?). As to warning defects, some jurisdictions impose strict liability (just as with design defects), but many courts use a simple negligence test: was the manufacturer negligent in failing to warn about the danger? Warning cases are often attractive to plaintiffs because the cost to warn is typically negligible; even discounted by the low probability of harm, a risk of serious harm may make a lack of warning unreasonable.

Modern product liability reform statutes tend to provide for "statutes of repose," limiting the length of time a product is expected to perform safely; they also tend to consolidate the different theories of product liability into a unified theory of "defect." Most also permit contributory negligence as a defense to a claim based on a defective product.

EXERCISE

Each question gives you a fact pattern, and then you must choose an answer that best reflects the law as you understand it. Be careful to read the question and the suggested answers thoroughly. Select your answer by clicking on it. If you give an incorrect answer, you will be given feedback on what was wrong with your answer. By clicking on the feedback you will be taken back to the question to try again. Once a correct answer is selected, click on the feedback to go to the next question.

You may begin the exercise by click on a question number below. Throughout the tutorial three Shortcut Buttons will be located in the bottom right-hand corner of each page. The Return Button  brings you back to this page allowing you jump to questions of your choice if you prefer. The Information Button  takes you to the Torts Glossary. The Home Button  takes you to the Torts Tutorial Home Page.

Questions:

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Question #1

Fred was visiting a farm in Nebraska. He was walking past the barn near Delbert, who was chopping wood. When Delbert swung the ax, the head flew off and hit Fred, injuring him. The ax was negligently made by the Trustee Hardware Company. Prior to the MacPherson case, Fred would have been unable to recover from Trustee because:

(1)He assumed the risk of being hit when he passed so close to Delbert;

(2)The injury was also caused by the negligence of Delbert;

(3)Fred had no contractual relationship to Trustee;

(4)It is difficult to establish the existence of negligence

Torts Tutorial Chapter 9 – Product Liability

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Sorry, that's incorrect. There might be some claim that the *user* of the product might have assumed the risk, but in this case it wasn't the user who was injured. Instead, it was a person who (although he might have been close enough to be aware of the risk) had no idea that the ax head would fly off. Thus, assumption of risk would not apply. Try again.

Torts Tutorial Chapter 9 – Product Liability

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(4)It is difficult to establish the existence of negligence

Sorry, that's incorrect. Although Delbert's failure to inspect the ax might have been an additional cause of the accident, that wasn't the basis for the common law's refusal to provide a recovery to Fred. Try again.

Torts Tutorial Chapter 9 – Product Liability

Question #1

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That's right. At common law the courts required that the plaintiff show privity--a contractual relationship--between the injured party and the manufacturer. Even though the action was based on tort, the courts refused to extend a duty of reasonable care to anyone not in privity with the manufacturer.

Torts Tutorial Chapter 9 – Product Liability

Question #1

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(1)He assumed the risk of being hit when he passed so close to Delbert;

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(3)Fred had no contractual relationship to Trustee;

(4)It is difficult to establish the existence of negligence

Sorry, that's incorrect. Although it might be difficult to show negligence, because of the uncertainty of what reasonable care would be in a case like this, the facts suggest that the manufacturer was indeed negligent. Try again.

Question #2:

Wayne used a toaster to cook his toast. One day, after he had turned the toaster off, a short in the electrical wiring caused a fire that burned down his house. Wayne would like to sue the manufacturer for the damages caused to his house. Under the rule announced by Justice Cardozo in Macpherson v. Buick Motor, Wayne could not recover unless:

(1)Wayne was in privity with the manufacturer of the toaster

(2)The toaster, if negligently made, was likely to cause injury

(3)Either (1) or (2)

(4)Neither (1) nor (2)

Torts Tutorial Chapter 9 – Product Liability

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(4)Neither (1) nor (2)

Sorry, that's only partially correct. It's true that anyone in privity with the manufacturer could sue, but Cardozo expanded the law to include other prospective plaintiffs. Try again.

