Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we are doing another in our "Listen and Learn" series – this one on strict products liability. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the Law School Toolbox podcast. If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today we are going to be talking about strict products liability, which you might also see written as "strict product liability". Either is acceptable. Strict products liability is one of three theories of liability that can form the basis of a products liability claim. The other two theories are negligent products liability and breach of warranty. While we will not be discussing these other theories today, it is important to keep in mind that a products liability exam question will likely trigger a discussion of multiple theories of liability.

Lee Burgess: Okay, let's get started by defining strict products liability. Under the strict products liability theory, a commercial supplier of a defective product is subject to strict liability for any harm caused by the product, regardless of any wrongdoing or negligence.

Lee Burgess: A claim for strict products liability requires the plaintiff to show, one, defendant is a commercial supplier who routinely deals in goods of this type; two, the product was defective when it left the hands of the manufacturer or seller; three, the product was not altered when it reached the plaintiff; and four, the product caused an injury to plaintiff when it was being used in an intended or unintended foreseeable use.

Lee Burgess: That rule may seem pretty straightforward, but there's actually a lot to unpack. First, what does it mean for a defendant to be a "commercial supplier"? A commercial supplier is any person or entity who is engaged in the business of selling goods of the type. Casual sellers and service providers are not commercial suppliers. Note that any commercial seller in the distribution chain – including a retailor or a wholesaler – is deemed to be a commercial supplier, and a strict liability action may be brought against them regardless whether there is privity with the plaintiff. For example, let's assume that a manufacturer

manufactures a defective widget and then sells to a wholesaler, who then sells to a retailer, who then sells to the customer. In those circumstances, each of the manufacturer, wholesaler, and retailer are considered commercial suppliers, even though only the retailer directly supplied the customer with the product.

Lee Burgess: Moreover, the plaintiff doesn't actually need to purchase the defective product. So going back to our example, if the consumer uses the defective widget and causes an injury to a third party, the third party can assert a strict products liability claim against any of the three commercial suppliers, even though the third party didn't purchase the product themselves.

Lee Burgess: Alright, so now we know who can assert a strict products liability claim and against whom. The next question is: What does it mean for a product to be "defective"? There are three categories of defect: manufacturing defect, design defect, and failure to warn. We'll address each in turn.

Lee Burgess: Evidence of a manufacturing defect requires that, one, the product differs from the intended design; and two, it is more dangerous than if made properly. For example, let's assume that a manufacturer produces lawn mowers with blade guards. Due to an assembly line issue, a number of lawn mowers are produced without blade guards, and one of those lawn mowers causes injury. That constitutes a manufacturing defect because the defective lawn mower was more dangerous because it deviated from the intended design.

Lee Burgess: In contrast, a design defect exists if there was a way to build the product that, one, is safer; two, is more practical; and three, has a similar cost. When a design defect is alleged, the trier of fact must balance the alternative designs available – including their cost and effect on utility – against the risk to customers.

Lee Burgess: Going back to our lawnmower example, let's assume that even if the product is manufactured according to its design, the covered blades nevertheless cause injury in about 2% of users. But there is also an alternative way to build the blade covers so that they cover more of the blades. The alternative design would reduce injuries to 1% of users with no decrease in product performance and at no increased cost. The manufacturer rejects the alternative design, continues manufacturing based on the original design, and one of the original designs causes injury. That constitutes a design defect because the defective lawn mower was made more dangerous by being manufactured according to its intended design instead of a safer alternative.

Lee Burgess: Evidence of a failure to warn requires that, one, the plaintiff was not warned of the risks regarding the use of the product; two, which are not obvious to an

ordinary user but known to the designer/manufacturer. A warning must be proportionate to the risk involved with normal use of the product.

Lee Burgess: Going back to our lawnmower example, let's assume that there are no safer design alternatives to the original design, which means that no matter what, a lawn mower is going to cause injury in about 2% of users. The lawn mowers do not contain a warning, even though the danger of injury from covered blades is known to the manufacturer and is not obvious to an ordinary user. That constitutes a failure to warn defect, because the product, while inherently dangerous, is made even more dangerous by the fact that the consumers are not warned of the danger.

