

PRODUCTS LIABILITY LAW, Fall 2009

Exam No. _____

FINAL EXAMINATION

Instructions: Read at Once. Each violation, however trivial, knocks at least 1 point off your grade. Any Honor Code violation will be treated quite harshly.

1. When you pick up the exam from Ms. Kate Dreier, write the date and time on the first line of the Certification below. Write your exam number at the top of this page, and at the top of your answer to each part of the exam. Ms. Dreier will also record this information.

2. Submit your exam answers as a Word Perfect or MS Word document, double-spaced with 12-point type and 1-inch margins, e-mailed to Ms. Dreier <kdreier@uark.edu>, **within 8 hours** after you pick up the exam or by Friday, Dec. 18, at 4:30 pm, whichever is earlier.

3. Return these exam questions to Ms. Dreier, in person or by mail, together with your signed Honor Code Certification below. Note the prohibition against copying the questions. The deadline for returning these questions is as follows. (a) If you return the questions in person, you must do so by 4:30 pm the day after you pick up the exam or Friday, Dec. 18, whichever is earlier. (b) If you return the questions by mail, the envelope must be postmarked by the first day after you submit your exam answers (or by the next Monday if you submit your answers on a Saturday). Mailed returns are to be sent to Ms. Kate Dreier, U of A School of Law, 1045 W. Maple, Fayetteville AR 72701.

4. The exam consists of Part I, five multiple choice questions counting for about a sixth of the exam grade; Part II, eight statements whose accuracy you are to evaluate briefly, counting for about a third; and Part III, an essay question counting for about one-half. Answers to each Part must begin on a separate page, with your exam number written first. Number each page. Note the maximum word limits in Parts II and III. I will not penalize answers slightly over the limit, but if an answer is significantly overlong, I will not give any credit for what is written beyond the limit.

5. **READ THIS. Restrictions:**

(a) During the exam you may refer to the coursebooks, your notes and outlines, and any handouts. **You may not access any computerized database** (Internet databases, TWEN/Westlaw, Lexis, etc.) **or any treatise or law review-type articles** during the 8-hour period when you are taking the exam.

(b) You may not communicate about any of the course or exam topics (1) with anyone having knowledge of the exam, from the time the exam is made available until Friday, Dec. 18 at 4:30 pm, or (2) with any person, from the time you pick up the exam until Friday, Dec. 18 at 4:30 pm.

- This silence is the price you pay for your flexibility in the exam's timing.
- Note: The Honor Code requires reporting any known or attempted violation.

HONOR CODE CERTIFICATION

I certify that (1) I picked this exam up at _____ (time) on Dec. ____ (date), and I returned my answers by e-mail at _____ on Dec. ____; (2) I have not violated and will not violate paragraph 5 of these instructions, which I have carefully read; and (3) I have neither made, nor caused or allowed to be made, a copy of the exam or any part of it.

(your signature)

PART I. MULTIPLE CHOICE.

Each question has one best answer. There is a minor penalty for guessing wrong. You may explain your answer in one sentence, if you wish, but explanations are neither required nor credited.

1. Product category liability is more widely accepted in the U.S. than market share liability.
 - A. True.
 - B. False, market share liability is more widely accepted.
 - C. It's basically a tie.

2. When challenging the constitutionality of an Arkansas statutory provision relating to evidence in products liability cases, before trial an attorney must:
 - A. check if other trial courts within the state have ruled on that provision's constitutionality.
 - B. check if the highest courts of other jurisdictions have ruled on the constitutionality of similar statutes in those jurisdictions.
 - C. check recent U.S. Supreme Court rulings relating to the separation of powers.
 - D. notify the state Attorney General of the intended challenge.
 - E. None of the above.

3. Which of the following products falls under the regulatory jurisdiction of the Consumer Products Safety Commission?
 - A. Truck trailers lacking side guard underride protection
 - B. Off-road "side-by-side" Rhino-type vehicles
 - C. "Fen-phen" diet pills
 - D. Grilled chicken products containing heterocyclic amines such as PhIP
 - E. None of the above

4. Which of the following products could be found defective without proof of fault or of unreasonable choices by the manufacturer – that is, on the basis of "true" strict liability?
 - A. Burgers contaminated by illness-causing *e. coli* bacteria
 - B. Tippable skid steer loaders ("Bobcats")
 - C. Acetabular hip implants placed in patients by surgeons with insufficient training
 - D. Zyprexa antipsychotic prescription medication causing morbid obesity
 - E. All of the above

5. Prescription drug failure-to-warn cases following the learned intermediary rule have the most in common, in terms of their rationale, with which one of these cases?
 - A. Cipollone v. Liggett Group, the tobacco failure-to-warn case
 - B. Tesmer v. Rich Ladder, the falling ladder case
 - C. Uniroyal v. Martinez, the exploding tire case
 - D. Anderson v. Somberg, the case of the pituitary rongeur that broke off in the patient's spine
 - E. Persons v. Salomon North America, the thermoplastic ski boot and bindings mismatch case

PART II. STATEMENT EVALUATIONS.

