Taft law school.

Baby Bar.

Multistate.

Tuesday, September 22nd, 2020,

PROFESSOR: Good evening, everybody, and welcome to tonight's Baby Bar mini series. I do want to point out that these sessions are recorded. You can go to Taft website and sign in student section and all the lectures are there for you to go back to review for your convenience.

I hope everybody is having a good week and I hope you did a great job in reviewing the torts and going over Multistate. We will go over torts today and then starting contracts. You don't abandon torts because you will lose everything on what you built momentum on.

Let's go through the essay question. I hope you found this a racehorse and not too bad. Reading and breaking apart and getting a good hand on the subject matter. This is a strong products liability exam. It is something I want you to be aware of. Products liability is right for testing right now. The more you practice the concept, it's going to help you.

Read the call of the question. Since we are doing these online, I would recommend that you highlight the call. I will show you what I mean.

It will be in October, we will have a lecture on how to take the exam online. The subject will be tort. So that will be applicable for you guys. And how to mark your fact pattern and highlighting since you are doing on the computer versus hard copy to mark up.

Looking at this call, what theory or theories might the milk consumers recover damages from and what defenses should they anticipate in action against?

I would take my highlighter and highlight theories, damages, and defenses. Why? It means I need to focus on it. There got to be two more theories. If I see negligence, I didn't answer the call.

It says damages. And you will find this is very true and you will hear me say this several tiles on the Baby Bar exam. They always like to put damages and call but no facts. When you see that, I know I'm looking for general damages and special damages. Because it's on damages. But no facts. But I still have to address it based on the call of the question.

It also asks for defenses. Two or more.

Remember, I told you about the defenses could mean true defenses or counter arguments. So you got to pay attention to that. We got to make sure we are reading the call of the question.

You see there are three parties here. Grain Co. Farmer Jones, Big Food. There got to be something different amongst them. It can't be the same otherwise why they give me three different parties.

If you have questions, place them in the chat and I will help you.

Knowing this, there got to be different between all three. If I saw that every issue is verbatim, I know I'm wrong.

Pay attention.

Read the fact pattern. I suggest that you read the fact pattern one time through just to get a general sense of it and then come back and read it and highlight it. Remember, you get to highlight.

So we are going to pretend it we read it one time through.

Grain Co. Purchases grain from farmers each fall to resell as seed grain to other farmers for spring planting. That's the purpose.

Because of problems presented by parasites, Grain Co. Like all seed grain dealers always treats the seed grain it purchases with an invisible mercury based chemical to poison these parasites.

So they have problem with parasites. Like all seed grain dealers. That seems to be standard in the industry that they treat this with invisible mercury based chemical. Why invisible? That may lend a problem.

Grain Co. Sells them lose by the truckload. So it's loose. There's no packaging here. And here, it's treated with this invisible mercury based poison.

Grain Co. Trucks display sign that it's seed grains and not in food products. So is that adequate in regards to their warning?

Second paragraph. Farmer Jones bought a truckload from them. She was present when the seed was delivered and supervised the employees who unloaded the seed grain into the over silos. She was present and she was supervising.

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

Purposes of seed? This is based with mercury based poison. So they don't get attacked by the parasites. And you are not supposed to feed them.

And the milk were sold to Big Food. And CDC determined that the milk was poison. And traced it to Farmer Jones to Big Food. What the theory/theories might the milk consumer may recover damages from and action against Grain Co.?

You have products liability. Damages.

Defenses. Who is the plaintiff here? Milk consumers. I don't see true defenses jump out at me. I will look for counter argument because nothing in the fact pattern that they are above the standard of care. I have to dig into the inner issue and see what's tested.

What I do is I start off with theory of negligence. With products liability, you have we learned last week, battery, negligence, warranties, strict liability and tort. I start with negligence because I want to do a good job in building everything on there based on the fact and stealing it from my other theories.

If you start with strict liability, that's okay. It doesn't matter what you start with. It's your choice. But it's something you want prepared knowing how you will attack and handle products liability when it comes up.

