

Mastering Products Liability

Mastering Series
Russell Weaver, Series Editor

Mastering Bankruptcy
George W. Kuney

Mastering Civil Procedure
David Charles Hricik

Mastering Criminal Law
Ellen S. Podgor, Peter J. Henning, Neil P. Cohen

Mastering Evidence
Ronald W. Eades

Mastering Legal Analysis and Communications
David Ritchie

Mastering Products Liability
Ronald W. Eades

Mastering Products Liability

Ronald W. Eades

LOUIS D. BRANDEIS SCHOOL OF LAW
UNIVERSITY OF LOUISVILLE

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2008 Ronald W. Eades
All Rights Reserved.

Library of Congress Cataloging in Publication Data

Eades, Ronald W. Mastering products liability / by Ronald W.
Eades.

p. cm. —

(Mastering series) Includes index.

ISBN 978-1-59460-423-2 (alk. paper)

ISBN 10: 1-59460-423-1 (alk. paper)

1. Products liability—United States. I. Title. II. Series.

KF1296.E18 2008 346.7303'8—dc22

2008004361

Carolina Academic Press
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Series Editor's Foreword	xi
Preface	xiii
Chapter 1 · History and Background of Products Liability	3
History and Background Roadmap	3
A. Product?	3
B. Fair Price Doctrine	4
C. Caveat Emptor	5
D. Return to Consumer Protection	6
E. Privity	6
F. Privity Abolished	8
G. Move from Negligence to Strict Liability	9
1. Negligence	9
a. Res Ipsa Loquitur	10
b. Proof without Fault	11
2. Warranty	12
3. Strict Liability	13
4. Misrepresentation	15
H. Multiple Bases of Liability Allowed	15
I. Types of Defect	17
J. Restatement (Third) of Products Liability and Back to Negligence	18
K. Federal Involvement	19
History and Background Checkpoints	20
Chapter 2 · Negligence	21
Negligence Roadmap	21
A. Elements	21
B. Failure to Use Reasonable Care	23
C. Res Ipsa Loquitur	24
D. Other Problem Areas with Negligence	26
Negligence Checkpoints	27

Chapter 3 · Strict Liability in Tort	29
Strict Liability Roadmap	29
A. Basic Elements of Restatement (Second) of Torts 402A	29
1. Introduction	29
2. Business Seller	30
3. Product	31
4. Defective Condition	32
5. Unreasonably Dangerous	34
6. Without Substantial Change	34
7. Users or Consumers	35
8. Physical Harm	35
B. Tests for Unreasonably Dangerous	36
1. Consumer Expectation	36
2. Risk-Utility	37
3. Knowledgeable Manufacturer	38
4. Combinations	39
C. Proof Problems	39
1. Defect in the Product	40
2. Unreasonably Dangerous	41
3. Need for Expert Testimony	41
Strict Liability Checkpoints	42
Chapter 4 · Warranty	43
Warranty Roadmap	43
A. Introduction	43
B. Express	44
C. Implied	45
1. Fitness	46
2. Merchantability	47
D. Special Contract Problems	49
1. Notice	49
2. Economic Losses	50
3. Disclaimers	51
4. Limitation of Damages	54
5. Unconscionability	57
6. Privity	58
Warranty Checkpoints	61
Chapter 5 · Misrepresentation	63
Misrepresentation Roadmap	63
A. Elements of the Claim	63

1. General Elements	63
2. False Representation of a Material Fact	64
3. Scierter or Basis of Liability	65
4. Intent to Induce Reliance	66
5. Justifiable Reliance	66
6. Damages	66
B. Important Distinctions between Misrepresentation and Express Warranty	67
1. Notice	67
2. Disclaimers	68
3. Limitations of Remedies	68
4. Basis of Liability	68
5. Damages	68
Misrepresentation Checkpoints	69
Chapter 6 · Parties	71
Parties Roadmap	71
A. Plaintiff	71
B. Seller	73
C. Chain of Distribution	74
D. Manufacturer, Wholesaler, Retailer, Component Part Manufacturer	75
1. Component Part Manufacturers	75
2. Manufacturers	77
3. Wholesalers	78
4. Retailers	79
5. Additional Issues with the Initial Chain of Distribution	80
E. Used Product	80
F. Successor Corporation	82
G. Franchisor, Endorser	83
H. Leases	84
I. Real Estate	84
J. Services	86
K. Contribution, Indemnity	87
1. Tort or Contract	87
2. The Workers Compensation Problem	89
Parties Checkpoints	91
Chapter 7 · Manufacture	93
Manufacture Roadmap	93
A. Departure from Design	94

