*Chapter 3*

**Tort Law and Product Liability**

Answers to Learning Objectives/

Learning Objectives Check Questions

at the Beginning and the End of the Chapter

**Note that your students can find the answers to the even-numbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.**

**1A.** ***What is defamation? Name two types of defamation.*** Wrongfully hurting another’s reputation is defamation. Doing so orally is *slander*; doing it in writing or in a form of communication that has the potentially harmful qualities characteristic of writing (pictures, signs, statues, and films) is *libel*.

**2A.** ***Identify the four elements of negligence.*** The four elements of negligence are as follows:

**1.** A duty of care owed by the defendant to the plaintiff.

**2.** The defendant’s breach of that duty.

**3.** The plaintiff’s suffering a legally recognizable injury.

**4.** The in-fact and proximate cause of that injury by the defendant’s breach.

**3A.** ***What is meant by strict liability? In what circumstances is strict liability applied?*** Strict liability is liability without fault. Strict liability for damages proxi­mately caused by an abnormally dangerous or exceptional activity, or the keep­ing of dangerous animals is an application of this doctrine. Another significant application of strict liability is in the area of product liability.

**4A.** ***What are three types of product defects?*** The three types of product defects traditionally recognized in product liability law are manufacturing defects, design defects, and defective (inadequate) warnings.

A manufacturing defect is a departure from a product unit’s design specifications that results in products that are physically flawed, damaged, or incorrectly assembled.

A product with a design defect is made in conformity with the manufacturer’s design specifications, but it nevertheless results in injury to the user because the design itself is flawed.

A product may also be deemed defective because of inadequate instructions or warnings about foreseeable risks. The seller or other distributor must include comprehensible warnings if the product will not be reasonably safe without them. The seller must also warn consumers about foreseeable misuses of the product.

**5A.** ***What defenses to liability can be raised in a product liability lawsuit?*** Defenses to product liability include plaintiff’s assumption of risk, product mis­use, and comparative negligence, as well as the attribution of injuries to com­monly known dangers. Also, as in any suit, a defendant can avoid liability by showing that the elements of the cause of action have not been properly pleaded or proved.

Answers to Critical Thinking Questions

**in the Features**

**Adapting the Law to the Online Environment—Critical Thinking**

***Should domain name hosting companies be liable for revenge porn?***In general, current law says no. For example, Section 230 of the 1996 Communications Decency Act protects Internet service providers (ISPs) from liability for user-generated content that they host. Also, domain name registrars and Web hosting companies such as GoDaddy.com do enjoy a safe harbor for user-generated content that they host, even when the content might be defamatory or might invade someone’s privacy.

**Beyond Our Borders—Critical Thinking**

***Could U.S. companies that sold Chinese drywall to consumers also be held liable for damages? Why or why not?*** Privity of contract is not required for lia­bility to arise under strict product liability laws. Therefore, a firm in the United States that sold the defective Chinese drywall could also be held liable for the in­juries it caused to consumers.

Answers to Critical Thinking Questions

**in the Cases**

**Case 3.1—Critical Thinking—Legal Consideration**

***Financing for the purchase of the property was conditioned on the bank’s review of Guido’s answers to the environmental questionnaire. How could the court conclude that the plaintiffs justifiably relied on misrepresentations made to the bank? Explain.*** Guido owned nine houses that lacked a functioning waste disposal system. When sewage was found on the property, Guido had the system partially replaced. Meanwhile, the Environmental Protection Agency found diesel fuel in samples of water from four of the houses. Guido listed the houses for sale. In response to questions from prospective buyer Revell’s bank, Guido denied any knowledge of environmental problems. Revell bought the houses.

Financing for the sale was conditioned on the bank's review of the environmental information that Guido supplied. Guido completed the bank’s questionnaire knowing, in general terms, that his answers would affect the sale of the property. The questionnaire identified Revell as the purchaser of the property. Under these circumstances, Revell could properly rely on the representations made to the bank in the answers on the questionnaire. “Simply put,” the court concluded, “Guido spoke false and deceitful words to [Revell] through the bank just as effectually as if they had met face to face.”