I will start with negligence. Duty breach causation damages.

Duty is a manufacturer or distributor of product owe, discover, and correct any known the defect. And duty owe to foreseeable user.

In this case, we are looking at Grain Co. And they purchased grain from farmers to resell. They are distributor. They treat with mercury based poison. Duty of due care to inspect defect with seed grain. They did owe, since Farmer Jones that purchased the product, and used it to feed over cattle that ended up in the milk. So in that case, you would argue the milk consumers are foreseeable user based on the seed bed to the dairy cattle and then produced milk then sold to Big Food.

In your breach, this is where you will spend some time.

Breach isn't an argument of failure to warn or failure to proper design. You have to go through the defective. You have a manufacturing defect, warning defect or design defect. They told you the display on the truck that says seed grain not for food product. Is that adequate food warning?

Grain Co. Treated the grain with poison. They have a duty to warn, whoever comes in contact with this, to warn them of this poison that's on the product. They would argue they sold it and have the sign on the truck. And based on these trucks, Farmer Jones was present, she supervised and told the employee where to put the seed grain. Is it enough to have it on the side of the truck? And based on the argument, I would make, whatever is written on trucks not related to what the truck is or purpose. People resell vehicle and signs no longer any good. Is that sufficient warning?

They could have done made over sign ‑‑ when she gets a receipt sign a clause statement that she understands that you cannot use this in food product. Right? Like a disclaimer that she signs it to that effect.

Big argument here, which a lot students don't see is design defect. That flagged it because it's invisible. No one can see it. So based upon you treating the seed grain with an invisible mercury based chemical. I can't see it. That's inherently danger in design. Farmer Jones you use the seed to plant as well as to feed your cows. So I can easily mix it up. I don't know which one is which. Based upon the design the defect. It's inherently dangerous. Maybe make it a neon color. Then I know it's been treated with this mercury based poison and not feed that to my cattle. I find that strong argument as being a design defect.

I got duty, breach. Next, causation.

Who is suing? Milk consumer. They got sick because Grain Co. Didn't properly warn or design seed grain they are selling that had the poison. As well as Farmer Jones used it in feeding the cattle. So I have two wrong doers here. This is prime example of successive tortfeasor. That will help me in lawsuit two in Farmer Jones.

With successive tortfeasor we have two independent negligent acts that cause the results.

Grain Co. To warn or design, ended up in the food, as well as Farmer Jones used it for dairy cattle for feed. Based on the negligent acts of these two parties, the milk consumers would not have gotten poison. So that's actual cause.

Proximate cause. Is it foreseeable? Proximate cause is not big issue. If you use the seed grain that says, it has the poison and says not to use in food product and is it foreseeable that people can get poisoning? The answer is yes.

So that satisfies the proximate cause.

Damages. Your general damages would be what? General damages are basically your pain and suffering or property loss. Based on these facts they got sick. Damages are in the call but no facts. So you want to give me a sentence or two that you know the call. Receive any damages from the illness which maybe pain and suffering. And special damages. Because of illness they may have expenses and wage loss income. Which can be special damages.

There's no facts that says they can't go to work or medical bill but the call told me that. Pay attention to the call of the question.

One or two sentences and get out because there's no facts.

We have two wrong doers. When you have multiple parties you should ask, can we seek indemnification or contribution. Grain Co. Is trying to seek indemnity. Farmer Jones is at fault here. Since they were distributor of the grain that was tainted with the poison, Farmer Jones purchased it, fed it to the cows, and poison the milk. She is the primary liable party.

But there's no adequate notice. So arguable. Don't care. Fall back on contribution.

Contribution is basically when you have joint and several tortfeasors that's proportion according to your fault.

This is an issue, that means you proper have an actual cause problem. There are ways to look at an exam and see checks and balance. If I talk about indemnity contribution but no actual cause issues but for and got out, flag, I go back and look now. Because I know I made a mistake. I have to have joint tortfeasor. The argument here in regards to the two which we talked about previously and that would get us to indemnification and contribution.