Torts Tutorial Chapter 9 – Product Liability

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Sorry, that's only partially correct. Try again.

Torts Tutorial Chapter 9 – Product Liability

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That's correct. A plaintiff in privity with the manufacturer still had a right to sue, but Cardozo expanded the class of eligible plaintiffs to include anyone who was injured who could show that the toaster was the kind of product which, if negligently made, was likely to cause injury.

Torts Tutorial Chapter 9 – Product Liability

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(3)Either (1) or (2)

(4)Neither (1) nor (2)

Sorry, that's incorrect. At least one of the two answers is correct. Try again.

Question #3:

Melissa was driving her 1983 Ford Escort when a rear tire exploded, causing her to lose control of the car and suffer serious injuries. Under current law, Melissa could recover from the tire manufacturer if she were able to prove:

(1)That there was a defect in the tire;

(2)That the tire was negligently made;

(3)That accidents of the type she suffered do not normally occur in the absence of negligence

(4)Any of the above.

Torts Tutorial Chapter 9 – Product Liability

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(2)That the tire was negligently made;

(3)That accidents of the type she suffered do not normally occur in the absence of negligence

(4)Any of the above.

Sorry, that's only partially correct. Proving the existence of a defect is the easiest method to show negligence, but it's not the only way. Try again.

Torts Tutorial Chapter 9 – Product Liability

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(4)Any of the above.

Sorry, that's only partially correct. Although negligence, if proven, would establish Melissa's right to recover, it's not the only means. Other theories would be less burdensome. Try again.

Torts Tutorial Chapter 9 – Product Liability

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(2)That the tire was negligently made;

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(4)Any of the above.

Sorry, that's only partially correct. You have identified the res ipsa loquitur doctrine, which was used in cases like *Escola v. Coca Cola*. However, it's not the only method of establishing negligence, and is in fact somewhat cumbersome. Modern products liability law eliminates the necessity of using res ipsa. Try again.

Torts Tutorial Chapter 9 – Product Liability

Melissa was driving her 1983 Ford Escort when a rear tire exploded, causing her to lose control of the car and suffer serious injuries. Under current law, Melissa could recover from the tire manufacturer if she were able to prove:

(1)That there was a defect in the tire;

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(3)That accidents of the type she suffered do not normally occur in the absence of negligence

(4)Any of the above.

That's correct. Any of the three theories is useable in a products liability case. However, the first one (product defect) is usually easiest to prove, since it doesn't require a showing that the tire was negligently made. Although the res ipsa loquitur doctrine would allow the jury to infer negligence without actual proof, it still makes negligence an issue. Under strict liability the existence of the defect alone suffices to justify a recovery.

Question #4:

Use the facts of the previous question (Melissa was injured by an exploding tire, causing her to lose control of her car). If Melissa wanted to prove that the tire contained a manufacturing defect, she would have to prove that:

(1)The tire was not as sturdy as tires made by other manufacturers;

(2)The tire didn't conform to the manufacturer's specifications;

(3)A reasonably prudent person wouldn't have used this kind of tire design;

(4)Melissa was using the product in the way the manufacturer intended.

Torts Tutorial Chapter 9 – Product Liability

Use the facts of the previous question (Melissa was injured by an exploding tire, causing her to lose control of her car). If Melissa wanted to prove that the tire contained a manufacturing defect, she would have to prove that:

(1)The tire was not as sturdy as tires made by other manufacturers;

(2)The tire didn't conform to the manufacturer's specifications;

(3)A reasonably prudent person wouldn't have used this kind of tire design;

(4)Melissa was using the product in the way the manufacturer intended.

Sorry, that's incorrect. If the tire wasn't as sturdy as those produced by other manufacturers, it might indicate a design defect. But this question asks for the test for a manufacturing defect. Try again.