**Case 3.2—Critical Thinking—Ethical Consideration**

***Would the result in this case have been different if Taylor’s minor son, rather than Taylor herself, had been struck by the ball? Should courts apply the doctrine of assumption of risk to children? Discuss.*** There is no legal bar to applying assumption of risk to children. Children are expected to use the degree of caution required of a child of like age and intelligence under similar circumstances. The courts have therefore applied the doctrine of assumption of the risk in numerous cases, such as when a child was injured while playing on a trampoline, swinging from a rope swing, or diving into a swimming pool. The key is whether the child knew of the danger, was able to appreciate the risks associated with it, and voluntarily chose to run the risk. Normally, it is up to a jury (or a judge in a bench trial) to decide if the facts indicate that the child voluntarily undertook the risk.

**Case 3.3—Critical Thinking—Legal Consideration**

***Could VeRost succeed in an action against Nuttall alleging that the company’s failure to maintain the forklift in a safe condition constituted negligence? Discuss.*** Yes, VeRost could succeed in an action against Nuttall, alleging negligence in failing to maintain the forklift in a safe condition.

In this case, VeRost was working at a facility owned by Nuttall Gear, LLC, when he was injured in an accident involving a forklift made by Mitsubishi Caterpillar Forklift America, Inc. In VeRost’s subsequent suit against Mitsubishi, the maker proved that the forklift was not defective on the basis of its design or manufacture—when it was made and delivered to Nuttall, it had a safety switch that would have prevented plaintiff's accident. But someone thereafter modified the forklift by disabling the safety switch. If that modification could be attributed to Nuttall, the employer could be liable for VeRost’s injury.

In the *VeRost* case, Verost initially filed his suit against Mitsubishi and Nuttall. The court issued a judgment in favor of Mitsubishi and dismissed the complaint against Nuttall. The appellate court reinstated the claim against Nuttall, based on the findings and reasoning noted here.

Answers to Questions in the Reviewing Feature

at the End of the Chapter

**1A.** ***Defense***

The strongest defense will be assumption of the risk, which is common in sports. That defense is strengthened by the state statute that formalizes the defense.

**2A.** ***Statute***

Yes, because the statute strengthened the traditional common law rule. The legislature can change or limit common law rules, such as those for liability. Here the legislature strengthened the rule of assumption of the risk, which makes it very difficult for a plaintiff to overcome.

**3A.** ***Effect of statute***

No, because of assumption of the risk. The defense of assumption of the risk would still likely be a successful defense for the ski resort. That rule generally applies to participants in sporting events unless the host creates unreasonably dangerous conditions and does not warn clients.

**4A.** ***Proportioned damages***

Comparative negligence allows the jury to compute the contributions of both parties to the situation. This results in the reduction or elimination of the plaintiff’s recovery, depending on the state rule and the percent of negligence contributed.

Answer to Debate This Question in the Reviewing Feature

at the End of the Chapter

***All liability suits against tobacco companies for lung cancer should be thrown out of court now and forever.*** It is difficult to believe that those who smoked in the past and those who smoke tobacco products today didn’t or don’t know about the health dangers of smoking.  After all, even 75 years ago, before any research was carried out, kids called cigarettes “coffin nails.”  Common sense tells anyone that inhaling smoke into one’s lungs cannot have a positive effect on one’s health.  Cigarettes are just another product that individuals have the choice to buy or not to buy.  There should be no liability issues here.

Cigarette companies for years promoted the glamour and even the safety of smok­ing, so tobacco manufacturers should be liable for the deaths caused by cigarette smok­ing, at least those that occurred in the past.  There is uncontroverted proof that the ads for cigarette smoking were misleading because they played down the negative health ef­fects of this activity.  Any time false advertising is an issue, companies that engage in it should be held liable for the results of such advertising.

Answers to Issue Spotters

at the End of the Chapter

**1A.** ***Jana leaves her truck’s mo­tor running while she enters a Kwik-Pik Store. The truck’s transmission engages and the vehicle crashes into a gas pump, starting a fire that spreads to a warehouse on the next block. The warehouse col­lapses, causing its billboard to fall and injure Lou, a bystander. Can Lou recover from Jana? Why or why not?*** Probably. To recover on the basis of negligence, the injured party as a plaintiff must show that the truck’s owner owed the plaintiff a duty of care, that the owner breached that duty, that the plaintiff was injured, and that the breach caused the injury. In this problem, the owner’s actions breached the duty of reasonable care. The billboard falling on the plaintiff was the direct cause of the injury, not the plaintiff’s own negligence. Thus, liability turns on whether the plaintiff can connect the breach of duty to the injury. This involves the test of proximate cause—the question of foreseeability. The consequences to the injured party must have been a foreseeable result of the owner’s carelessness.

