Taft Law School

Electronic Classroom – Baby Bar Mini Series

04/23/19 6:00 ‑ 7:00 PM

>> INSTRUCTOR: Good evening, everybody. Welcome to tonight's baby bar mini-series. We'll be starting in approximately five minutes. Thank you.

Good evening, everybody. Welcome to tonight's baby bar mini-series. We'll be started in approximately two minutes. If you can make sure you have the Grain Co. exam in front of you, that's our primary focus for tonight's lecture. Again, begin in approximately two minutes. Thank you.

Before we get started, the person that had the question in in regards to your multiple choice questions. Those are usually sent out with your essay on Wednesday, and then on Monday she generally sends out the actual answers. Students like it that way because they want to do it on their own versus knowing they have the answer and looking at it versus working through the process themself. So I would check your email from Wednesday.

All right. First thing I want to point out is that these sessions are recorded. For your convenience, if you miss a session or want to go back and review it go to Taft's Web site, the student section, and click on the baby bar mini-series. Anything we're reviewing, such as tonight like the essay question or the multiple choice questions, everything's posted there for you for your convenience. If you can't find your email with the questions, that's another place to get them. They should be up in the next few days.

All right. So let's go ahead and look at the essay question. Hopefully all of you did take a chance to look at it at least issue spot it. I only got one student that actually wrote it. This is something you want to do why? Looking at exams and kind of going throughout process helps two ways. One, your timing. Do I have my timing down? A lot of times, surprise we don't. We don't want surprises at the baby bar so it's important for you to take simulated exams and timed exams. In regards to going through the step or the process, are you seeing the issues? The more exams you expose yourself to and understand what kind of feedback in essence in regards to the issues are you missing, that's gonna help you.

In regards to an actual critique, if I get really flooded, I'll give a quick overview. When I get one or two, it's easy for me to go through it and get feedback. That's helpful. If that's a way, too, to help you write exams, I'm willing to put the time in to get you the write exams. That's important.

Let's go ahead and look at this essay question. The one thing I want to point out, too, is to always look at the call of the question. Always need to start off with the call of the question. Looking at this particular exam: On what theory or theories might the injured milk consumers recover damages from, and

what defenses should they anticipate, in actions against: Grain Co., Farmer Jones, and Big Food. Now, obviously when you see this type of call, I have a general idea what's being tested, but do you? This is something, again, with practice and the more exams you get exposed to you'll start seeing that and of course break that apart appropriately, which is important.

Now, in regards to the exam here, it says what theories. What does that mean? I'm looking for what? Two or more. It says might the injured milk consumers recover damages. Damages singular versus plural. That only tells me general special damages should be looked at. What you're gonna see, especially on the baby bar, is they have a tendency to put that in the call but never give you facts. The call tells me I need to address it. It says what defenses? That's rather odd as well. What defenses?

Now, in looking at this I know I have two or more theories; I know I have damages, two, and defenses two or more. But what does defenses mean? And you read this, you know when you go through this and you're seeing negligence, what defenses come to mind assumption of the risk. Contributory negligence, comparative negligence. The milk consumers didn't do anything. There's nothing in the facts suggest they were aware it was tainted. It had mercury base, nothing. So generally defenses can mean true defenses or counterarguments so be aware of that. Why? You have to make sure you answer the call. That's where your point value is.

The other thing I want to point out, this is a very general type call. What that means is your point value will become based on your issue spotting as well as your analysis, versus if the call said will there be liability or strict liability, that's very specific. Your point value's really gonna come into the point analysis.

The other thing I want you to be aware of is I obviously look to the baby bar as well as the bar exam. I notice on the bar exam they're starting to change their calls. One from the last bar was what claims may Carol reasonably raise against Dan what arguments Dan reasonably make, and what is the likely outcome. So claims is very similar to theories; two or more; right? He used the term arguments. So I want you to be aware of that term as well in the call. Arguments, again, can be true defenses or counterarguments. Maybe the bar has a tendency to start going that direction more. Usually when you see the call like this that we're looking at tonight defenses people obviously go to defenses. Contributory, comparative, assumption of the risk. They don't think counterarguments. Maybe that's the bar's way of saying people when I say arguments that could be a counterargument versus an actual defense itself. I want you to be aware of that. The more we can understand what the call is asking obviously the better chance we have in answering the call of the question don't we?

The other thing I want you to be aware of in regards to the call, a lot of people guess what? Don't do well because they do not answer the call of the question. So I want to make sure you answer the call. That's very important. Always go back to it before you commit yourself to typing in the exam and look at your outline and make sure we did what? Answered the call. It's funny that I have to say that. Again, a lot of times we go on a tangent because we see some issue and never go back and really pay attention to the call of the question, which is especially true of the multiple choice questions. A lot of times when we get things done, which you'll see a couple tonight people were asking about, you didn't pay attention to the call because, again, even though you might find plaintiff sues defendant, but the call that says what's the defendant's best chances of getting out of the claim, you're focusing on a way to relieve them of the liability. So the call did dictate; right?

Start off with the facts. Grain Co. purchases grain from farmers each fall to resell as seed grain to other farmers for spring planting.

The first sentence tells you the purpose when they buy this obviously, they're gonna resell it.

Because of problems presented by parasites which attack and eat seed grain that is stored for more than a few months, Grain Co., like all seed grain dealers, always treats the seed grain it purchases with an invisible mercury‑based chemical to poison these parasites.