Torts Tutorial Chapter 9 – Product Liability

Use the facts of the previous question (Melissa was injured by an exploding tire, causing her to lose control of her car). If Melissa wanted to prove that the tire contained a manufacturing defect, she would have to prove that:

(1)The tire was not as sturdy as tires made by other manufacturers;

(2)The tire didn't conform to the manufacturer's specifications;

(3)A reasonably prudent person wouldn't have used this kind of tire design;

(4)Melissa was using the product in the way the manufacturer intended.

That's correct. A manufacturing defect is found where the product that causes the injury differs from what should be identical products made by the same manufacturer. Here, for example, the tire might have a shortage of rubber at a key spot or a tear caused by the manufacturing machinery. Melissa would also have to prove that the defect was present at the time it left the manufacturer's hands.

Torts Tutorial Chapter 9 – Product Liability

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(1)The tire was not as sturdy as tires made by other manufacturers;

(2)The tire didn't conform to the manufacturer's specifications;

(3)A reasonably prudent person wouldn't have used this kind of tire design;

(4)Melissa was using the product in the way the manufacturer intended.

Sorry, that's incorrect. You are looking for a manufacturing defect, and this answer talks about whether or not there was a design defect. Try again.

Torts Tutorial Chapter 9 – Product Liability

Use the facts of the previous question (Melissa was injured by an exploding tire, causing her to lose control of her car). If Melissa wanted to prove that the tire contained a manufacturing defect, she would have to prove that:

(1)The tire was not as sturdy as tires made by other manufacturers;

(2)The tire didn't conform to the manufacturer's specifications;

(3)A reasonably prudent person wouldn't have used this kind of tire design;

(4)Melissa was using the product in the way the manufacturer intended.

Sorry, that's incorrect. Although Melissa's own conduct might figure into a determination of whether she is entitled to damages, or how much, it doesn't answer the question of whether the product contained a manufacturing defect. Try again.

Question #5:

[The same facts as the previous question: Melissa's tire explodes, causing a car accident.] To establish the existence of a design defect in the tire, Melissa would have to prove that:

(1)The design criteria used by the manufacturer did not conform to the standard used in the tire industry;

(2)A reasonably prudent person wouldn't have used the design, if he knew what was known at the time the tire was manufactured;

(3)The design was one that created an unreasonable risk of injury;

(4)It depends upon the jurisdiction.

[the same facts as the previous question: Melissa's tire explodes, causing a car accident.] To establish the existence of a design defect in the tire, Melissa would have to prove that:

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(3)The design was one that created an unreasonable risk of injury;

(4)It depends upon the jurisdiction.

Sorry, that's incorrect. This would establish a strong case for negligence, but the unique thing about product liability law is that it isn't just a negligence standard. In product liability, the plaintiff must prove a defect, which may or may not involve negligence. Try again

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(3)The design was one that created an unreasonable risk of injury;

(4)It depends upon the jurisdiction.

Sorry, that's incorrect. This is a true negligence standard, but it is not followed in all jurisdictions. Many jurisdictions permit the use of contemporary knowledge about the product, or even consumer expectations that don't take into account risks and benefits, in order to judge whether or not there is a design defect. Try again.

[the same facts as the previous question: Melissa's tire explodes, causing a car accident.] To establish the existence of a design defect in the tire, Melissa would have to prove that:

(1)The design criteria used by the manufacturer did not conform to the standard used in the tire industry;

(2)A reasonably prudent person wouldn't have used the design, if he knew what was known at the time the tire was manufactured;

(3)The design was one that created an unreasonable risk of injury;

(4)It depends upon the jurisdiction.

Sorry, that's incorrect. Although some jurisdictions use a test for a design defect that is based upon a true negligence standard, others employ something closer to a strict liability standard. Try again.

[the same facts as the previous question: Melissa's tire explodes, causing a car accident.] To establish the existence of a design defect in the tire, Melissa would have to prove that:

(1)The design criteria used by the manufacturer did not conform to the standard used in the tire industry;

(2)A reasonably prudent person wouldn't have used the design, if he knew what was known at the time the tire was manufactured;

(3)The design was one that created an unreasonable risk of injury;

(4)It depends upon the jurisdiction.