**2A.** ***Rim Corporation makes tire rims that it sells to Superior Vehicles, Inc., which installs them on cars. One set of rims is defective, which an in­spection would reveal. Superior does not inspect the rims. The car with the defective rims is sold to Town Auto Sales, which sells the car to Uri. Soon, the car is in an accident caused by the defective rims, and Uri is in­jured. Is Superior Vehicles liable? Explain your answer.*** Yes. The manufac­turer is liable for the injuries to the user of the product. A manu­facturer is liable for its failure to exer­cise due care to any person who sustains an injury proxi­mately caused by a neg­ligently made (defective) product. In this scenario, the failure to inspect is a failure to use due care. Thus, Rim Corporation is liable to the injured buyer, Uri. Of course, the maker of the component part may also be liable.

Answers to Questions and Case Problems

**at the End of the Chapter**

**Business Scenarios and Case Problems**

**3–1A. *Liability to business invitees***

Yes. An occupier of the premises has a duty to use ordinary care to keep its premises in a reasonably safe condition and to warn customers of any foresee­able hazards. What constitutes a foreseeable hazard depends on whether a rea­sonably prudent person would conclude that harm could likely result from the conditions. Here, the manager knew of the storm conditions, knew that wa­ter accumulated rapidly on the floor, and knew or should have known that the wa­ter created a hazard. A court could find that the manager’s failure to re­move the water constituted negligence, and the manager could be held liable for Kim’s injuries.

**3–2A. *Design defects***

Carmen’s mother can bring a suit against AKI under a theory of negligence or strict liability. Under negligence theory, Carmen’s mother would have to show that AKI failed to exercise due care to make the product safe and that this breach of duty was the proximate cause of the damages.

If Carmen’s mother brings a suit under a theory of strict liability, according to the *Restatement (Second) of Torts,* she needs to establish six basic requirements of strict prod­uct li­ability, which are as follows: (1) the defendant must sell the product in a defec­tive condition; (2) the defendant must normally be engaged in the busi­ness of selling the product; (3) the product must be unrea­sonably dangerous to the user or consumer because of its defective condition; (4) the plaintiff must incur physi­cal harm to self or property by use or consumption of the product; (5) the defec­tive condition must be the proximate cause of the in­jury or damage; and (6) the goods must not have been substantially changed from the time the product was sold to the time the injury was sustained.

Under either theory (negligence or strict liability), privity of con­tract is not required. Some courts may not allow re­covery for property damage unless personal injury also occurs.

**3–3A. *Defenses to product liability***

To establish a strict product liability claim, a plaintiff must show among other things that the product was in a defective condition, unreasonably dangerous to the user. A product can be defective and unreasonably dangerous if it is not equipped with necessary safety features.

But a product is not defective simply be­cause it does not have all the optional safety features that could be included. For example, a bicycle is safer when it is equipped with lights, but a bicycle not so equipped is not defective and unreasonably dangerous.

Textron could argue that the same reasoning could be applied here: the golf car was not defective and un­reasonably dangerous merely because it did not have lights. A product can be de­fective and unreasonably dangerous if it does not come with adequate warnings. But a product is not defective for failing to warn of a commonly known danger. Textron could contend that the operation of an unlighted golf car on a public highway at night presents a commonly known risk. Consequently, the golf car was not rendered defective and unreasonably dangerous by Textron’s failure to warn against nighttime operation on public roads.

As for the negligence claim, there is similarly no duty to warn of a danger that is commonly known. Against the negli­gence claim, Textron might also assert a defense of comparative negligence, con­tending that Stroud was negligent in driving the unlit golf car at night on a public road. On these defenses, the court granted a summary judgment in Textron’s fa­vor. On the plaintiffs’ appeal, a state intermediate appellate court affirmed.

