Chapter 5

**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-numberednumbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.**

**1A.** ***Can a manufacturer be held liable to any person who suffers an injury proximately caused by the manufacturer’s negligently made product?*** Yes. Privity of contract is not required for recovery by an injured plaintiff on the ground of negligence in a product liability action. In other words, a manufac­turer is liable for its failure to exercise due care to any person who sustains an injury proximately caused by a negligently made product, regardless of whether the in­jured person is in privity with the manufacturer.

**2A.** ***What public policy assumptions underlie strict product liability?*** The law imposes strict product liability as a matter of public policy. This public policy rests on the threefold assumption that:

**1.** Consumers should be protected against unsafe products.

**2.** Manufacturers and distributors should not escape liability for faulty products simply because they are not in privity of contract with the ultimate user of those products.

**3.** Manufacturers, sellers, and lessors of products are generally in a better position than consumers to bear the costs associated with injuries caused by their products—costs that they can ultimately pass on to all consumers in the form of higher prices.

**3A.** ***What are the elements of a cause of action in strict product liability?*** Under Section 402A of the *Restatement (Second) of Torts,* the elements of an action for strict product liability are as follows:

**1.** The product must be in a defective condi­tion when the defendant sells it.

**2.** The defendant must normally be engaged in the business of selling (or distributing) that product.

**3.** The product must be unrea­sonably dangerous to the user or con­sumer because of its defective condi­tion (in most states).

**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.

**6.** The goods must not have been substan­tially changed from the time the product was sold to the time the injury was sustained.

**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

**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.

**Linking Business Law to Corporate Management—Critical Thinking**

***Quality control leads to fewer defective products and fewer lawsuits. Consequently, managers know that quality control is important to their company’s long-term financial health. At the same time, the more quality control managers impose on their organization, the higher the average cost per unit of whatever is produced and sold. How does a manager de­cide how much quality control to undertake?*** First, a manager has to deter­mine whether she or he is maximizing short- or long-run profits for the company. While there may be a tendency to maximize short-run profits, in the long run, profits could be lower if only short-run decisions are made. In other words, short-run profit maximization means reduced quality control activities within an or­ganization. Increased warranty and product liability lawsuits may not occur for a year or two or even later. In today’s business environment, most companies have also to look at the long run. Therefore, managers will institute quality control systems that will lead to maximum long-run profits. That means that they will compare the cost of increased quality control with the long-term benefits of having not only fewer lawsuits, but also a better reputation and better customer relations.

Answers to Critical Thinking Questions

in the Cases

**Case 5.1—Critical Thinking—Political Consideration**

***If the public wants to change the policy applied outlined in this case, which branch of the government—and at what level—should be lobbied to make the change? Explain.*** The statute at the heart of this case is the National Childhood Vaccine Injury Act of 1986 (NCVIA). The branch of the government that should be lobbied by the advocates for a change in the policy expressed through the statute is the legislative branch. Any change should be sought through the legislative process at the federal level by lobbying Congress. The reason is that the NCVIA is a federal statute.

**Case 5.2—Critical Thinking—Legal Environment Consideration**

***By what means did the plaintiff most likely discover the defendant’s studies of an alternative design for the door-latch system?*** The plaintiff most likely discovered the defendant’s studies of an alternative design through the means of discovery. Discovery includes gaining access to documents and other types of evidence. Generally, discovery is allowed regarding any matter that is relevant to the claim of any party.

In this case, the plaintiff might have learned of the defendant’s studies of an alternative design through a deposition, an interrogatory, a request for admission, a request for documents, or electronic discovery.

**Case 5.3—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.** ***Product liability***

Kolchek may sue the manufacturer Great Lakes for product liability based upon negli­gence. Furthermore, she may assert claims against Great Lakes and Porter, as a mem­ber of the distributive chain, for strict product liability based upon design defects associ­ated with the spa and inadequate warnings with respect to its use.

**2A.** ***Privity of contract***

Injured consumers may bring claims sounding in product liability or strict liability against manufacturers despite the absence of a direct contractual relationship. Potential defendants to such actions include manufacturers, sellers, and lessors.