That's correct. Some jurisdictions use a "hindsight" standard, which allows the use of today's knowledge in judging whether or not the design was reasonably safe. Other jurisdictions use a true negligence standard, which asks whether a reasonable person in the shoes of the manufacturer would used the design, based upon knowledge available then. Until you know what approach your jurisdiction uses, it's hard to predict the standard that will be applied.

Question #6:

Sam was mowing his lawn with an Eastinghouse Model 24 electric lawnmower. When he came to a particularly thick part of the lawn the mower stopped, apparently because the grass was jammed in the blades. Sam bent down to investigate the problem, lifted up the mower and tried to free the mower blade. The mower restarted and caused him serious injury. Sam would like to sue Eastinghouse for failing to provide an automatic shut-off device. What would be the effect of a finding that Sam was negligent in failing to turn off the power himself?

(1)No effect, since a reasonably safe design would have made it unnecessary for Sam to turn the power off.

(2)Sam's negligence would probably reduce his recovery.

(3)Sam's claim would be barred, because he misused the product.

(4)Sam's claim would be barred, because he assumed the risk.

Torts Tutorial Chapter 9 – Product Liability

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(4)Sam's claim would be barred, because he assumed the risk.

Sorry, that's incorrect. You may be thinking that, but for the dangerous design, Sam wouldn't need to use reasonable care. But that just establishes that both Sam's negligence and the product danger were both proximate causes of the injury. One party's failure to use reasonable care (or failure to produce a reasonably safe product) won't excuse the other party from using reasonable care. Try again.

Torts Tutorial Chapter 9 – Product Liability

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That's correct. In this case, the conduct was something a reasonably prudent person wouldn't do. Therefore it would be considered negligent. The case for assumption of risk is quite poor, since there would have to be a "voluntary encounter of a known risk." In all likelihood Sam was simply not thinking about the fact that the motor would restart.

Torts Tutorial Chapter 9 – Product Liability

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(2)Sam's negligence would probably reduce his recovery.

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(4)Sam's claim would be barred, because he assumed the risk.

Sorry, that's incorrect. Product misuse arises when the product is used for a purpose for which it was not intended, such as using a blender to stir paint lacquer, or a lawnmower for a ceiling fan. However, even a misuse of the product will not bar liability so long as it was a (mis)use reasonably to be foreseen by the manufacturer. Under these facts, Sam did a stupid thing, but it is something that occurred while he was using the lawnmower for the purpose for which it was intended. Try again.

Torts Tutorial Chapter 9 – Product Liability

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(3)Sam's claim would be barred, because he misused the product.

(4)Sam's claim would be barred, because he assumed the risk.

Sorry, that's incorrect. In most product liability cases, assumption of risk has been treated as a damage-reducing defense, rather than a bar to recovery. Moreover, under these facts it's not clear that Sam actually understood the risk and voluntary assumed it. Instead, he seemed to be forgetful of the fact that the mower would restart. Try again.

Question #7:

If a jury decided that Sam was negligent, but the lawnmower was also defective because of its lack of adequate safety devices, in most jurisdictions the result would be:

(1)Sam would not recover anything, since negligence is more culpable than simply producing a defective product.

(2)Sam would recover 100% of his damages, since strict liability cannot be offset by ordinary negligence

(3)Sam would recover half of his damages, since both were equally at fault;

(4)None of the above

Torts Tutorial Chapter 9 – Product Liability

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(3)Sam would recover half of his damages, since both were equally at fault;

(4)None of the above.

Sorry, that's incorrect. Although one might think that negligence (since it is fault-based) could be considered more culpable than strict liability (which may be imposed without fault), many product defects reflect negligence in production, design, or marketing. Consequently, it is left up to the jury to decide the relative culpability of manufacturer and plaintiff. If the plaintiff has been really stupid, that will significantly decrease the recovery. But if the product is very defective (e.g. the Ford Pinto), that will greatly increase culpability for the manufacturer.