That takes care of the first lawsuit against Grain Co. For negligence. And again you will see that we spent a lot of time there because I want to develop the type of defect and causation, damages, it's the same plaintiff. And look to see any defenses.

Contributory, assumption of the risk. Any defenses? No. No consumer do anything.

Counter arguments here? Sub issue in regards to actual cause.

What some students do they will force to talk about that assumption of the risk. That's a waste of time. So you want to make sure you understand the call and it's a true defense versus sub issue or counter argument within the fact pattern itself that will help you.

The next issue I talk about warranty. We have express warranty, and implied warranty of merchantability. That exist in every product exam.

With implied warranty of merchantability, seed grain. They are going to come back with counter argument saying this is standard in the industry because they tell you all seed grain dealers, but it doesn't make it right. So the argument here is there wasn't adequate warning. So even though it's standard in the industry that they do this, it wasn't fair in its quality because it ended up being used in food product that make the milk consumer sick because the milk was poison.

So that's why again I do a good job at the beginning so I can steal from it.

Strict liability and tort.

With strict liability in tort, that can be for the manufacturer, distributor, retailer. Strictly liable based on the defective product. They failed to warn and design and Farmer Jones basically fed it to over dairy cattle and produced contaminated milk. It caused the consumer harm and lack of warning, it's a defective product. When they sold it to Farmer Jones, with this invisible poison, it wasn't intended to be in food product but you did and sold it to Big Food which then sold to the milk consumer. Put in the stream of commerce. So Grain Co., you will be strictly liable.

So again, if you can take something they discussed previously, you can do that. There's a difference with defined supra versus defined supra means you are taking the rule and placing it. Define and discuss. I want the argument place there too. So make sure you understand the difference.

Then in regards to Grain Co., did I answer negligence, strict liability, and strict liability in tort.

Lawsuit two. Milk consumer versus Farmer Jones. We are suing for products liability. Theory? Negligence. Again, as a defect, she is producing milk, she is a manufacturer. As a manufacturer, she owes duty to inspect, correct and foreseeable users. She breached over duty because she manufactured defective milk that had mercury based poison. So arguing manufacturing defective.

First lawsuit there's warning defect and design defect.

Second lawsuit is warning defect. In regards to the question, you have the duty to warn versus design defect inherent ‑‑ manufacturing defect is different in kind. So this is manufacturing defect. A manufacturing defect is rare. It doesn't come up a lot. But this is a prime example of how you can see it tested. Usually designed in warning but here's the manufacturing defect. And different in kind good milk before and now tainted milk. And we can go to causation. But for mixing the seeds up, they wouldn't with be sick. Successive in the first lawsuit, I can do define discuss supra. So based on your time.

Proximate cause. Is it foreseeable if you feed your cattle seed grain not for food product because it has poison. Is it foreseeable you did feed your cattle and could make the milk bad? Absolutely. There's no argument of intervening act. Nothing. So I can go straight into it.

My damages? We have different defendant but same plaintiff. I can take it when I address up above. Steal it from above. That will help me. Again, I look for negligence, and talk about the duty breach causation damages. The milk consumers. Don't see defenses there. And then I will continue on with my next theory.

Here, it would be implied warranty of merchantability. You represent the product is what? Fair in its use. Farmer Jones manufactured milk. She sold it to Big Food who sold it to milk consumers. So that is fair average use, drink it and not get sick. They got sick because it was contaminated with poison. She breached the implied warranty of merchantability. Actual cause, proximate cause, and damages. Supra, right back.

Last theory. Argument, did you put defective product in the stream of commerce? She didn't produce tainted milk previously. It was defective because it was contaminated who sold to Big Food who sold to the milk consumer. So she will be strictly liable. Actual cause, proximate cause, damages, designed, discussion supra.

Now, I go back before I go to the next lawsuit and say, I talked about Farmer Jones. Did I see any difference between Grain Co. And Farmer Jones? Yes. I saw the difference in regards to defect because it was a manufacturing defect versus a design and warning defect. So there is a difference in the actual lawsuit.