**3–4A. *Intentional infliction of emotional distress***

The court found that the facts alleged in the complaint, if true, were sufficient to establish Kiwanuka’s claim of intentional infliction of emotional distress. There was evidence that Bakilana, on a daily basis, used her position of power and control over Kiwanuka to engage in an intentional pattern of outrageous verbal abuse against her. The complaint further alleged that Bakilana intentionally interfered with Kiwanuka’s attempts to form relationships or acquaintances, thereby deepening Kiwanuka’s suffering of isolation and distress. These allegations were sufficient to show extreme and outrageous conduct, intentionally committed, that resulted in severe emotional distress to Kiwanuka. Therefore, the court held that Kiwanuka’s claim for intentional infliction of emotional distress could be tried.

**3–5A. Business Case Problem with Sample Answer—*Product defects***

The accident was caused by Jett’s inattention, not by the texting device in the cab of his truck. In a product-liability case based on a design defect, the plaintiff has to prove that the product was defective at the time it left the hands of the seller or lessor. The plaintiff must also show that this defective condition made it “unreasonably dangerous” to the user or consumer. If the product was delivered in a safe condition and subsequent mishandling made it harmful to the user, the seller or lessor normally is not liable. To successfully assert a design defect, a plaintiff has to show that a reasonable alternative design was available and that the defendant failed to use it.

The plaintiffs could argue that the defendant manufacturer of the texting device owed them a duty of care because injuries to vehicle drivers and passengers, and others on the roads, were reasonably foreseeable. They could claim that the product’s design (1) required the driver to divert his eyes from the road to view an incoming text from the dispatcher, and (2) permitted the receipt of texts while the vehicle was moving.

But manufacturers are not required to design a product incapable of distracting a driver. Theduty owed by a manufacturer to the user or consumer of a product does not require guarding against hazards that are commonly known or obvious. Nor does a manufacturer’s duty extend to protecting against injuries that result from a user's careless conduct, such as Jett’s carelessness in this situation.

**3–6A. *Negligence***

Yes, Rawls could obtain benefits from Progressive Northern Insurance Co. under an underinsured motorist clause, on the ground that Bailey had been negligent. To succeed in a negligence action, the plaintiff must prove that (1) the defendant owed a duty of care to the injured party (plaintiff), (2) the defendant breached that duty, (3) the breach was the cause of harm to the plaintiff, and (4) the harm to the plaintiff was a legally recognizable injury. The duty must be such that a reasonable person engaging in the same activity would anticipate a risk of the negative consequences and guard against it.

In this problem, Zabian Bailey rear-ended Rawls at a stoplight. According to the facts, the evidence showed it was more likely than not that Bailey failed to apply his brakes in time to avoid the collision, failed to turn his vehicle to avoid the collision, failed to keep his vehicle under control, and was inattentive to his surroundings. Bailey’s duty to Rawls included any and all of thee precautions—braking in time, turning the vehicle, keeping the vehicle under control, and remaining attentive to the surroundings. Clearly, Bailey breached this duty, and the breach caused whatever harm Rawls suffered—damage to his vehicle and injury to himself. Depending on whether Bailey was grossly negligent, punitive damages might be appropriate.

In the actual case on which this problem is based, a jury found in Rawls’s favor, and the court entered a judgment against Progressive. On the insurer’s appeal, a state intermediate appellate court reversed, but on further appeal the state supreme court reversed again, holding that the evidence supported the jury’s findings in Rawls’s favor.

**3–7A. *Negligence***

Yes, West Star was negligent in failing to provide a reasonably safe place to work. Central to the tort of negligence is the concept of duty of care. Tort law measures duty by the reasonable person standard—how a reasonable person would have acted in the same circumstances. But the degree of care to be exercised varies, depending on the person’s profession, his or her relationship with the injured party, and other factors—in other words, it is what a reasonable person in the position of the defendant in a negligence case would have done in the particular circumstances.

In this problem, West Star Transportation, Inc., ordered its employee Charles Robison to cover an unevenly loaded flatbed trailer with a heavy tarpaulin. The load was ungainly, uneven, and about thirteen feet above the ground at its highest point. Manipulating the tarpaulin without safety equipment or assistance, Charles fell from the load and sustained a head injury. West Star owed a duty to its employee to exercise reasonable care, but West Star did not do what a shipper of ordinary prudence would have done under the same or similar circumstances. West Star should have refused to handle a load requiring unreasonably dangerous tarping or the company should have taken appropriate safety precautions.

In the actual case on which this problem is based, a jury found that West Star's negligence proximately caused the incident. On West Star’s appeal, a state intermediate appellate court affirmed.