Lee Burgess: Okay, that's it for our rules, so let's move on to our first hypo. This one is adapted from the February 2013 California bar exam:

Lee Burgess: "Darla is in the pest control business. She develops and produces fumigation gas for her own use. She also sells the gas to customers. Some of her competitors do not sell gas to customers because consumers sometimes do not follow safety instructions. Darla sold a container of fumigation gas to Albert for use in ridding his apartment of insects. Although she had intended to produce gas of standard toxicity, she had unknowingly produced gas of unduly high toxicity.

Lee Burgess: Albert used the gas and succeeded in killing all the insects in his apartment. Because he used the gas carelessly, some made its way into the apartment of his neighbor, Paul. The gas caused Paul to suffer serious lung damage and to fear that he would contract cancer as a result. Is Darla liable to Paul? Discuss."

Lee Burgess: Alright, it's immediately clear that we're in products liability territory because Paul is seeking to hold Darla liable due to injuries caused by a product – fumigation gas. On an exam, you would want to consider each of the three theories of products liability and determine which of the three were applicable. But we're just going to deal with strict products liability for today.

Lee Burgess: The first element of strict products liability requires us to determine whether Darla is a commercial supplier who routinely deals in goods of this type. Here, we're told that Darla develops and produces fumigation gas for her own use. That alone would not make her a commercial supplier. But we're also told that she sells the gas to consumers, and in this case she sold the gas to Albert. That makes her a commercial supplier. Remember that it doesn't matter that Paul didn't purchase the gas from Darla himself; Paul was injured by the gas and can still sue Darla under the strict products liability theory.

Lee Burgess: The second element requires us to determine whether the gas was defective when it left Darla's hands and, if so, whether it suffered from a manufacturing defect, a design defect, or a failure to warn. We'll start with manufacturing defect. We know that a manufacturing defect requires evidence that, one, the product differs from the intended design; and two, it is more dangerous than if made properly. Here, we're explicitly told that the fumigation gas differed from the intended design. Darla intended to produce gas of standard toxicity, but unknowingly produced gas of unduly high toxicity. The fact that the gas was more toxic than intended means that it was more dangerous than intended. Accordingly, Paul will be able to show that the gas suffered from a manufacturing defect.

Lee Burgess: Now, what about the other two categories of defect? We have been given no information about the design of the gas Darla intended to produce, other than it was of standard toxicity. There is also no indication here that Darla was aware that she was selling gas with higher than normal toxicity and failed to provide a warning. All we know is that the gas that injured Paul deviated from Darla's intended design. So it doesn't look like design defect or failure to warn is at issue in this question.

Lee Burgess: Now that we have established a manufacturing defect, we need to move on to the third element, which requires us to determine whether the gas was altered when it reached Paul. While we're told that Albert used the gas carelessly, there is no indication here that Albert altered the gas in any way. So this element is satisfied as well.

Lee Burgess: The fourth and final element requires us to determine whether the product caused Paul's injury. As with negligence claims, both actual and proximate cause must be shown. There's no question here that the defective gas was the actual cause of Paul's injury. But for the increased toxicity of the gas, Paul would not have been injured by Albert's use of the gas, or at least not to the extent that he was. But what about proximate cause? We know that Albert was careless in using the gas, but the facts suggest that this misuse was foreseeable. Specifically, we're told that some of Darla's competitors do not sell gas to consumers because consumers sometimes do not follow safety instructions. Because Albert's careless use of the gas was foreseeable, the gas was the proximate cause of Paul's injury.