Then I can go to lawsuit three against Big Food. Again, Big Food, I'm going after for negligence. Again they are a retailer. Remember, my rule originally manufacturer distributor owe duty to inspect, discover and correct. And that duty is owed to all foreseeable user. It's different for retailer. They have the duty if they should have known there's a defect.

In this case, they have the duty to correct something that they have knowledge of. Milk consumer are foreseeable. They owe duty but they have no knowledge. They don't breach. This is the sealed doctrine. So retailer gets product from distributor or manufacturers and they manufactured being put together like milk, flour, sugar, orange juice, it's put together. Unless I have knowledge such as a big hole in there to know there's something wrong with it. Sealed container doctrine. No way to tell contamination unless I open everything up to test.

Sealed container doctrine. They had no knowledge and then go on from there.

The next theory, implied warranty of merchantability.

Remember, it doesn't matter if you are manufacturer, distributor, retailer. Since Big Food sold the food to milk consumer. It was defective because the consumer became ill because of the poison in the milk, they will be held liable, implied warranty of merchantability.

Then I go to actual cause. Supra.

Proximate cause. Supra.

And damages, supra.

And last strict liability in tort. They are strictly liable. They can seek indemnification. Then they go to actual cause, proximate cause ‑‑ they will go after Farmer Jones because she is the one that sold defective milk. She is the primary wrongdoer here.

We buy products all over the world. We don't have jurisdiction. I always use world market out here that they buy things from China and Japan and all over the world. If you buy something that's contaminated, how do you sue that manufacturer if they are not United States? They don't have jurisdiction. Go to their courts to sue? Costly. And then you are not their citizen. That's why we have these rules. If retailer wants to sell it, you are accountable but they have a contract with the distributor so they have a way to jurisdiction, connection, they contractually agreed to and they have a connection as to that relationship. That's what makes it fair. That's a remedy to that.

So do I see different in this lawsuit? Sealed container doctrine so I feel comfortable.

You will see with products liability. I had no product to let the reader know where I'm at. Always let them know. Product is like an umbrella. There's negligence, and warranty, et cetera. You would never address and go through negligence and then talk about a general negligence. Never. It's the same negligence. It's just under product. It's the same thing.

You will see with negligence, give a rule. You don't have to do that. No extra points for that.

Duty. Go through what duty, do care, and inspect, correct. And that duty to all foreseeable person. The person who using the product.

After you show the duty, we go to breach. And this is where you want to spend some time and go through your if defect. I sub head note them. And you see there's counter play argument here. Grain Co. Had on their truck, seed grain not for food product. But Farmer Jones obviously didn't see it. Was that really an adequate warning and make your arguments. Because it did end up in the food. Let's say if they told over, since with the invisible mercury, it's easily something that can be messed up. Couldn't tell the difference. Made a mistake. And make your argument. But you do see this is an issue and I need to let the examiner know.

And design defect. The invisible flagged to me. Can't see it. I don't like that I can't see it. Even though it's standard in the industry because they all do this it doesn't make it right. Always think back, manufacturer of the cars. Nobody had seat belts way back. It doesn't make it right. So same thing here. With regards to the mercury based poison. People can make mistakes. I don't know that it's there.

We treat things, if you think about differently. Where you put it and children all that stuff, have a factor.

I have my successive tortfeasors. Use it in the food product, milk consumers become sick, proximate cause, straightforward. This exam did not test proximate cause. It's foreseeable. Give adequate warning, feeds end up in food product. And your damages.

My damages are not lengthy. Why? No facts. But I still have to talk about it. Because it's in the call. And you will see a lot of times, it's 5 points. I want my 5 points. That tell us the reader you didn't follow the call.

Next theory. This is indemnification. We touched on it briefly. It allows if you have somebody else ‑‑ joint tortfeasor ‑‑ if you have primary responsible party, then I want indemnity.

Prime example would be that ‑‑ we all have insurance. Car insurance. And when we get sued, we indemnify the insurance and they take over the lawsuit.

Contribution.