Torts Tutorial Chapter 9 – Product Liability

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(3)Sam would recover half of his damages, since both were equally at fault;

(4)None of the above.

Sorry, that's incorrect. Some commentators and judges have balked at comparing negligence and strict liability, arguing that they are "apples" and "oranges." But most jurisdictions accept the notion that both parties are responsible for the injury and the recovery should reflect their relative contribution. Try again.

Torts Tutorial Chapter 9 – Product Liability

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(3)Sam would recover half of his damages, since both were equally at fault;

(4)None of the above.

Sorry, that's incorrect. There is no way of predicting that the jury would split the responsibility exactly 50-50. Most jurisdictions will give the jury the option to divide the damages on a percentage basis. The division might be 90-10, 10-90, or anything in between. Try again.

Torts Tutorial Chapter 9 – Product Liability

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(2)Sam would recover 100% of his damages, since strict liability cannot be offset by ordinary negligence.
(3)Sam would recover half of his damages, since both were equally at fault;
(4)None of the above.

That's correct. Most jurisdictions have rejected the extremes of either placing all of the responsibility on the plaintiff, or all of the responsibility on the defendant. Since both have contributed to causing the injury, both should be held accountable. The precise percentages of relative fault will be left to the jury.

Question #8:

Sam's accident occurred in a jurisdiction that has enacted a product liability reform statute containing a "statute of repose." The statute also specifies a statute of limitations of three years. Sam's claim would be barred if:

(1)The "useful safe life" of the product expired before he brought his claim.

(2)The time between his purchase of the product and the time of the injury was more than three years.

(3)The accident occurred after a time when most consumers would have purchased a newer product.

(4)None of the above.

Torts Tutorial Chapter 9 – Product Liability

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(3)The accident occurred after a time when most consumers would have purchased a newer product.

(4)None of the above.

Sorry, that's incorrect. The *injury* must occur within the useful safe life of the product, but the action need not be brought within that time frame. Statutes of limitation regulate how long the plaintiff can wait before filing the claim. In the case of a useful safe life of 12 years, if the accident occurs in the 10th year, but the action isn't brought until the 13th year, both the statute of repose and the statute of limitations could be met.

Torts Tutorial Chapter 9 – Product Liability

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(2)The time between his purchase of the product and the time of the injury was more than three years.

(3)The accident occurred after a time when most consumers would have purchased a newer product.

(4)None of the above.

Sorry, that's incorrect. The statute of repose is typically longer than three years. Most statutes start with a presumption of 12 years and then allow evidence to increase or decrease that amount. The three-year limitation applies to how long the plaintiff can wait before filing a claim after the injury has occurred. Try again.

Sam's accident occurred in a jurisdiction that has enacted a product liability reform statute containing a "statute of repose." The statute also specifies a statute of limitations of three years. Sam's claim would be barred if:

(1)The "useful safe life" of the product expired before he brought his claim.

(2)The time between his purchase of the product and the time of the injury was more than three years.

(3)The accident occurred after a time when most consumers would have purchased a newer product.

(4)None of the above.

Sorry, that's incorrect. Most jurisdictions use a presumption for useful safe life (often 12 years), but either party can introduce evidence to increase or decrease that presumptive figure. How long people keep their old products before trading them in is relevant, but not dispositive, in determining how long the "useful safe life" of the product should be. If most people buy a new car when their car gets to be ten years old, it doesn't necessarily mean that the product's useful safe life has expired. Otherwise, a person using a car more than ten years old might have no remedy for a defect.

Torts Tutorial Chapter 9 – Product Liability

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(2)The time between his purchase of the product and the time of the injury was more than three years.

(3)The accident occurred after a time when most consumers would have purchased a newer product.

(4)None of the above.

That's correct. Under the statute of repose, the injury must occur during the "useful safe life" of the product. The statute of limitations regulates how long the plaintiff can wait after the accident has occurred to bring suit.

You have now completed the exercises for Chapter 9. You will now be returned to the menu.

END

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