Lee Burgess: Okay, that's it for that hypo. That hypo allowed us to work through a full analysis of a manufacturing defect, but it didn't allow us to get into the other kinds of defects. So let's do one more. This one is adapted from the February 2006 California bar exam:

Lee Burgess: "Autos, Inc. manufactures a two-seater convertible, the Roadster. The Roadster has an airbag for each seat. Autos, Inc. was aware that the airbags can be dangerous to children, so it considered installing either of the two existing technologies: one, a safety switch operated by a key that would allow the passenger airbag to be turned off manually; or two, a sensor under the passenger seat that would turn off the airbag upon detection of a child's presence.

Lee Burgess: Both technologies had drawbacks. The sensor technology was relatively new and untested, and the safety switch technology had the risk that people might forget to turn the airbag back on when an adult was in the seat. The safety switch would have increased the price per car by $5, and the sensor would have increased the price per car by $900.

Lee Burgess: Research showed that most riders were adults and that the airbags rarely hurt children who were properly belted into the seat. No federal or state regulation required either a safety switch or a sensor. Autos, Inc. chose to install neither.

Lee Burgess: Oscar bought a Roadster. On his first day of ownership, he decided to take his 10-year-old daughter, Chloe, to a local ice cream shop. On the way home, Oscar accidentally ran the Roadster into a bridge abutment. The airbag inflated as designed and struck Chloe in the head, causing serious injury. Chloe was properly belted into the seat. She would not have been hurt if the airbag had not struck her.

Lee Burgess: What tort theories can reasonably be asserted on Chloe's behalf against Autos, Inc.? Discuss."

Lee Burgess: Alright, once again we are presented with a clear case of a product causing an injury. So let's go through our strict products liability analysis.

Lee Burgess: First, is Autos, Inc. a commercial supplier? Yes. Autos, Inc. manufactures the Roadster and sells it to consumers either directly or through other commercial suppliers.

Lee Burgess: Second, was the Roadster's airbag defective when it left Autos, Inc., and if so, what was the nature of the defect? We're told that the airbag inflated as designed and are given no other information about the manufacturing of the airbag. So manufacturing defect is not at issue in this question. We are, however, given a lot of information about the design of the airbag, which tells us that we need to discuss the design defect theory.

Lee Burgess: We know that a design defect exists if there was a way to build the product that, one, is safer; two, is more practical; and three, has a similar cost. Here, we know that there were two alternative ways to build the product – one involving a switch that would turn the airbag on and off, and another involving a sensor that would detect a child in the passenger seat. While the switch was subject to user error, it nevertheless was a practical solution that would have made the car safer for children by allowing the airbag to be turned off. Moreover, the switch cost $5 per car to implement, making it a cost-effective solution even when accounting for the fact that children were not the typical Roadster passengers.

Lee Burgess: The sensor, on the other hand, cost $900 and was untested. It would therefore be difficult for Oscar to argue that the sensor was safer or cost-effective. Accordingly, on these facts, Chloe's best argument is that the airbag had a design defect because it did not include the "on" and "off" switch.

Lee Burgess: What about failure to warn? We're not told whether Autos, Inc. provided any warnings regarding the airbag. We are told, however, that Autos, Inc. was aware that airbags can be dangerous to children. Moreover, it is likely that Oscar and Chloe did not know of that danger. So if Autos, Inc. did not provide an adequate warning regarding the danger of airbags to children, Chloe could probably assert a failure to warn defect as well.

Lee Burgess: Moving on to the third element, there is no indication that the airbag was altered before it reached Chloe.

Lee Burgess: Finally, we need to address causation. The question tells us that the airbags inflated as designed, and Chloe would not have been hurt in the accident if the airbag hadn't stuck her. That's enough to establish actual cause. Proximate cause is a little trickier because Autos, Inc. could argue that Oscar driving into the bridge was the proximate cause of Chloe's injuries, not the airbag. But that argument is likely to fail because accidents are foreseeable and are the very reason that cars have airbags in the first place. Therefore, Oscar will be able to demonstrate that the defective airbag caused Chloe's injuries.

Lee Burgess: Well, that's all we have for today. We hope you found these hypos to be helpful examples of how to work through strict products liability questions. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always

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