And implied warranty of merchantability. You warn the product is average in use.

Last week, the chair we use as ladder. That's fair average use. If it's misuse. We got anticipate what people are going to do with your actual product. In that case, it would be.

And issue of strict liability in tort. I'm stealing a lot of causation and damages to save time. Because it's verbatim, same discussion it have warranty. Your expressed warranty and fitness over purpose have a tendency to go together. You will have to see a fact pattern some type of representation. What I mean it has to be on the product or verbal, which is rare, but the actual seller.

So it's not an issue that comes up a lot but you will know when you see it. It's going to be on the product itself. Safe and wholesome. Now it's issue. You tell me it's safe and wholesome when it's not.

So that's your first lawsuit against Grain Co.

Farmer Jones next. Milk consumer versus Farmer Jones. Products, you don't have to give me pleasantries. Negligence.

She owe the duty to inspect discover correct.

Different in kind. I told you it's rare but you will know when it's there. Manufacturer previously and I'm still manufacturing when this one came out different. Then your actual cause, she mixed the grain to cattle and produce contaminated milk. Is it foreseeable?

I supra backup my damages.

Implied warranty of merchantability. Not a fair average use regarding to milk. I'm getting conclusionary. Time is a racehorse in an exam.

Based on inadequate warning and poison. She is strict liability.

Lawsuit three. Big Food. Difference here in regards to the sale container doctrine. You will see this is tested on the Multistate. Airplane engine. There are bolts left in the crates. So when they installed it, it malfunctioned, the argument is that person should have known based on the circumstances. So you did breach your duty. Again based upon that fact pattern, it should tell you to check into it.

Again, since they didn't have knowledge, no breach. But they will be accountable for implied warranty of merchantability as well as strict liability in tort. And seek indemnification. That's essay in a nutshell.

A couple of things before we hit those.

First, if you look for the call, it's a good call. Theories. Damages and defenses.

With a products liability exam, if you have a call like this, you will always have the issue of negligence, implied warranty of merchantability, and strict liability in tort. Always. The only way that would change if the call said, are they liable for implied warranty of merchantability or strictly liable?

Which they have done. There's one out there with a banana. And it was, oh, Baby Bar question. That the banana was treated with invisible chemical to keep the bugs and the squirrel bit and through it on the floor and consumer slips and get injured. But in that call, it gave you strict liability. Pay attention to the call. A lot of people, melody says, negligence, implied warranty of merchantability. No. The call narrow you down. It was under strict liability. So we have to talk about strict liability in tort and show the defect, which again, it was treated with invisible poison, designed defect and warning defect. And go on from there.

That's a good exam to look at and it's a Baby Bar question to look through.

You have three theories based on what I call the general call. Remember, the call can be very specific and that would change things. So pay attention to the call of the question. And I recommend mark it up. Use the highlight. Pay attention in what they are asking.

Some of the questions, I always start with negligence. You don't have to. But make sure you do one lawsuit at a time.

Common question. Causation. Every tort has causation. It's tested on the Multistate.

Defamation, invasion of privacy.

Every tort as causation. It's timing.

Make sure you understand that.

If there's more than one way to bring up defect, raise it. If you see one, look to see if there are multiple.

In this exam, they call for defenses. No true defenses. Indemnity, contribution, sealed container. These are arguments so I answered the call in regards to defense.

No comparison to the risk. All the consumers did was buy the milk and drink it and got sick.

There's another exam where a man and bought a roaster, two seater car, and didn't have air bags. Manufacturer didn't put air bags. And the father runs into a tree air bag deploy and injures the daughter in the seat. Theory, damages, defenses. The little girl is suing. What did she do? She didn't do anything. This was a bar exam. Some brought it to make it work or didn't work. That's not what they were looking for. They were looking for successive tortfeasor. State of the art as defense. The car was manufactured without the air bag. State of art, standard, based on the time of manufacturer, what do we expect in a car.

In regards to your cost benefit factor and $5 or putting the switch to shut off the air bag. Those are defenses they are looking for. Counter arguments.