Now, what is that telling you right off the bat? Well, it's customary, right, in the industry isn't it? So again, what's that telling me? Everybody else does it. But does that make it permissible? It also says it's an invisible mercury‑based chemical. Why is it invisible? I'm already thinking the type of defect is a problem with the design defect. Again, if it was color based and if this is the type of business that I did and it's going to be neon green, I'd be aware it had the mercury‑based poison in the seed, wouldn't I?

Grain Co. sells the seed grain loose by the truckload to the farmers who will plant the seed. The Grain Co. trucks display signs that state: "Seed Grain. Not for Use in Food Products."

So that is a what? A type of warning. So the issue is, is that adequately warning? You and I obviously on the roads all the time and we see things stated on trucks that maybe it's a used truck and we don't pay attention, or what's even stated on the truck is not the primary business of the truck anymore. Do people really pay attention to that? That's an argument you're gonna have to make as to whether or not this is adequate warning.

Paragraph 2 states:

Farmer Jones bought a truckload of seed grain from Grain Co. She was present when the seed grain was delivered, and supervised the Grain Co. employees who unloaded the seed grain into her silos.

She's present. What's that telling you? Should she have been aware of the truck that displays the sign "seed grain ‑‑ not for use in food product"?

She then used some of the seed grain to sow her field. When she found that she had some seed grain left over, she fed it to her dairy cattle.

The first purposes in regards to her field is proper, but the fact that she fed it to her cattle. Whoops. The purpose of the seed is obviously to replant and not for what? Food consumption. She just fed it to her cows. pass

Now it says, Farmer Jones sold the milk produced by her dairy cattle to Big Food Stores, Inc. ("Big Food"). Several of the people who bought their milk at Big Food became seriously ill, and the Centers for Disease Control (CDC), a government agency that investigates outbreaks of illness, determined that mercury poisoning was the cause of their illness. CDC traced the mercury to the milk that Farmer Jones sold to Big Food.

Starting off with what theory or theories that the milk consumers might bring? Who's the plaintiff? Milk consumers. In regards to products liability ‑‑ obviously it's a defective product that's what we bring up here ‑‑ remember I told you, when you see a call that's generic like this, it's guaranteed that you will automatically have three theories. What are the three theories? Negligence, applied warranty and merchantability, and strict liability and tort. So no matter what, when you have this type of call, you already know the issues that you do need to address on the examination.

First issue I generally do is negligence. Does it matter? No. The reason I do negligence first is I want to do a good job here, and then steal from it for my other issues. Why? This has got a lot of issues in this exam. This is more of a racehorse. There's a lot of need to get through. And the sub issues, those are worth points. Not just seeing negligence. What within negligence is being tested here for your point value? Now, remember, with negligence, you need to show the duty, the breach of that duty, the actual proximate cause and damages. based on this fact pattern we know it's products. What's the duty? It's a different duty than what we've learned. In regards to distributor manufacturer of a product has a duty of care to inspect, discover, correct or warn of any known defect, don't they?

To whom is that duty of due care owed to? To any foreseeable user of the product. Grain Co. is the one that sells the grain. They're a distributor. Like all seed grain dealers, they do put this invisible base mercury on their grain itself to get rid of the parasites. But they owe a duty of care to inspect, discover, correct or warn farmer that this grain does have this mercury‑based poisoning. They have a duty obviously to Farmer Jones to make her aware in regards to the mercury‑based poisoning on this seed. Now the issue is, did they breach?

Now, in your breach generally we're gonna type the defect. The general rule is if you can bring up more than one defect, you need to bring it up. The first one I'll argue is the warning defect, and I think that's obvious. Remember, warning defect exists when the manufacturer fails to warn of potential harm that the product can cause. So based on the facts here, they did tell you that it had this what? Invisible mercury‑based poisoning. The argument here is you failed to adequately warn that I shouldn't use this in any food product. Here, farmer did use it where? In feeding their cattle, which obviously produced the milk. When Farmer Jones used this seed improperly, was there a lack of warning? Grain Co.'s going to argue no. On our trucks it clearly states seed grain not for use in food products. The issue becomes, is that an adequate warning? Even though the facts did tell you ‑‑ and they're playing with you, aren't they, trying see do you understand you have to argue both sides ‑‑ grain Co.'s going to say they have had it posted on their product trucks. Further, they're gonna say, you were present, Farmer Jones, when the seed grain was delivered. You actually supervised the employees to unload it. So these are all good facts to bring out and argue that there was adequate warning.

And of course now look to the farmer's side wait a minute here. Who says I really paid attention to what was on the truck and what was labeled on the actual truck? What should you have done to adequately warn me that this has a chemical poison based upon the seed and it cannot be used for any food products such as what? Feeding it to my dairy cattle. What about the bill ladling, which you'll learn about that more in regards to UCC, so the sale invoice, couldn't you disclose it there? Could you have me even initial that I was aware of it? Break that apart.

In regards to your products liability, you can do a much shorter rule. So it depends on how you set it up. So if you start off with negligence, you don't even technically have to define negligence. You can go to the headnote of duty after you headnote negligence. Also, some students ‑‑ which Fleming’s has some in their answers as well ‑‑ is they actually start off with the defective product. They had this whole what I call a canned paragraph going through the actual three types of defect and make [inaudible] versus Buick. It's a canned. Then they go through the actual defects and then they start their theory. Either one works. In regards to the IYAC and leaving out the rule, I'm a firm believer in IRAC. The problem I see with IYAC is a lot of times students are very conclusory and what that means, all they're doing is regurgitating the facts. They don't take the time to tie back in the elements to show this fact supports this element. It's something you can practice. When I was running out of the time on the exam myself, what I would do is start off with IRAC, and then I when it got near the end and I was running out of time, I did my IYAC. To me, that indicated to the reader I know how to IRAC and I do a good job, but I have a timing problem now I'm going to be more conclusory in hitting the true element as well that was being tested that was worth the points.

