Hi Product Liability Class!

We look forward to our class this year. We normally meet Mondays, 11:15 am-12:55 in the Courtroom (Room 112), and our first class will be Monday, January 27, 2020.

Attached is our syllabus – we have divided the class into 8 Sessions, and we will try to cover a session in each class period. We will not use a text book this year for this class – instead please read the cases, statutes and Restatement sections that are identified in the syllabus. All of these materials can be found on the Internet. If you would like to look at a good textbook on the subject, look at Products Liability, Cases and Materials, Fischer & Powers (5th ed.), which is available in the library. We would emphasize that it is very important that you read the materials for each sessions before class, as we will teach the class based on the assumption that you have already read the materials. The assignment for Monday, January 27 is the Session 1 material, and we will go from there. There will be several Mondays when we won’t have class – check your email – and there have been a few times when the weather prevented us from coming to Columbia.

As you probably know, I am adjunct faculty – and a product liability practitioner in Kansas City. I graduated from the law school in 1983, and I have been teaching this class as an adjunct since 2008. You can reach me by email at: rgeary@shb.com.

The final exam will be a summative/cumulative exam, closed book, multiple choice form, 50 questions. Our learning outcomes and objectives are:

Students will:
- learn the historical framework and public policy and practical considerations behind modern products liability law;
- become familiar with the required elements of and available defenses to various types of products liability actions;
• explore the effect of statutes, regulations and preemption in the products liability arena;
• gain practical knowledge useful to practicing in the area of products liability;
• gain knowledge relevant to answering product liability questions on the bar exams.

As you know, spring break week is March 23, 2020.

Thanks for signing up for our class – I look forward to meeting you and discussing product liability law with you!

Roger Geary
Product Liability  
2020 Class Sessions

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 “safer feasible alternative” part of plaintiff’s burden?
     — Is “state of art” a defense for the defendant?
   • 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?
    - **State ex rel J & J v. Karl**, 648 S.E.2d 899 (W. Va. 2007)
- 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
    - *Mulcahy 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.
- 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 the 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
    - Riegel v. Medtronic, 552 U.S. 312 (2008)
  - 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)

B. Complex Litigation
   Options where there are many plaintiffs.
   • F.R.Civ. P. 42 Consolidation
     — Matters may be consolidated for trial or hearing where there are common issues of law or fact.
   • F.R. Civ. P. 23 Class Actions
     — Requires class so numerous that joinder of all is impractical
— Requires common questions of law or fact
— Requires claims of representative parties to be typical
— Can have collateral estoppel effect for non-party class members where losing party lost identical issue necessary for final judgment

— **In re Rhone-Poulenc Rorer Inc.**, 51F.3d1293 (7th Cir. 1995)

• **28 USC §1407 Multi District Litigation**

— Applies to cases pending in federal courts
— Involving one or more common question of fact
— May be transferred to any District Court for coordinated or consolidated pretrial proceedings by
  (1) Judicial Panel on Multi District Litigation; or
  (2) motion filed with the panel by a party.
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.

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 – 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. 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

Session 8

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-