

Products Liability
Mr. Sanders
Spring 2022

The only materials in the course are a Casebook (Fischer, et al. 5th ed.) and a set of problems attached in an e-mail and that will also be available from my secretary.

The outline does not have specific dates attached to specific assignments. Each Thursday I will give an estimate of where we should get the following week. Plan on reading 3 to 5 cases per class depending on their length, difficulty, etc.

As I believe the Associate Dean has informed everyone, I will be teaching the class via Zoom.

Note that there are a substantial number of assigned cases that are not in the casebook. Their names and citations are listed in the syllabus. You will have to go online to read these cases. Be sure to check for these cases as I will treat them as assigned reading. It is best if you get a copy of these opinions as they are printed in the West reporters so that we can all be on the same page when discussing them. There are also a number of cases that I want to draw your attention to, but which are not assigned or which I only want you to skim over. By the way, I doubt we will actually cover all that is listed below. I never have! As we go along, I may decide to skip some cases if I think we are falling too far behind.

Finally, I will do the problems that are bold faced in the syllabus in class sometime during the week they are listed or early the following week. **I expect everyone to turn in on time a written answer to the problems. I will discuss what I am looking for at the first class meeting.**

Topic	Page
I. Introduction	1-3
II. Negligence	4-10
III. Misrepresentation	10-17
Also Do Problem # 1 part 1. (We will discuss this when we do problem #1 part 2.)	
IV. Warranty	
A. Introduction	19-21

B. Express Warranty	21-31
C. Merchantability	31-40
D. Fitness for Particular Purpose	40-42
In Class do Problem on page 42.	
E. Persons who are Protected	43-48
F. Disclaimers and Limitations of Remedies	48-68
G. Notice	68
H. Summary	
Read: <i>Chandler v. Gene Messer Ford</i> , 81 S.W.3d 493 (Tex. App. 2002).	
Also Do Problem # 1 part 2.	
V. Emergence of Modern “Strict” Liability in Products	
A. Adoption	69-81
B. Policies Underlying Products Liability	81-103
(I will spend limited class time on this material.)	
Do: Escola Hypo that I will hand out in class.	
C. The Jury and Multiple Theories of Recovery	
Read: <i>Hyundai v. Rodriguez</i> , 995 S.W.2d 661 (Tex. 1999).	
Read: <i>Ford Motor Co. v. Miles</i> , 141 S.W.3d 309 (Tex. App. 2004).	
VI. Defect	
A. Introduction	105-106
B. Manufacturing Defects	106-118
Read: <i>Ford Motor Co. v. Ledesma</i> , 242 S.W.3d 32 (Tex. 2007).	
C. Proof of Non-Specific Defect-	
Circumstantial Evidence and performance standards	118-125
Read: <i>Ford Motor Co. v. Ridgway</i> , 135 S.W.3d 598 (Tex. 2004).	
Read: <i>Casey v. Toyota Motor Engineering</i> , 770 F.3d 322 (5th Cir. 2014) (read pages 322-330)	

D. Design Defects	
1. Introduction	125-126
2. Consumer Expectations	126-147
Do: Problem # 2	
3. Risk Utility	147-167
Read: <i>Turner v. General Motors</i> , 584 S.W.2d 844 (Tex. 1979).	
4. Mixed tests	168-175
The Unreasonably Dangerous requirement in Texas. Read: <i>Emerson Electric Co. v Johnson</i> , 627 S.W.3d 197 (Tex. 2021).	
Obviousness and design defects in Texas Read: <i>Uniroyal Goodrich Tire Co. v. Martinez</i> , 977 S.W.2d 328 (Tex. 1998). Read: <i>Timpte Industries, Inc. v. Gish</i> , 286 S.W.3d 306 (Tex. 2009).	
5. Special Issues Related to Design Defects	
a. Foresight/Hindsight	175-178
b. Misuse	179-187
c. Changes in Technology–Alternative Design	187-220
Read: <i>Genie Industries v. Matak</i> , 462 S.W.3d 1 (Tex. 2015) (read majority opinion but glance over the dissent)	
Do Problem # 3 on page 207 of casebook	
d. Delegating the Design Process	220-240
Read: <i>Ranger Conveying and Supply, Co. v. Davis</i> , 254 S.W.3d 471 (Tex. App. 2007). Read: <i>Air & Liquid Systems Corp. v. DeVries</i> , 139 S.Ct. 986 (2019).	
e. Medical Devices and Pharmaceuticals	240-261
E. Warning Defects	
1. Duty to Warn	261-284