There are different ways. That's why I tell students read model answers. Go to the bar Web site and read the baby bar student answers and gives you an idea what's accepted versus I can do this.

I think, too, in practice, remember, or when you're taking the exam, we all try for scholar. Not going to happen, especially under the pressure. That gives you an idea, oh, look, I can write this type of exam and still pass. But you don't want to achieve for that. You want to achieve for the high highest. You don't wanna go for mediocre because if you falter, we have a problem.

No, there will not be a timer. It's you. So you want to go to the bar Web site and see what you can bring in. Your little pillow, pencils. They're not gonna supply you with anything. You cannot bring in your phone, you cannot have a timing device that makes noise. A lot of your timing devices now connects to the Internet; they will take them away. Analog watch. You can't have an alarm clock if it makes noise. I highly recommend go to the bar Web site and see what type of watches is permitted and recommend you get one even if you have to buy one for ten bucks, get it on eBay, the old ones, and start practicing. You fold it and put it in front of you and start watching that time. What I did, you'll find no matter what time you get to the exam it's never started on time. I would put it at noon. Four essays supposed to be done by 4:00. Was that the real time? Of course not, but I won't have to sit there and figure we started at ten to 9:00. Don't wanna go there. I wanna focus on the exam. Set it when you know your four hours a up so you can keep track of your time. I guarantee number one complaint from students I hear all the time; I ran out of time. Why didn't you bring a timing piece?

I'm glad you brought that up because I usually do near the end, but it's something you should practice with now. Any time I did simulations I always had my watch piece in front of me so I'd get used to looking at it when I have to. It's very important. And you want to have one because most likely they will not be a clock where you take the exam or if it is, it's a mile away and you're not gonna be able to see it.

They will give you calls. What do I mean? They're not gonna say it's been one hour go to exam number two. They will tell you one hour remaining after three have passed. Then they'll give you ten minute call, five minute call, stop writing. So you will allocate your time. That's why, again, I tell you it's important to do simulations so you get your timing down. I promise you, that four hours sitting there writing those exams fastest four hours you'll experience. That couldn't have been four hours. Yes, that's why we practice.

Again, go to their ‑‑ they shouldn't permit that, but the MPRE should allow a watch. I can't believe they'd say no analog. Go to their Web site. That's the best thing I can tell you. There is a list of things that they permit for you to bring in.

Again, some people tell me they have the timer showing on my laptop. So if you have it on ExamSoft when you take the exams, it should be there for you for the baby bar as well.

For some reason people don't seem to pay attention to that either. So again, if you want a piece go look to see what type of watch you can bring in and have it right in front of you and start using it in practice.

We did talk about the first type of defect which, is the warning defect. Can we argue manufacturing defect? No. How about design defect? This was a harder one for students to see. To me, why'd they give you the word invisible? If it's invisible, that means I can't see it. Based upon it being invisible, poison on a seed grain, it's nearly dangerous so you should obviously warn me. Besides warning me, let me know it's inherently dangerous in its design and people could use it by mistake, which happened here by Farmer Jones in feeding it to the dairy cattle. It's inherently dangerous in its design, they can make it a different color so we're aware that it's treated with this mercury‑based poisoning. So I find warning defect as well as design defect.

Now I actually showed the duty, showed the breach now I'm gonna go to causation. Actual cause. Now, who is suing, again? Milk consumers. Why? Because Grain Co. sold the to Farmer Jones this mercury‑based seed with the poison on it. This triggers successive tortfeasors; right? So that is an issue to bring up. If you just brought up but for Grain Co. putting the poison on there, milk consumers wouldn't have been injured. It wasn't just their act. It was the fact that Farmer Jones fed it to her cattle, produced the milk, and sold it to Big Food. We have two independent negligent acts that caused the result. So but for Grain Co.'s failure to adequately warn and properly design the seed grain and make it clear it's not supposed to be used in food products, as well as but for Farmer Jones not what? Reading the sign and adhering to and feeding it to her dairy cattle, milk consumers would not have been injured. Again, this is a prime example of successive tortfeasors.

Then we go to our proximate cause. Remember, I told you last week during the lecture, with proximate cause you want to ask yourself is: is it a direct act or indirect act? Which would this be? If you look at the facts, Grain Co. treated the grain with the invisible mercury‑based poisoning, so it's a direct act. So is proximate cause really a big issue here, even though I have to dress and prove it up because it's an element for negligence for a prima facie case. Are they really playing with me on it? The answer's no.

Is it foreseeable when Grain Co. who's a distributor of seed grain, failed to adequately warn Farmer Jones not to use the seed in food products that obviously could be used in a food product and then of course the one that's consuming the food gets sick? Absolutely yes, therefore it's relatively foreseeable, therefore their proximate cause of milk consumers' injuries. And then go to your damages.

Remember, it said what? Damages. What are your general damages here? They became sick. Remember, general damages are your property loss ‑‑ which I don't see here in these facts ‑‑ or pain and suffering. Since they became sick, I'm gonna argue they're suffering so we can recover pain and suffering. Am I done? No. Because the call said damages. What? There's no facts. I will bring up special damages, which, remember, are reasonably foreseeable must be planned and proven and milk consumers can recover for their medical expenses and/or any lost income based upon their illness and I can get out. I don't need to do any more than that why? There's no facts. So you'll know if it's a bigger issue based on the facts.

