Session 1

A. History and Development
   • Roman Law
   • English Law
     — Chandelor v. Lopus, 79 ER 3 (1603)
     — Winterbottom v. Wright, 152 ER 402 (1842)
   • UCC/Warranty Law
     — Henningsen v. Bloomfield Motors, 161 A.2d 69 (N.J. 1960)
   • Misrepresentation
   • American Law
     — Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1963)
     — Rest. Torts 2nd §402A

B. Strict Liability Elements
   • Elements
   • What is a “product” under strict liability?
   • Who can be a plaintiff under strict liability?
   • Who can be a defendant under strict liability?
   • What transactions are subject to strict liability?
     — Sale of used goods?
     — Sale of real estate?
     — Services?
Session 2

A. Types of Defects
   • Manufacturing Defect
     — Welge v. Planters LifeSavers Co., 17 F.3d 209 (7th Cir. 1994)
   • Design Defects
     — Consumer Expectations Test
     — §402A, Comments (g) and (i)
       — Bourne v. Gilman, 452 F. 3d 632 (7th Cir. 2006)
     — Risk Utility Test
       — Rest. 3d §2
     — Barker v. Lull Engineering, 573 P.2d 443 (Cal. 1978)

B. Issues In Design Defect Cases
   • Hindsight v. Foresight
   • Misuse by plaintiff/defendant’s knowledge of plaintiff’s misuse
     — “Reasonably anticipated use”
   • Changes in technology/plaintiff’s tool or defendant’s tool?
     — Is “state of art” a defense for the defendant?
     — Is “safer feasible alternative” part of plaintiff’s burden?
   • Rest. 2d 402A Comment k: unavoidably unsafe products
     — Grundburg v. Upjohn Co., 813 P.2d 89 (Utah 1991)
Session 3

A. Failure to warn/Warning Defects

- Information Torts
- When is there a duty to warn?
  - If danger is open/obvious?
  - If seller does not/could not reasonably know of risk?
    - *Rosa v. Taser*, 684 F.3d 941 (9th Cir. 2012)
- Causation
  - What would have made a difference?
  - Heeding presumption.
- Adequacy of Warning
  - What types of information are required?
  - What about foreseeable misuse?
- Obvious or Known Dangers
  - *Rest 3rd §2 Comment j*
- Whom To Warn/Who Can Be A Plaintiff?
  - Users/consumers/bystanders
  - Ultimate users.
- What if there is a learned intermediary?
  - What if a drug company warns the treating doctor, but the doctor does not warn the patient?
- Allergies
- Is there a continuing duty to warn?
  - Courts split.
  - *Rest. 3d §10*
— Missouri

B. **Causation in Products Cases**

- Tests for causation
  - But for causation
  - Substantial factor causation
  - Missouri Law
- Causation in failure to warn cases
  - *402A Comment j*
  - Heeding presumption – some states recognize
- Enhanced injuries
  - Multiple injuries/multiple sources of injuries
- Linking defendant with the product
  - Alternative to causation
  - *Muleahy v. Eli Lilly Co.*, 386 NW 2d 67 (Iowa 1987)
  - Market share liability
- California view – multiple toxic exposure cases
- Proximate cause/foreseeability
  - *Palsgraf v. Long Island RR*, 162 N.E. 99 (NY. 1928)
Session 4

A. Defenses in 402A cases

- “Contributory negligence” by the plaintiff – historically a complete bar.

- Negligence by the plaintiff in using the product
  - Misuse is a complete bar, where there is abnormal or unintended use, but what about collateral negligence, where the plaintiff creates unreasonable risks for his own safety? Like the foreseeable misuse of driving too fast?


- Assumption of the risk – voluntary assuming a risk that is known and apparent/appreciated.

- Missouri law – Mo. Rev. Stat. § 537.765

- State of the art
  - Where is it allowed/what are its limitations?
  - Defendant must plead and prove - where it is allowed

- Statute of Limitations
  - What starts running of the statute?

B. Statutes and Safety Regulations

- Effect of defendant’s non-compliance

- Effective of defendant’s compliance with safety regulations.

- Federal preemption
  - US Constitution/Supremacy Clause
  - Express preemption
  - Implied Preemption
Session 5

A. Evidence in products cases

- How is defect proven?
  - Can it be proven circumstantially without an expert?
    - Rest. 3d §3
    - Smoot v. Mazda, 469 F.3d 675 (7th Cir. 2006)

- Industry Standard/State of the Art

- Post Accident/Subsequent Remedial Measures
  - FR Evid. 407

- Similar occurrences
  - Can plaintiff offer evidence of other failures?