2. Adequacy of Warning	284-318
3. Obvious or Known Dangers	319-329
Read: <i>Caterpillar v. Shears</i> , 911 S.W.2d 379 (Tex. 1995); <i>Brocken v. Entergy Gulfstates Inc.</i> , 197 S.W.3d 429 (Tex. App. 2006). Do: Problem # 4	
4. Who to Warn	
a. Users, Consumers and Bystanders	330-346
b. Learned Intermediaries	358-362
Note: do not read the Karl case in the Casebook. But look at the notes after the Case and W.Va. Code § 55-7-30 (undoing <i>Karl</i>), Read: <i>Centocor, Inc. v. Hamilton</i> , 372 S.W.3d 140 (Tex. 2012). See but do not read: <i>Ackerman v. Wyeth Pharmaceuticals</i> , 526 F.3d 203 (5th Cir. 2008).	
c. Allergies and Idiosyncratic Reactions	362-368
d. The Continuing Duty to Warn	368-379
Read: <i>Rodriguez v. Riddell Sports Inc.</i> , 242 F.3d 567 (5th Cir. 2001).	
VII. Causation in Fact	
A. Tests for Determining Causation	381-383
B. Proof of Causation	
1. Reliance on Warnings	383-399
Read: <i>Gillespe v. Century Products Co.</i> , 936 S.W.2d 50 (Tex. App. 1996).	
2. Enhanced Injuries	399-410
3. Linking the Defendant to the Product	410-447
Read: <i>Borg-Warner Corp. v. Flores</i> , 232 S.W.3d 765 (Tex. 2007).	
VIII. Proof of Defect and Causation	449

A. Industry Standard and Custom	449-463
B. Post-Accident Remedial Measures	463-469
C. Expert Witnesses	469-543
Read: <i>Cooper Tire & Rubber Co. V. Mendez</i> , 204 S.W.3d 797 (Tex. 2006); <i>Merck & Co., Inc. v. Garza</i> , 347 S.W.3d 256 (Tex. 2011).	
Do Problem # 5	
IX. Proximate Cause	545
A. Introduction	545-550
B. Duty Forseeability and Remoteness	550-557
Texas “Producing Cause” (Discussing <i>Lear Siegler, Inc. v. Perez</i> , 819 S.W.2d 470, 472 (Tex.1991) and <i>Union Pump Co. v. Allbritton</i> , 898 S.W.2d 773, 775 (Tex.1995). Note: These two cases are <u>not</u> assigned reading.	
C. Product Alteration	557-578
D. Comparative Fault – Superceding Cause	579-588
X. Effect of Statutes and Regulations	589
A. Introduction	589-590
B. Non-compliance and Compliance With Safety Statutes	591-600
Read: <i>Wright v. Ford Motor Co.</i> , 508 F.3d 263 (5th Cir. 2007). See but don’t read : <i>Hamid v. Lexus</i> , 369 S.W.3d 291 (Tex.App. 2011). See but don’t read : <i>American Honda v. Milburn</i> , 2021 WL 5504887 (Tex. App. 2021)	
C. Regulation	600-616
D. Preemption	617-637
Read: <i>Bic Pen Corp. v. Carter</i> , 251 S.W.3d 500 (Tex. 2008). You might wish to skim (i.e. get a flavor for); <i>Wyeth v. Levine</i> , 129 S.Ct. 1187 (2009); <i>PLIVA, Inc. v. Mensing</i> ,	

131 S.Ct. 2567 (2011); *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S.Ct. 2466 (2013); *Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068 (2011) (childhood vaccine act); *MCI Sales and Service, Inc. v. Hinton*, 329 S.W.3d 475 (Tex. 2010) (bus seatbelts); *Lofton v. McNeil Consumer & Specialty Pharmaceuticals*, 672 F.3d 372 (2012) (concerning Civ Pract. & Rem. Code § 82.007(b)(1)); *Wildman v. Medtronic, Inc.*, 874 F.3d 862 (5th Cir. 2017) (express warranty)

XI. Damages	639
A. In General	639-641
B. Pecuniary Loss and Harm to Property	642-654
Read: <i>Golden Spread Electric Coop., Inc. v. Emerson Process Management Power & Water Solutions, Inc.</i> , 954 F.3d 804 (5th Cir. 2020).	
See but do not read: <i>Wiltz v. Bayer Cropscience, LP</i> , 645 F.3d 690 (5th Cir. 2011).	
C. Mental Distress	654-670
See but do not read: <i>Lowe v. Philip Morris USA, Inc.</i> , 183 P.3d 181 (Ore. 2008). (no to medical monitoring)	
D. Punitive Damages	670-696
Texas Exemplary Damages Statute: Chapter 41 of the Civil Practice and Remedies Code	
XII. Apportionment of Liability	697
A. Consumer Conduct Defenses	697-698
1. Plaintiff Behavior Under Section 402A	698-702
Do: Problem # 6	
2. The Movement to Comparative Responsibility	702-716
Read: <i>General Motors v. Sanchez</i> , 997 S.W.2d 584 (Tex. 1999).	
We will also discuss the Texas Proportionate Responsibility Statute: Chapter 33 of the Civil Practice and Remedy Code.	