Now, the call did say what? Defenses. So we just did negligence. So is there anything I can argue against milk consumers such as contributory negligence? Comparative negligence assumption of the risk? Absolutely not. And you will see if you look at student exam answers they go argue this. Waste of time. It tells the reader you really don't understand; right? How about an issue in regards to indemnification of contribution? Grain Co. argues Farmer Jones did this, why am I paying? In regards to indemnity ‑‑ which a lot of times when you have multiple plaintiffs in a products liability case you will bring up indemnification and contribution. With indemnification what it is is when it allows for the defendant who's secondarily for the plaintiff's injuries to receive reimbursement from the primarily liable party. So now the issue is, who's the primary responsible party here? Is it grain Co. or Farmer Jones? Make your argument. I don't care how you conclude, as long as you argue.

Grain Co.'s going the say yeah we're the distributor, but we're not the one that fed it to the cattle that produced milk sold to Big Food. Versus Farmer Jones is gonna argue wait a minute here. I bought this grain from you and it wasn't use this as regular feed for my cows. Don't care. What you conclude, just argue both sides and pick a position. That's why you'll fall back to the issue of contribution.

With contribution, basically this is again with joint tortfeasors and you proportion regarding to fault. If Grain Co.'s responsible and also Farmer Jones, they're gonna proportion according to fault.

Now, how do I know that I should have addressed indemnity and contribution? Safety factor. You had successive tortfeasors. Well, what is the whole premise of successive tortfeasor? They have multiple parties. Right? Two independent negligent acts so I know I'm going to have indemnity, contribution, or both. So that's another way to help you see the issue and what I call back into it if I don't pick it up.

Do I see anything else to argue to continue on? No. Then I'll go to the next theory.

Implied warranty and merchantability. With implied warranty and merchantability, it's implied that a manufacturer, distributor, or retailer argues warrants that its product is fair and average in its use. Grain Co.'s the one that distributes the seed grain even though they do spray it with this mercury‑based poison they've altered it. So is it fair and average in regards to its use? Now you're gonna make an argument because it would be without the poison, but because obviously they didn't warn you or design it properly so you're aware that it has this mercury‑base poison, it's not in fair and average quality in regards to its use.

Then go to your causation. What am I gonna do with my actual proximate cause? I'm going to steal it from up above. Define, discuss supra is fair game on the baby bar. So you don't wanna just cut and paste. Just put defined, discussed so the reader says you talked about it up here, same argument. Which it is in this case because it's the same one.

Plaintiff. So actual cause, proximate cause, damages are those the same? Absolutely. It's the same plaintiff. So my actual cause, proximate cause, general damages, special damages, define, discuss supra. I do headnote those out separately then put define, discuss supra so the reader knows go back up there if you want to read it again. And you do wanna use this premise why? Because of time. There is a lot more here than you really realize.

Absolutely. You can say define supra. Absolutely. So there's two things you can put. Define supra means take the rule up above I already defined up above and make sure you're correct; right? Versus define and discuss supra says take not only the rule but the analysis. You may use both on the examination it saves time and it is permitable.

Another permitable thing is define infra, which I try not to use unless they mess me up with the call of the question so I don't have a choice. Infra means you're going to discuss it later. Stay away from it, unless you have to because how they laid out the call for you. Sometimes you'll see in crim law or something like that, where, gee, the wrongdoer is going second and the one that didn't do it's going first I might have to infra the activity because I can't really talk about it until I get to that call. You'll know.

Again, how do I know? More exams I expose you to, you'll start seeing that. Use them for the definition. But make sure it's proper.

If you can do that, sure. Now, in regards to placing all definitions, are you talking about so when you actually read the essay question that you're issue spotting and put the definition? I've known people who've done that. In essence, you wrote out your rules why you're reading the exam and issue spotting, then you go back to it in regards to tying it back in. Is that what you mean? That has worked for some people. Not a lot. I manually do an outline by hand and break it apart that way. To actually outline on the computer's hard because you're scrolling up and down. Our brains go faster than we can write and type anyway. Sometimes you think you actually put something down there as well and it's not there. Rule of thumb: If you are doing that, and you're seeing the issues, and you're doing relatively well, wouldn't change a thing. If you're doing that and not, it's time to go back to that manual hand ‑‑ outlining and making your actual outline and taking that outline and typing that into your answer. Again, that will dictate.

I've seen in my career one person that was able to really do that and did a good job and they weren't missing things. So it works for some but majority of us no.

What's another theory we can sue for? What'd I tell you the three theories are? The last one would be strict liability and tort. Again, with strict liability and tort, this is where, again, you place a defective product in the stream of commerce, and it's the distributor, manufacturer, or retailer, and it causes injury to the consumer in this case. So Grain Co. failed to what? Adequately warn or adequately design the seed grain. It ended up being treated with a chemical mercury‑based poison ended up being used in a food product which Farmer Jones fed to her milk cows. They produced milk which was drank by the milk consumers. Therefore it was defective; it did harm milk consumers based on their lack of warning or you can argue design defect or either or both. Since the defect was existent at the time it was sold and placed in the stream of commerce, Grain Co.'s gonna be liable under strict liability. Again your actual cause, proximate cause, general damages and special damages are the same. Define discuss supra. That was our first lawsuit for call number one milk consumers versus Grain Co.