**3A.** ***Requirements***

Plaintiffs in strict product liability cases must show the product was in a defective con­dition when it was sold, the defendant sells or distributes such products in the ordinary course of business, the product was unreasonably dangerous, the plaintiff suffered physical harm or injury to property as a result of use of the product, the injury was proximately caused by the defect, and the product was not substantially changed from the time it was sold to the time the injury occurred.

**4A.** ***Defenses***

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. Leaving a six year old unattended in the spa may be deemed negligent and thereby reduce the plaintiff’s ultimate recovery.

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.** ***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.

**2A.** ***Bensing Company manufactures generic drugs for the treatment of heart disease. A federal law requires generic drug makers to use labels that are identical to the labels on brand-name versions of the drugs. Hunter Rothfus purchased Bensing’s generic drugs in Ohio and wants to sue Bensing for defective labeling based on its failure to comply with Ohio state common law (rather than the federal labeling requirements).*** ***What defense might Bensing assert to avoid liability under state law?***  Bensing can assert the defense of preemption. An injured party may not be able to sue the manufacturer of defective products that are subject to comprehensive federal regulatory schemes. If the federal government has a comprehensive regulatory scheme (such as it does with medical devices and vaccines), then it is assumed that the rules were designed to ensure a product’s safety and the federal rules will preempt any state regulations. Therefore, Bensing could not be held liable under state law if it complied with the federal drug-labeling requirements.

Answers to Questions and Case Problems

**at the End of the Chapter**

**Business Scenarios and Case Problems**

**5–1A. *Product liability***

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.

**5–2A. *Product liability***

The court should rule in favor of the manufacturer, finding that the gun did not malfunction but performed exactly as Clark and Wright expected. The court should also point out that Clark and Wright appreciated the danger of using the guns without protective eyewear. Clark offered no proof that the paintball gun used in the incident failed to function as expected. He was aware that there was protective eyewear available but he chose not to buy it. He was an active partici­pant in shooting paint­balls at other vehicles. The evening of the incident Clark carried his paintball gun with him for that purpose. Wright also knew it was dan­gerous to shoot someone in the eye with a paintball gun. But the most crucial tes­timony was Wright’s statement that his paintball gun did not malfunction.

**5–3A. *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.

**5–4A. *Product liability***

If there were any inadequacies in the warning label, they were not a substan­tial factor in bringing about the injuries suffered. It was Chow’s responsibility to read the label, which covered the factors involved in the incident. So that claim is properly dismissed. As to the claim of design defect, Chow must estab­lish that the product was not reasona­bly safe and that it was feasible to design it in a safer manner. The claim of an expert that backsplash is a common prob­lem does not mean there is a safer design. There was no evidence offered of a superior, safer design of the product in question so the claim was properly dismissed.

**5–5A. *Strict product liability***

No. Dobrovolny’s claim is not likely to succeed. The majority of states recognize strict product liability. The purpose of strict product liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers rather than by the injured persons. The law imposes this liability as a matter of public policy. Some state courts limit the application of the tort theory of strict product liability to situations involving personal injuries rather than property damage.

In this problem, Nebraska recognizes strict product liability, but the state’s courts limit its application. The issue is whether these limits apply when a prod­uct self-destructs without causing damage to persons or other property. When a product injures only itself, the reasons for imposing liability in tort lose their sig­nificance. The consumer has not been injured, and the loss concerns the con­sumer’s benefit of the bargain from the contract with the seller of the product.

Although a consumer with only a damaged product may not recover in tort, the consumer is not without other remedies. Recovery can be sought on a contract theory for breach of warranty. Product value and quality are the purposes of war­ranties. Thus, even though the court is likely to deny Dobrovolny’s strict product liability claim, he might seek to recover for breach of warranty on contract princi­ples for the loss of his truck. If there were no express warranties that the truck would not spontaneously combust, relief may be possible for breach of the implied warranty of merchantability or fitness for a particular purpose. In the actual case on which this problem is based, the court issued a decision in Ford’s favor.