No battery here. No intent. No expressed warranty. You don't see any representation about the product.

So these are issues that you wouldn't talk about in regards to the exam.

Any questions in regards to the essay?

Everybody got it.

Under your theory and what you will break apart and go through?

You will find that actually ‑‑ I call this racehorse. Some are worse. One called can co exam.

It's a concrete ‑‑ you need to keep the blade in water or it will disintegrate. The concrete cutter, shut it down and looks fine and the blade shattered into his foot within seconds.

You see based on the plaintiff who is suing, he did something wrong. He misuse the product. Was it enough warning about it and how they disclose it?

Another product exam. This is why to get you guys focus on the verbiage. If you think about it or put yourself in it, there's a blender. A lady buy it and make hot soup but in the brochure, it says do not put hot liquids in the blender. Brochure? Why not owner's manual. Brochure is something you are trying to sell me something. Not an operating manual. So they use their words carefully. Would you look at a brochure for instructions about your blender? Probably not. The words they use, it means something. It's very important.

There are a couple of questions on the Multistate, I don't know if you have those in front of you, one was question number 10. And this is dealt with grocery store. Woman breaks in and steals money. And she takes beer. When she gets home. She gets sick. She is suing the beer company. She can do that.

Even though you are a thief, stick to your rules. Defective product. Manufacturer defect. In regards to duty, they have a duty to inspect, discover, correct. It was contaminated so they breached that duty. It was a manufacturer defect.

The call basically says, will they fine for over if the injuries caused by ace. You can't argue over as an intervening act. That's not how it works. So in essence your proximate cause, and I think your question might be, causation to narrow it. If we look at exactly what happened, most likely, proximate cause always fail. So is it foreseeable that someone steals beer and drink it and get sick. It could happen. So it's a broader spectrum. And she should be able to recover.

And then the other one was number 16. This is where Barry was interested in purchasing Samuel's house. He asked Samuel were their termites in the house. Samuel said no believing it's true. Barry purchased the house and 3 months later, the termites damaged the framework for several years.

He claim for negligent misrepresentation. You need a false representation made by a lack of due care or one justify rely to the detriment. So now the issue here how can the homeowner get off on this?

So his best defense would be A, Samuel did not know there's termites in the house.

Samuel did not have duty to tell. Yes he did.

C. It's an expression of opinion.

And D., belief no termites was reasonable. That's the best argument.

Based on the fact, show that Barry the purchaser did not rely. Look at your elements to see what's being tested and which is the test defense based on the answer choices they gave me. The best choice is belief no termites is reasonable.

He didn't rely, that's a better choice. But that's not my answer choice.

Those were the two questions I have on the Multistate. I hope you are taking them and doing them.

When you miss a question, what do you do? You look to the why. If I pick A and it's B, why? What was I looking at and looked incorrectly? That's very important.

If you are afraid products liability or you want more, shoot me an e‑mail and I will be happy to send you three or four. And I recommend you to do is look at them and compare the answer why is this different than this one. They do test product differently because of the call of the question or actual parties or party's conduct. So make sure you understand. If I see product, how do I know defenses or counter arguments or one theory or what is expressed? Warranty that I need to address?

You should have from your first year Flemming writing book five contract, there's ‑‑ that's a products liability exam. That's one to look at too. That's a good example for you to look at and see. And it also has an issue of endorser. That's an area that could ‑‑ distributor or retailer. You can't sue me under product.

Any questions?

If anything does come up shoot me an e‑mail, I will be more than happy to help you.

Next week we will go over contract. I will give you an idea of how things are tested and come up.

You have UCC. Uniform commercial code. Get a hold of the sales Gilbert. They are going to test that. I believe in the e‑mail it's going to have testable area for UCC that you need to know. So I will send that out on Friday. Code Section you need to look at and they will come up here and there on the essay.

Shoot me an e‑mail if things come up. I will be happy to help you. Keep up the good work. Keep focusing. You can do this. I will chat with you guys next week. Good night.

(Event adjourned at 6:52 p.m.)