Now go back before you commit. Did I talk about theories? Yes, I did. Negligence? Implied warranty merchantability and tort. Did I talk about damages? General, special. Did I talk about defenses. Didn't see any defenses. Wait a minute. Indemnity contribution plus counterarguments in regards to between Farmer Jones and Grain Co. So yes, I've answered the call so I'm ready to go to call number two.

Again, always make sure you address the call of the question. Very important.

Call number two is Farmer Jones. I want you to pay attention to one thing is when you see repetitiveness of the issues. I see products and I see here we go back through negligence again. There's got to be something a little bit different. It can't be verbatimly the same. Define discuss supra I'm on my way. So in regards to products here against farmer Jones going through negligence what's the difference? As to Farmer Jones, she has the duty as a manufacturer of the mil, to discuss discover any known defects. That duty's owed to foreseeable users, which would be milk consumers since she sold the milk to Big Food.

How did she breach her duty? She had no knowledge that this had the mercury‑based poisoning in it or she wouldn't have fed it to her dairy cattle. This is a different type of defect. This is a manufacturing defect which comes up every once in a while. A manufacturing defect is where the product is different in kind than the rest of the line. Her dairy cattle produced milk weeks one, two, three, what have you, and it was perfectly good milk. When she fed it the seed grain, the milk became contaminated so it's different in kind from what they've previously done. That's what we will be calling a manufacturing defect.

Now, in regards to causation, is it her fault? Well but for what? Her mixing the grain up feeding it to her dairy cattle, they wouldn't obviously been consumed by the milk consumers and be sick. Is it foreseeable? Again, direct act. It's foreseeable obviously if you feed your cattle a mercury‑base poison seed the product they produce, the dairy milk, is going to be contaminated. So it is foreseeable one could drink it. Obviously, it's severely injured. Damages is the same damages yes absolutely. So define, discuss, supra.

So what was different with this negligence than the one we talk about with Grain Co.? It's the type of defect. So in this case, it was a manufacturing defect. Okay.

Again, what else would you bring against Farmer Jones? Implied warranty merchantability. So again, Farmer Jones manufactured the milk, sold it to the milk consumers so we got the manufacturer. Selling the milk consumers ‑‑ to Big Food who sold it to milk consumers ‑‑ placed it stream of commerce. Was it fair and average in regards to its use? No, it's contaminated. You don't expect milk to be contaminated. Then your causation, your damages supra back.

What about strict liability? Yes, because she's a distributer of the milk. Manufacturer/distributer. In regards to Farmer Jones manufactured the milk and distributed it by selling it to what? Big foods. It contained a mercury‑based poison based on the seed she gave to her cattle so is it defective? Yes. As discussed, it's defective. Therefore she placed a defective product in the stream of commerce because the milk consumers drank and became injured, and then my causation damages define discuss supra.

So that's call number two in regards to Farmer Jones. We don't have any what? Defenses. People are arguing contributory negligence, comparative negligence. There's nothing in the facts that suggest milk consumers did anything wrong. So don't let the call make your bring up issues that don't exist. Remember what is the call mean? True defenses or counterarguments. Keep that in mind.

Now you see milk consumers versus Big Food. First thing we're gonna talk about is negligence. What's the difference between negligence against Big Food and against Farmer Jones or Grain Co.? Well, what is Big Food? Is Big Food a manufacturer? No. They distributor? No. They're a retailer. Oh. Okay. What's a retailer's duty to inspect, discover, correct, or warn of any known dangers? So they have a duty to correct any known defects. Did they breach that duty? And actually, I see people always say yeah, they did. Wait a minute here. How? Picture milk. Put yourself at the grocery store buying milk. It's generally sealed. So how or what facts do I have that Big Food had a knowledge that this was damaged with mercury‑based poison? Can I argue a manufacturing defect, design defect, or warning defect against Big Food and I can't because they didn't know. They didn't have knowledge.

So since they had no knowledge, right, you can argue what's called the sealed container doctrine. There's no obligation on their part to sample every piece of milk before they sell it. Can you imagine? So therefore they actually didn't breach their duty of due care. This is something that comes up in the multi states. With a retailer, sealed container doctrine actually comes up more often than you think. Unless they have some type of knowledge ‑‑ which you'll see on the multi states, they'll tip you off ‑‑ there's a big hole in the can, a dent. There's one actually which I thought was kind of weird with a manufacturing of airplane engines and they tell you they noticed two bolts were missing left in the crate. What kind of tells them they should give notice gee, something's missing on the engine. Maybe we should not use it, or disclose or something in regards to the consumer that purchased it. Was that enough to obviously give them knowledge they had issue to act?

In this case, with the negligence, we can knock it out to find no breach. I wanna point out to you, this is what I call an absolute. What does that mean? There's nothing to say, well, the breach is gray. You could argue the other side that they did follow below the standard of care. I don't have anything to grab onto. When it's absolute, we're done. I want to make sure I know that, why. Because of time. Imagine, keep going through actual cause, proximate cause, et cetera, don't wanna do that unless I have to. At this point, we can find they did not breach their duty of due care. The more you practice you'll see that comes up quite often with the retailer under the sealed container doctrine.

All right. Any other theory I can assume? For sure. Implied warranty and merchantability. Remember, any manufacturer, distributer, retailer, you're on the hook under this theory. Why? Because again you placed the product out there for people to buy. The issue is, is it fair and average in use? Since it's contaminated it's not. No consumers became ill. You're gonna be held accountable, causation damages supra. Same thing with the strict liability and tort. If it's an inherently dangerous product and you place it in the stream of commerce, you're gonna be held accountable. Big Food is gonna be held strictly liable as well. If you think about it, it's policy.