Maximum limit: 100 words per question

Each of the statements in Part II may be described as TTrue, FFalse, or AArguable. For some statements, where the issue is not open-and-shut but the arguments on one side are stronger, “Arguable but Likely True” (ALT) or “Arguable but Likely False” (ALF) may be the best description. State clearly which of these five descriptions (T, F, A, ALT, or ALF) best fits each statement, and in 100 words or fewer explain why. Part credit will be given for a correct answer and part for a persuasive explanation. There is no penalty for guessing wrong in Part II. Your explanations should draw on logic and legal principles, and may be enhanced by reference to authority or brief illustrations from course materials.

1. The Civil Justice Reform Act abolished joint and several liability in Arkansas.
2. In most U.S. jurisdictions, when an employee sues a manufacturer of a workplace product for an on-the-job injury and the proof shows that the injury was caused both by a defect in the product and by employer negligence, the product manufacturer can obtain contribution by the employer based on the finding of employer fault.
3. In most U.S. jurisdictions, product manufacturers may be held liable in some cases not only without proof of fault, but also without proof of a specific defect in the product associated with the plaintiff’s injury, even if the plaintiff failed to guard against an evident danger.
4. The state-of-the-art defense does not necessarily bar product liability claims where the allegedly defective product’s design complied with industry custom.
5. Under the Restatement (3d) approach, consumer expectations may sometimes be considered as part of the fundamental risk-utility balancing analysis, but (contrary to the law of some states) disappointment of consumer expectations alone may never serve as an independent basis for a finding of product defect.
6. On the issue of whether proof of a reasonable alternative design (RAD) is required for proof of design defect, Arkansas law and the Restatement (3d) are in fundamental disagreement.
7. When a defective product, due to its defective condition, self-destructs in dangerous fashion, but causes damage only to the product itself, under Arkansas law the accident does not give rise to a cause of action in strict liability or negligence against the product manufacturer.
8. When purchasing a corporation that manufactures products, an effective means for the buyer company to avoid assuming liability for defective products previously sold by the seller corporation is to purchase the seller corporation’s assets for cash.

PART III. ESSAY QUESTION.

Maximum limit: 2500 words

Jack Jones, a 65-year-old with a heart condition, was driving alone in his Toyota Camry south on College Ave. in Fayetteville on September 15, 2009, his seat belt buckled, the driver-side window open and his left elbow outside it. Suddenly the accelerator jammed and the car leapt forward. Jack stomped the brake pedal but the Camry kept speeding up, running stoplights and skidding wildly on the downhill curves. Finally the car flipped, rolled over twice, and came to rest in the parking lot of Penguin Ed's. The side airbags had deployed, and Jack's left elbow formed an odd angle.

Jack's troubles had only begun. After he arrived by ambulance at Washington Regional Hospital, Dr. Davis was setting his broken elbow when Jack went into cardiac arrest. Luckily the medical response time was quick, his condition was stabilized and a Medtronic heart pacemaker was implanted in his chest to avoid future cardiac episodes. Unluckily, a wire component connecting the pacemaker to the heart failed on Nov. 1, 2009. Jack had another heart attack Nov. 2, and he is not likely to live.

Jack's wife Jan read in the newspaper about Toyota's September 28, 2009 recall of 3.8 million vehicles, including the 2008 Camry, due to reports of driver-side floor mat entrapment of accelerator pedals. She consulted a partner in the Fayetteville law firm at which you are employed. The partner had a paralegal gather a few facts, noted below, and has turned the file over to you for preliminary analysis. The partner has instructed you to write a memo explaining the following:

1. What claims might the Joneses have, against whom, on what basis, and for what injuries? What authorities support each claim?
2. If you think that a particular claim may not succeed, explain why not.
3. If you lack sufficient information to evaluate a claim fully, describe what other information you need, how it would affect your evaluation of that cause of action, and how to obtain it.
4. Bottom line: Should we take this case? Why or why not? Or is it too soon to tell?

Facts unearthed by the paralegal:

- The National Highway Traffic Safety Administration had received 102 reports of jammed Toyota accelerators as of Sept. 28, 2009, including 13 crashes, five deaths and 17 injuries.
- Four people died in a Toyota Lexus driven by an off-duty policeman that crashed Aug. 28 at an estimated 120 mph. In a panicked 911 call, the doomed passengers said the accelerator was stuck and they were unable to turn off the engine.
- Toyota announced on Nov. 25, 2009 that it will provide all owners of recalled vehicles with newly designed replacement floor mats less likely to cause the accelerator to stick.
- In future models, Toyota will reconfigure the shape of the accelerator pedal and floor surface to increase the space between the accelerator pedal and the floor.
- In future models, Toyota will also install a brake override system to cut engine power in case of simultaneous application of both accelerator and brake pedals.
- The Camry owner's manual says, "NEVER rest your arm on top of the door or place your arm through an open window. . . . A seat occupant may be injured by an inflating side airbag if . . . an arm is resting on top of the door or protruding through an open window."
- The model of pacemaker that Jack received was recalled by Medtronic on July 1, 2009 due to multiple reports of wire failures, and the recall was designated Class I (urgent) by FDA. Notice of the recall reached every hospital in the nation. However, Jack's pacemaker, which Washington Regional had purchased in 2008, stayed in the hospital's inventory.