**3–8A. *Strict product liability***

Watts might recover from Medicis in an action grounded in product liability on proven allegations that the drug was unreasonably dangerous because Medicis failed to provide adequate warnings of its known dangers. A product’s maker or seller is liable for products that are so defective as to be unreasonably dangerous. This exists when a product is dangerous beyond the expectation of the ordinary consumer or a less dangerous alternative was economically feasible, but the maker or seller failed to use it. A product may be deemed unreasonably dangerous because of inadequate instructions or warnings.

In the fact of this problem, Medicis Pharmaceutical Corp. made Solodyn, a prescription drug. Medicis warned prescribing physicians that “autoimmune syndromes, including drug-induced lupus-like syndrome,” are possible from the use of the drug. Amanda Watts’s physician prescribed Solodyn for her acne. An insert included with the drug did not mention the risk of autoimmune disorders, and Watts was not otherwise advised of it. Later, she was diagnosed with lupus.In other words, Medicis did not adequately warn Watts about the risks of Solodyn and the inadequacy of the warning contributed to Watts's injuries.

In the actual case on which this problem is based, Watts filed a suit in an Arizona state court against Medicis to recover for her injuries. The court dismissed her complaint. A state intermediate appellate court vacated the dismissal and remanded the case, based in part on the reasoning stated above.

**3–9A. A Question of Ethics—*Wrongful interference***

**1.** The New York Court of Appeals recognized that “[a]t bottom, as a matter of policy, courts are called upon to strike a balance between two valued interests: protec­tion of enforceable contracts, which lends stability and predictability to parties' deal­ings, and promotion of free and robust competition in the marketplace.” The court ac­knowledged that actions might be based on both prospective and existing contracts, but “greater protection is accorded an interest in an existing contract (as to which respect for individual contract rights outweighs the public benefit to be derived from unfettered competition) than to the less substantive, more speculative interest in a prospective re­lationship (as to which liability will be imposed only on proof of more culpable conduct on the part of the interferer).”

The court pointed out that “[a] defendant who is simply plaintiff's competitor and knowingly solicits its contract customers is not economically justified in procuring the breach of contract.” In other words, “[w]hen the defendant is simply a competitor of the plaintiff seeking prospective customers and plaintiff has a customer under contract for a definite period, defendant's interest is not equal to that of plaintiff and would not justify defendant's inducing the customer to breach the existing contract.”

**2.** The New York Court of Appeals’ answer to the question was no, absent a prior economic relationship, a general economic interest in making a profit was not a sufficient defense to wrongful interference with a contractual relationship. “One who intentionally and improperly interferes with the performance of a contract .  .  . between another and a third person by inducing or otherwise causing the third person not to per­form the contract is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.”

The court explained that “the plaintiff must show the existence of its valid con­tract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. In response to such a claim, a defen­dant may raise the .  .  . defense that it acted to protect its own legal or financial stake in the breaching party's business.”

The court acknowledged, however, that “protecting existing contractual relation­ships does not negate a competitor's right to solicit business, where liability is limited to improper inducement of a third party to breach its contract. Sending regular advertis­ing and soliciting business in the normal course does not constitute inducement of breach of contract. A competitor's ultimate liability will depend on a showing that the inducement exceeded a minimum level of ethical behavior in the marketplace.”

**Critical Thinking and Writing Assignments**

**3–10A. Business Law Critical Thinking Group Assignment**

**1.** The court should grant the manufacturer’s motion for summary judg­ment and dis­miss D’Auguste’s complaint. There is no proof as to whether the crack in the heel housing was substantial enough to have caused D’Auguste’s left ski to come off, whether the crack existed before the accident, or whether the crack resulted from the impact during the accident. In fact, there is no proof that the crack was in the binding at­tached to the left ski. In other words, there is no evidence that the crack constituted a defect. Furthermore, the “snap off” of the left ski may have been caused, not by a defect in the binding, but by negligence in the setting of the bindings.

**2.** The court should deny the manufacturer’s motion for summary judg­ment and allow D’Auguste’s claim to proceed. Despite the lack of proof with re­spect to the cracked heel housing noted in the previous answer, D’Auguste could still shoe that there was a defect in the binding and succeed in his ac­tion if he could prove that the product did not perform as intended and exclude all other causes for the product’s failure that are not attributable to the de­fendant.