If you buy things that the store and let's say they bought it from a company in China or Japan or somewhere, how are you gonna sue them? You can't. There's no contract relationship with you and basically, you're gonna learn in civil procedure how do you have jurisdiction over them? I don't really wanna go trucking to China or Japan to try to sue 'em, plus, their laws would apply there. Now what? So that's where out of fairness we make the retailer responsible and that's why they have indemnity and contribution to shield themselves from liability.

Yes. A reseller can be held strictly liable. It doesn't matter that they're not the manufacturer. The fact is they're a retailer of the product. If you think about the logic I just told you, if I'm just a retailer of a product ‑‑ think of any store ‑‑ and it's defective, how ‑‑ and you suffer severe injury, how are you gonna sue? Especially if it's what? From another country. Does that make sense? I mean, that again is policy. Which a lot of people feel sorry for Big Food here, but that's why they have indemnification. You'll see in real life you bring in this case a Big Food was sold they would bring in Grain Co. through indemnification and that attorney would take over. It's basically fair.

Yeah. So you can cut and paste what? Again, remember, with Big Food, right, we're looking at their conduct. We never really talked about causation against them except for in our what? Discussion in regards to implied warranty and merchantability, then you can steal from it ‑‑ one‑line it, two‑line it, get in and out relatively quick. You're probably running out of time at this point but it's a different party.

Yes. So basically the theory of anybody within the chain of distribution's going to be liable. The only way not, that's your negligence, which we impose a different duty. Make sense? Again, you have to show how they breached that duty. That's why again in this case through the sealed container doctrine. Again, if they have some type of knowledge, I've got them. I've got you now.

Now, in regards to this question I want to make sure a couple key things before we jump to some multi states. Make sure you headnote your theory. Let the reader know what you're talking about. Don't make him guess or, gee, where are we? No. Once you start a theory, carry it all the way through. If you start with negligence: Duty breach causation damages. Don't jump into another theory. Warranties, it's a separate issue. Warranties do have causation and damages and then of course if there's any defenses. The other thing is to make sure, like, if you saw an argument for unforeseeability, that's a proximate cause argument. What's really important in this products liability exams that you need to understand a lot of times is the defect and the type of defect. So that's important. In regards to one to the baby bar with products liability you know if there's other defenses such as state of the art. I think that was tested a year ago where state of the art would be a defense. You'll know based on the facts how far I have to go and how much detail, versus if it's one that I can get in and out. The facts dictate every time.

You think this is the meanest essay people do with products. If you think about it, actually, if you go through enough products, this should be can for you. It should be relatively straightforward. And I would pray for it. It's relatively simple because you've done enough you've got it pretty much canned up. If you handwrite, makes it a little bit more difficult. That's where you learn to what? Cheat. It's not really cheating, but to save time, your define discuss supra helps you. Or sometimes if I'm running out of total time like an example when I got to Big Food, I had two minutes and I just started Big Food are you kidding me? Headnote negligence say the issue here is under the sealed container doctrine they didn't breach the duty of due care, so therefore no liability for negligence. However, they would be liable under implied warranty and merchantability and strict liability and tort. Since they're a retailer of the product, boom go to my indemnity. Sloppy, but the reader knows I'm out of time and I got to the crux of the problem so they understood I knew what was being tested. That's what's important. If you bebop through every element and the reader can't where their weak lies ‑‑ the weakness ‑‑ you gotta break it apart.

If you can get away from handwriting, you should. You've got so many more advantages to laptop. I mean, time, spell check. I mean, you can make your presentation better. My handwriting you can't read so I have to print so that really kills my time. There is a great advantage if you can learn to laptop.

The key thing too is to go through what and make sure you identify the issues but make sure you paid attention to the call of the question. Don't bring up nonissues. Does that hurt you? Yes, it does. Why? Couple. Time. And of course if you're bringing up so many nonissues the reader's like you don't understand what's going on and we don't want that either. So break it apart.

All right. Anybody have any questions before we jump into a couple multi states ‑‑ I can't believe how fast the time's going ‑‑ on this particular essay? Remember I sent you out for those of you who requested some tort products liability exam. Take a look at those. Contrast. That's what's important. In essence what's the question between question one and two, between question two and three. You'll see the call dictates; right? In regards to sometimes it's a specific call versus a general call. Or sometimes it could be who's actually the party?

All right. Any other questions in regards to the essay? All right. Let's go to the first question so hopefully you have your multi states.

Question number two and three a person had a question on. I have to read question one to get to two and three.

I really feel in this question because we didn't pay attention to the call it says:

Delta was the manufacturer of a product known as Delta’s Follicle, which was sold over the counter for the treatment of dandruff and dry scalp conditions. Jonathan purchased a bottle of Delta’s Follicle at Watson’s drugstore.

Jonathan's obviously the purchaser.

A statement on the label read, “This product will not harm normal scalp or hair.”

So there's it's what? Telling you in regards to its product.

Jonathan used the product as directed. Because of a scalp condition making him allergic to one of the ingredients, the product irritated his scalp, causing him much pain and discomfort.

In an action by Jonathan against Delta ‑‑ remember, Delta's the manufacturer ‑‑ with strict liability. Remember, with strict liability, it's where you place manufacturer distributor or retailer places a defective product in a stream of commerce.

It says: Which of the following additional facts or inferences if it was the only one true would be the most helpful to Jonathan's case?