B. Malfunction Doctrine	94
C. Food and Beverages	95
1. Exploding bottles	95
2. Adulterated Products	96
Manufacture Check Points	98
Chapter 8 · Design	99
Design Roadmap	99
A. Tests to Use	100
1. Consumer Expectation	100
2. Risk/Utility	101
3. Knowledgeable Manufacturer	102
4. Combinations of Tests	103
B. Feasible Alternative	103
C. State of the Art	104
D. Dangerous with No Feasible Alternative	105
E. Comment K and Pharmaceuticals	106
Design Checkpoints	107
Chapter 9 · Warning	109
Warning Roadmap	109
A. Instructions and Warnings	109
B. Elements	110
1. Conspicuous	110
2. Inform the User of Risks	110
3. Inform of the Magnitude of the Risk	111
4. Explain How to Safely Encounter	111
C. Negligence or Strict Liability	111
D. Plaintiff Would Have Acted Differently with Product	112
1. Issue of Causation	112
2. Read and Heed Presumption	112
E. Who Must Be Warned?	113
1. Bulk Supplier	113
2. Sophisticated User	114
3. Learned Intermediary Rule	114
Warning Checkpoints	116
Chapter 10 · Causation	117
Causation Roadmap	117
A. Cause in Fact	117
B. Proximate Cause	119

C. Special Problems with Warnings	122
1. Would Have Read?	122
2. Read and Heed Presumption	123
Causation Checkpoints	123
Chapter 11 · Additional Proof Problems	125
Proof Roadmap	125
A. Experts	125
B. Custom	127
C. State of the Art and Feasible Alternative	128
D. Statutes and Regulations	128
E. Subsequent Remedial Measures	129
Proof Checkpoints	133
Chapter 12 · Defenses	135
Defenses Roadmap	135
A. Contributory Fault	136
1. Contributory Negligence	138
2. Comparative Fault	138
B. Assumption of Risk	139
C. Disclaimers and Limitations of Remedies	140
D. Misuse	140
E. Federal Preemption	140
F. Government Contractor	141
G. Statutes of Limitations and Statutes of Repose	141
Defenses Checkpoints	142
Chapter 13 · Damages	143
Damages Roadmap	143
A. Personal Injury	143
B. Property Damages	144
C. Economic Losses	145
D. Punitive Damages	146
Damages Checkpoints	147
Mastering Products Liability Checklist	149
Index	153

Series Editor's Foreword

The Carolina Academic Press Mastering Series is designed to provide you with a tool that will enable you to easily and efficiently “master” the substance and content of law school courses. Throughout the series, the focus is on quality writing that makes legal concepts understandable. As a result, the series is designed to be easy to read and is not unduly cluttered with footnotes or cites to secondary sources.

In order to facilitate student mastery of topics, the Mastering Series includes a number of pedagogical features designed to improve learning and retention. At the beginning of each chapter, you will find a “Roadmap” that tells you about the chapter and provides you with a sense of the material that you will cover. A “Checkpoint” at the end of each chapter encourages you to stop and review the key concepts, reiterating what you have learned. Throughout the book, key terms are explained and emphasized. Finally, a “Master Checklist” at the end of each book reinforces what you have learned and helps you identify any areas that need review or further study.

We hope that you will enjoy studying with, and learning from, the Mastering Series.

Russell L. Weaver
Professor of Law & Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law

Preface

The true beginnings of products liability law can be debated. It may appear to start with Restatement (Second) of Torts §402A in the 1960s. It could be traced to the abolition of privity for negligence cases in *MacPhearson v. Buick* in the early 1900s. It could, however, be traced back to Coke on Littleton and the discussion of the fair price doctrine in the 1700s. Whatever the birth date of modern products liability law, it is clear that it had and continues to have a major impact from the mid-20th century until today.

The law developed slowly until the advent of strict liability in tort in the mid-1960's. From that period through the end of the 20th century, the law exploded. Products liability issues were discussed in terms of consumer protection or the harm to manufacturers. Products like automobiles, cigarettes, and prescriptions drugs became the central issues in the debate.

By the end of the 20th century, detractors were seeking to pull back on the extent to which consumers were protected. The Restatement (Third) of Products Liability showed a definite return to negligence. The extent to which that will be followed is still to be seen.

As a topic of study, the above discussion should point out why products liability is exciting. It is a modern development in the law in the United States and worldwide. It has had a major impact on the lives of ordinary people whether they were injured parties who sought relief or employees in factories who felt they lost jobs because companies were unable to compete in that marketplace.

This text is designed to provide a discussion of the broad range of topics that come under the heading of Products Liability. A portion of the history of that area is discussed in order to help illuminate some of the relationships between different areas of the law. The different bases of claims and defenses are also presented. The text tries to provide a discussion of the more common issues that arise in this area. For students taking a course in Products Liability, this work should be useful for most courses in that area. It will provide the basics that will be covered regardless of the specific areas of concern the faculty seeks to provide focus.

At times, this work will need to cite to the Restatement of Torts and the Uniform Commercial Code. The language of those documents is not provided

in full, but, instead, attempts are made to explain those materials. It is suggested that the reader of this book should seek out copies of those materials when they are being cited. Being able to read the exact language of the Restatement and the Uniform Commercial Code will assist in the understanding of the material being presented.

Ronald W. Eades
Professor of Law
Louis D. Brandeis School of Law
University of Louisville
Louisville, Kentucky