**5–6A. *Product misuse***

No, Ford could not succeed on a claim that Cheyenne had misused the seatbelt. Product misuse occurs when a product is used for a purpose that was not in­tended. This defense has been severely limited by the courts. It is recognized as a defense only when the particular use was not reasonably foreseeable. Manufacturers and suppliers are required to expect reasonably foreseeable mis­uses and to design products that are safe when misused or marketed with a pro­tective device, such as a childproof cap.

In the facts of this problem, Cheyenne was too young to be negligent, and it is reasonably foreseeable that a child would wear a seatbelt incorrectly without understanding the risks.

In the actual case on which this problem is based, the court issued a judg­ment in Cheyenne’s favor.

**5–7A. Business Case Problem with Sample Answer—*Product liability***

Here, 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 contend 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 due to the product’s design that (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 or protecting against injuries that result from a user's careless conduct. That is what happened here.

In the actual case on which this problem is based, the court reached the same conclusion, based on the reasoning stated above, and an intermediate appellate court affirmed the judgment.

**5–8A. *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.

**5–9A. A Question of Ethics—*Strict product liability***

**1.** The state supreme court held that the “ordinary consumer of a lighter, such as the Aim N Flame here, is an adult—the typical user and pur­chaser. Therefore, the expectations regarding the Aim N Flame's use and safety must be viewed from the point of view of the adult consumer.” The court held that the lighter met this test. “The purpose of a lighter, such as the Aim N Flame, is to produce a flame. Clearly then, the ordinary consumer would expect that, when the trigger is pulled, a flame would be produced. Here, the Aim N Flame was not used in its intended manner, i.e., by an adult.” But “[a]n ordinary consumer would ex­pect that a child could obtain possession of the Aim N Flame and attempt to use it. Thus, a child is a reasonably foreseeable user. Likewise, an ordinary consumer would appreciate the consequences that would naturally flow when a child obtains possession of a lighter. Specifically, an ordinary consumer would expect that the Aim N Flame, in the hands of a child, could cause the result that occurred here—the starting of a fire that led to injury to a child. .  .  . In other words, the Aim N Flame did not fail to perform as an ordinary consumer would expect when used in a reasonably foreseeable manner. Thus, as a matter of law, no fact finder could conclude that the Aim N Flame was unreasonably dangerous under the consumer-expectation test.”

**2.** Among the factors to be considered in this context are the magnitude and probability of the foreseeable risks of a product. To be weighed in the balance is the product’s utility. Under these considerations, according to the court in the Calles case, “[i]f the likelihood and gravity of the harm outweigh the benefits and utilities of the product, the product is unreasonably dangerous.” The court disa­greed with Scripto’s contention, reasoning that “the open and obvious nature of the risk is just one factor .  .  . , and it will only serve to bar the liability of the manufacturer where it outweighs all other factors.” To hold as Scripto contended “would essentially absolve manufacturers from liability .  .  . even though there may be a reasonable and feasible alternative design available that would make a product safer, but which the manufacturer declines to incorporate because it knows it will not be held liable. This would discourage product improvements that could easily and cost-effectively alleviate the dangers of a product.” Such a rule “would also frustrate the policy of preventing future harm which is at the heart of strict liability law.”

**3.** The court issued a summary judgment in Scripto’s favor, but on Calles’s appeal, a state intermediate appellate court reversed this judgment, and Scripto appealed to the Illinois Supreme Court, which affirmed the lower appel­late court’s ruling, remanding the case for trial on Calles’s strict liability claims. The state supreme court considered a number of factors to determine whether the lighter was an unreasonably dangerous product, but concluded that “reasonable persons could differ on the weight to be given the relevant factors, particularly where additional proofs are necessary, and thus could differ on whether the risks of the Aim N Flame outweigh its utility. Therefore, reasonable persons could dif­fer as to whether the Aim N Flame is unreasonably dangerous, and we cannot say that Scripto was entitled to judgment as a matter of law.”

**Critical Thinking and Writing Assignments**

**5–10A. 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.