What are we trying to do? Prevail as a plaintiff here; right?

A. says Injuries of the kind sustained by Jonathan do not ordinarily result from the use of a product like Delta’s Follicle unless the manufacturer was negligent.

That seems to go to negligence, so why would I have pick that answer choice when they told you he sued under the theory of strict liability and tort?

B. Prior to Jonathan’s purchase of the product, an article regarding the allergy from which he suffered had appeared in a widely‑read journal of the hair‑care industry.

Well, that doesn't mean he knew. Again, remember you placed the product in the stream of commerce. Actual proximate cause damages that's not gonna help in regards to him prevailing in any manner, shape, or form.

C. a reasonable person would not have expected the use of the Delta's Follicle to result in the irritation of the scalp for someone with Jonathan's allergy.

Well, in regards to strict liability, you placed a defective product in the stream of commerce ‑‑ which they did ‑‑ but for is it foreseeable? Seems proximate cause. What would the consumer expectation be? That I could use this and if it had any reaction to anybody having an allergy you would disclose that. C looks good.

D. At the time it manufactured the product purchased by Jonathan, Delta was aware that its ingredients could irritate the scalp.

What does awareness go towards? Battery. And he sued under the term of strict liability and tort. So, again, look to the call and what theory. When they give it to you, stick to your elements. If they knew liability and battery, of course. But he didn't sue under battery. He sued under strict liability. I'm stuck picking an answer that's gonna support or negate ‑‑ in this case, we wanna support ‑‑ strict liability. So for question two C would be correct.

Question three, it says:

In an action by Jonathan against Watson, which of the following would be Jonathan’s most effective argument?

Remember, with Watson what? They're the retailer. So could they be negligent? No. The sealed container doctrine. They will be liable under the theory of strict liability and tort, and implied warranty and merchantability. So those are the two answers they're trying to gear for to find.

A. says: Any negligence by Delta is imputed to Watson. We know that's not true. \*\*\*\*\*

The product was defective as labeled. I'm going to put a plus there. If it's defective as labeled. If you put a looks good to me.

C. says ,Watson breached an extreme warranty. Didn't make any warranty.

D. A drugstore is under a special duty to be aware of possible allergic reactions to products, which it sells.

That's not true. So we know B would be the best answer choice. So again, in regards to missing this, you're not focusing on the party and what's going on. So Watson, again, remember, is the retailer. So how can I hold the retailer responsible? Not under negligence, because there's nothing in the facts to show they're aware of this. Now, if Jonathan came and told them this, story might change. At this point, no. Be aware of that.

For question No. 3, B is the best answer and that's why.

Okay. Next one was question 12. If you guys have a couple post them and I'll try to take a look at them. I think I only have one more that someone asked about.

If Perry asserts a claim against Douglas for defamation, Perry will be successful if...

Remember, with defamation what do you need? You should be, again, always thinking of your elements. A false defamatory statement published intentionally or negligently to a third party who knew and understood.

And then, is it libel versus slander? Libel is written form, permanency, slander's spoken. You'll know, again, based on the facts and determine which way to jump. But now identify kind of refreshed my mind set so now I'll read the facts and see what I can pull out.

Perry, who owned an appliance repair shop, was at a cocktail party when he saw Douglas one of his competitors. Approaching Douglas, Perry said, “I’m glad to run into you. I was hoping that we could discuss the possibility of going into partnership instead of competing with each other.” Douglas responded, “I wouldn’t go into business with you because you’re the most incompetent person I've ever known.” Aaron, a customer of Perry’s, overheard the conversation. As a result, the following day, Aaron canceled a contract, which he had with Perry.

Again, they told you Perry asserts a cause of action against Douglas for defamation. Go back and look at the statement. Was it a false, defamatory statement? Perry wants to be successful. The call told me he just needs to prevail here. We're going to make assumption false defamatory statement. Was it published intentionally or negligently? Well, he's angry. I could say it's intentional. But was it published to a third party? Well, if you go to the actual facts, it says "Aaron a customer overheard." Were they aware of his presence? You and I can talk to each other and defame each other. It has to be published to a third party. This is what this multi states' testing. Third party. Published to a third party. So I'll hone in to an answer to hit that element. I broke apart my elements of defamation to hone in as to what was being tested. If I don't do that, I'll get the second best answer because I'm not really narrowing down what the examiners are testing. So now that I broke it apart, I'm ready to go look at my answer choices which, a lot of students will read the call read the facts and then look at the answer choices without really break it apart to determine what's being tested. You need to do that. You don't, I guarantee you'll get the second best answer and you get frustrated because I know this stuff but something's going on here.

A. says Douglas knew or should have known that his statement was defamatory what he made it. Even if it's true, does it matter? Can you recover? No.

B. says Douglas knew or should have known that the statement was false what he made it. Who cares because we know what they're testing here because a customer overheard it. Was it published to a third party?

C. Douglas known or should have known that the statement would be overheard when he made it. That supports publication to a third party.

Or D. Douglas knew or should have known that harm would result from the statement. You don't need to know that either. Doesn't go to the element of publication to a third party.

You know the answer choice is C.

You see by breaking it apart like I just did, doesn't this problem become quite easy? Versus if you didn't break it apart and you read all four, you're sitting there going back and forth on which one to choose. You've got to break it apart that far in detail. So we know since it goes to the issue in regards to publication, it has to be C. is the correct answer choice. Right? No way of hiding that.