- Expert Witness Testimony
  - When is it allowed?
    - Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)
    - FR. Evid 702
    - Best v. Lowes Home Center, 563 F.3d 171 (6th Cir. 2009)
    - Missouri rule
Session 6

A. Compensatory Damages in Products cases
   • Must have damage to person, or to property other than just to the product
   • Compensatory/economic damages
     — Medical, past and future
     — Wages, past and future
     — Property damage
   • Compensatory/non-economic
     — Pain and suffering
     — Emotional distress?
     — State caps on damages?
   • What about pure harm to the product?
   • What about pure economic loss?
   • What about pure mental distress?
   • Non-injured bystanders with pure emotional distress?

B. Punitive damages in products cases
   — Purpose
   — Conduct
     — Most states, as a matter of state law, require clear and convincing evidence as burden of proof.
     — Acosta v. Honda Motor, 717 F.2d. 828 (3rd Cir. 1983)

C. Constitutional limits to punitive damages
   • Due process clause
   • Punitive damages may not be excessive/ratios
• Punitive damages may not be based on dissimilar conduct by the defendant/conduct by the defendant must have nexus to injury

• Evidence of harm to others not the plaintiff can be used to determine entitlement to punitive damages, but not to determine amount of punitive damages.

• State caps on punitives
• Bifurcation
• Motions in limine
Session 7

A. Complex Litigation

What options are available when there are many plaintiffs?

- **F.R. Civ. P. 42 Consolidation**
  - Requirements

- **F.R. Civ. P. 23 Class Actions**
  - Requirements; types; creation; effect
  - *Valentino v. Carter Wallace, Inc.*, 97 F.3d 1227 (9th Cir.1996)
  - *In re Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 51 F.3d 1293, (7th Cir. 1995)

- **Multi district litigation 28 USC §1407**
  - Requirements; how created; effect

- **Issue Preclusion/Collateral Estoppel**
  - Is a jury finding in trial 1 against a defendant binding in favor other plaintiffs against the same defendant in other cases?
  - Issue preclusion
  - Requirements
  - 1)party to be estopped previously litigated the issue and lost;
  - 2)final judgment entered against the losing party;
  - 3)resolution of that issue was necessary to the judgment against the party.

- Offensive non-mutual collateral estoppel by new plaintiffs.
  - *Hardy v. Johns-Manville Sales Corp.*, 611 F.2d 334 (5th Cir. 1982)
Session 8 – Missouri Law

A. Development of Strict Liability
   — Keener v. Dayton Electric, 445 SW 2d 362 (Mo. 1969)
   — Rodriguez v. Suzuki, 996 SW 2d 47 (Mo. 1999)

B. Missouri Statutes and Instructions
   • Missouri Product Liability Statute
   • MAI 25.04 (Strict Liability – Defect)
   • MAI 25.05 (Strict Liability – Failure to Warn)
   • MAI 25.09 (Negligent Manufacture/Design)
   • MAI 25.10A (Negligence/Failure to Warn)

C. Defenses
   • State of the Art – Mo. Rev. Stat. § 537.764
     — Failure to Warn
     — Design Defect
   • Plaintiff’s comparative fault – Mo. Rev. Stat § 537.765
     — Assumption of Risk
     — Comparative Fault
   • Dismissal of Mere Seller – Mo. Rev. Stat. § 537.762
   • Statute of Limitations

D. Evidence/Issues
   • Expert Opinion – Missouri and Daubert
   • Subsequent Remedial Measures
   • Similar Occurrences
   • Continuing Duty to Warn
E. **Actual Damages**
   - Punitive Damages
   - Burden of proof
   - Constitutional issues
   - Statutory cap – **Mo. Rev. Stat. § 510.265**
   - State lien of 50% – **Mo. Rev. Stat. § 537.675**
   - Bifurcation/Credit – **Mo. Rev. Stat. § 510.263**

F. **Effect of Settlement**
   - **Mo. Rev. Stat. § 537.060**
Session 9

A. The case of Victor Victim v. Fossil Cars, Inc. (we will circulate the materials toward the end of the semester)

B. Review/Questions

-End-