3. Assumption of the Risk	716-724
4. Misuse	724-736
B. Apportionment of Liability Among Defendants	736-739
1. Indemnity	739-752
<p>Who should indemnify whom in Texas? See but do not read: <i>Petroleum Solutions Inc. v. Head</i>, 454 S.W.3d 482 (Tex. 2014) (manufacturer v. component part maker); <i>Pan v. Sumitomo Rubber Industries, LTD</i>, 2018 WL 3055773 (S.D. Tex. 2018) (effect of indemnity statute on Jurisdiction); <i>In re NCS Multistage, LLC</i>, --- S.W.3d ---, 2021 WL 4875743 (Tex. App. 2021) (indemnity and responsible third parties); <i>Charlie Thomas Ford v. Ford Motor Co.</i>, 2021 WL 786600 (Tex. App. 2021) (what is a “Products Liability: action?)</p>	
2. Contribution	752-756
3. Partial Settlements	756-760
4. Employers	760-768
XIII. Parties and Transactions	801
A. Parties Who Can Be Sued	801
1. Retailers, Wholesalers and Distributors	801-808
2. Government Contractors	809-819
3. Successor Corporations	819-829
B. Transactions Covered	829-830
1. Leases	830-840
2. Franchises	840-846
<p>Facilitators: Read: <i>Amazon.com, Inc. v. McMillan</i>, 625 S.W.3d 101 (Tex. 2021).</p>	

3. Publications	846-852
4. Used Products	852-859
5. Real Estate	859-865
5. Services	865-882

XIV. Statutes of Limitations and Repose

Read: *Galbraith Engineering Consultants, Inc. v. Pochucha*, 290 S.W.3d 863 (Tex. 2009).

Read: *Camacho v. Ford Motor Co.*, 993 F.3d 308 (5th Cir. 2021).

See **but don't read**: *Stevenson v. Ford Motor Co.*, 608 S.W.3d 109 (Tex.App. 2020)

XV. Complex Litigation 883

(We may do parts of this chapter as time allows).

XVI. Other issues

Forum Non Conveniens: Read: *In re Pirelli Tire L.L.C.*, 247 S.W.3d 670 (Tex. 2007).
 Bar Room Brawl weapons! *Gann v. Anheuser-Busch, Inc.*, 394 S.W.3d 83 (Tex. App. 2012).

I am required by the University to add the following items:

Required Language for All Courses

1. Covid related information:

COVID-19 Information

Students are encouraged to visit the University's [COVID-19](#) website for important information including on-campus testing, vaccines, diagnosis and symptom protocols, campus cleaning and safety practices, report forms, and positive cases on campus. Please check the website throughout the semester for updates.

Vaccinations

Data suggests that vaccination remains the best intervention for reliable protection against COVID-19. Students are asked to familiarize themselves with pertinent [vaccine information](#), consult with their health care provider. The University strongly encourages all students, faculty and staff to be vaccinated.

Reasonable Academic Adjustments/Auxiliary Aids

The University of Houston complies with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, pertaining to the provision of reasonable academic adjustments/auxiliary aids for disabled students. In accordance with Section 504 and ADA guidelines, UH strives to provide reasonable academic adjustments/auxiliary aids to students who request and require them. If you believe that you have a disability requiring an academic adjustments/auxiliary aid, please contact [the Justin Dart Jr. Student Accessibility Center](#) (formerly the Justin Dart, Jr. Center for Students with DisABILITIES).

Excused Absence Policy

Regular class attendance, participation, and engagement in coursework are important contributors to student success. Absences may be excused as provided in the University of Houston [Undergraduate Excused Absence Policy](#) and [Graduate Excused Absence Policy](#) for reasons including: medical illness of student or close relative, death of a close family member, legal or government proceeding that a student is obligated to attend, recognized professional and educational activities where the student is presenting, and University-sponsored activity or athletic competition. Under these policies, students with excused absences will be provided with an opportunity to make up any quiz, exam or other work that contributes to the course grade or a satisfactory alternative. Please read the full policy for details regarding reasons for excused absences, the approval process, and extended absences. Additional policies address absences related to [military service](#), [religious holy days](#), [pregnancy and related conditions](#), and [disability](#).

Recording of Class

Students may not record all or part of class, livestream all or part of class, or make/distribute screen captures, without advanced written consent of the instructor. If you have or think you may have a disability such that you need to record class-related activities, please contact the [Justin Dart, Jr. Student Accessibility Center](#). If you have an accommodation to record class-related activities, those recordings may not be shared with any other student, whether in this course or not, or with any other person or on any other platform. Classes may be recorded by the instructor. Students may use instructor's recordings for their own studying and notetaking. Instructor's recordings are not authorized to be shared with *anyone* without the prior written approval of the instructor. Failure to comply with requirements regarding recordings will result in a disciplinary referral to the Dean of Students Office and may result in disciplinary action.

Syllabus Changes

Due to the changing nature of the COVID-19 pandemic, please note that the instructor may need to make modifications to the course syllabus and may do so at any time. Notice of such changes will be announced as quickly as possible through e-mail.

I should note a few things about the above language. First, the Law Center is governed by its own absence policy so you may disregard this language. Second, I will be recording every class and I will share the recording with the class. Third, I cannot imagine any changes in the syllabus but of course will let you know if this arises.

2. Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the “Let's Talk” program, a drop-in consultation service at convenient locations and hours around campus.

http://www.uh.edu/caps/outreach/lets_talk.html