What was the next or the last question? Let's see here. Oh. Question number 21. This one deals ‑‑ it says: If Pauline asserts a claim against Sunset for damages resulting from her embarrassment, Sunset’s best argument in defense is that...

Well, when you see embarrassment there's a couple things, I want you to break apart. Break your elements apart one by one and hone in on what's being tested. Always do that on the multi states. When they use the call "embarrassment" remember you have intentional infliction of emotional distress or negligent infliction of emotional distress. It's your job to determine which is being tested. It says:

While Pauline was visiting her daughter, the two of them decided to go swimming at a nearby public pool. Since she had not brought a bathing suit along on her visit, Pauline went to Darla’s store to purchase one. While looking at the suits on the bargain counter, she found one, which had been manufactured by Sunset. The package, which contained it, bore a label, which read,

“Disposable Bathing Suit. This garment is made completely from recycled paper. Although it is strong enough to be worn several times and is even washable, it’s inexpensive enough to be thrown away after one use. Buy several, and take them with you on trips to the beach.”

Pauline bought the bathing suit and wore it at the public swimming pool. After swimming for a few minutes, she climbed up to the diving board. She was preparing to dive into the pool when the wet paper bathing suit suddenly dissolved and fell from her in shreds, leaving her completely naked. Horrified, Pauline climbed down from the diving board as quickly as she could, calling to her daughter who ran over and wrapped her in a towel.

If Pauline asserts a claim against Sunset for damages resulting from her embarrassment Sunset’s best argument in defense is that...

Okay. Now, is this negligent infliction of emotional distress, or is this intentional infliction of emotional distress? Well, it has to be what? Negligent infliction of emotional distress, and with negligent infliction of emotional distress foreseeable [inaudible] foreseeable, you need to have what? Actual damages. So let's take a look.

A. says Sunset made no representation to Pauline. Don't need a representation.

B. Pauline sustained no physical injury or symptoms. That looks like a plus because she has no damage.

C. Pauline purchased a suit from Darla. That doesn't matter.

D. Sunset acted reasonable in manufacturing labeling the bathing suit.

Well, obviously what's the best argument? B because she has no physical injury or symptoms. Common law you need a physical manifestation. Modern law's different, but the call didn't ask me about that. Remember, you're going to answer according to common law unless the call dictates otherwise. We know it has to be B, because for negligent infliction of emotional distress, you need some type of manifestation. She was just humiliated; that's not gonna work.

Now, if they told you modern law it would, because she was humiliated. Under modern law, she could recover. Remember, on the multiple choice questions we're always answering how? Pursuant to common law. So make sure obviously you understand that.

Now, in regards to ‑‑ we didn't go through very many. But when you go through the multi states I want you to hone in what is being tested here. So it's not just the theory. You've got to hone it down in regards to the actual element that's being tested.

So you're saying in regards to the entire set of questions it seems like the word "reasonable person would". You want to look to that word and obviously make sure if it's true, is it an elements in regards to what it's addressing? If I'm talking about negligence and I'm dealing with a general duty, then the reasonable person is something I'm going to look at. Versus if I'm dealing with district liability, I don't care about a reasonable person. It's liability regardless of fault. That's why you need to figure out the actual theory you're addressing under and then hone in. Otherwise I'm gonna get you. They'll get you to pick an answer that sounds good. You didn't pay attention to the actual theory. That's where we many times get hurt. That's something you want you to pay attention to.

Now, in regards to this point, what's going to happen? We just hit torts. Believe it or not, you should keep practicing torts. You want to keep going over in regards to your exams and your multi states because you're going to get stronger and stronger. If you ignore it, you'll forget everything you've learned and get frustrated. That's one thing I want to make sure you go over.

The other thing is, now we're gonna go on to contracts, which will be run the same way. We're gonna do a review that we did and kind of go over it. It's something that you want to break apart and the following week after that we'll do the essay. That doesn't mean you're off the hook; that means I want you still keep practicing torts and now start reviewing contracts. So it's like a domino building block process; right?

Contracts, if you're horrible couple key things to remember follow your checklist. You must take contracts in order. No way around it. Take it in the order of your checklist. That will help you so you don't mess up issues in and of itself. And then of course if you still don't see issues, I would have you start training yourself based on essays and multiple choice by looking at them and understanding how is this concept tested? When we do go over contracts, you're responsible for the UCC the Universal Customer Code. That is something, remember, I told you I recommend go buy the Gilbert's help you supplement. It is on the baby bar. They will test that. And if you have two essays coming down in regards to contracts one looks like it would be common law one would be most likely UCC. I'm trying to remember off the top of my memory and it's not skewing as to what you had last time. That kind of dictates, too, did you have two torts or two contracts? That'll dictate what's coming your way on the actual baby bar itself.

All right. So it looks like you actually had contracts, crim law torts. Either's fair game for you guys. Be prepared in and of itself.

When you mean selling things in regards to UCC is transaction with the sale of goods. Doesn't have anything to do with the sale of lands, it's just the sale of goods.

All right. So start preparing in regards to contracts. That's something we'll review. Keep on your torts. Keep going over your stuff so you don't learn it and you're building, getting stronger and stronger and stronger.

All right. If you have any questions, please shoot me an email at jolly@taftu.edu. Be more than happy to help you in any way that I can. Please put at least a day if you're busy in school as well as work put a day aside for your baby bar preparation. You need to do that. Because again, this is a tough exam and we wanna pass it. We wanna put it behind us.

I wish you guys all a good rest of the night. Good night.

[END TIME: 7:01 PM]