International Products Liability Outline

I. Introduction
   a. On balance, increase in globalization will increase the wealth and well-being of humanity, but brings its share of problems, e.g. defective products moving in the chain of commerce.
   b. Some major trading regions seem to be approaching the direction of American PL. Will that result in increased litigation there? My answer: I don’t think so. State health care systems and workers comp limitations, as well as limitation on suing sellers should keep the litigation to a lesser level. Also, the availability of lower damages makes litigation less financially rewarding.
   c. My question—has the increase in globalization affected U.S. product liability law?

II. International Aspects of PL Litigation in the U.S.
   a. Jurisdiction
      i. Alien Tort Claims Act—??? Relevance to this course? Grants jurisdiction for torts if in violation of law of nations or a treaty of U.S. Law of nations does not yet cover products liability, so not a basis of jurisdiction. (?)
      ii. Asahi—Jurisdiction must be reasonable.
         1. Factors:
            a. Burden on defendant
            b. Interests of forum state
            c. P’s interest in obtaining relief
            d. Judicial system’s interest in efficient resolution of controversies
            e. States’ shared interest in furthering fundamental substantive social policies.
      2. Plurality would also require that D “purposefully avail itself of forum state.” This view has been adopted by some lower courts and could become the prevailing view if this is relitigated today. However, other courts have not adopted this test, and have held that awareness that the product would end up in the forum is sufficient.
   b. Discretion to Dismiss—Forum non conveniens
      i. Piper—unfavorable change of law does not bar dismissal
         1. P sued in U.S. because the laws more favorable than Scotland’s laws
         2. Presumption that P’s choice of forum controls, but foreign Ps get less deference.
         3. Presumption can be overcome if analysis of private and public factors clearly point to another forum.
         4. Forum court has discretion to dismiss—cannot transfer a case out of the system, can only dismiss if not appropriate to try the case in the forum chosen.
         5. C of A holds that unfavorable change of law essentially means there is not alternative forum—in this case, there are certain Ds who would have no c of a.
         6. S. Ct. holds that unfavorable change in law, by itself, should not bar dismissal. Should not, in fact, be given substantial weight in a forum non conveniens inquiry, although it can be considered.
7. *Gulf Oil* says there must be an alternate forum and uses private and public factor balancing.

8. Analyzed under *Gulf Oil* using *Gilbert* two-prong balancing test:
   a. Availability of alternate forum
      i. Note: if the alternate forum provides a clearly inadequate remedy such that is really no remedy at all, the unfavorable change in law can lend substantial weight.
   b. Balance of private/public factors favors alternate forum
      i. Private factors (to determine whether trial in chosen forum would be oppressive and vexatious to D out of proportion to P’s convenience):
         1. Access to proof
         2. Availability of compulsory process and cost of obtaining attendance of witnesses
         3. View of premises, if appropriate
         4. Other practical problems of an easy, expeditious, and inexpensive trial
      ii. Public factors (to determine whether the chosen forum is inappropriate because of the court’s own administration):
         1. Court congestion
         2. “Local interest in having localized controversies decided at home”
         3. Interest in trial in a forum that is at home with governing law
         4. Avoidance of conflict of laws, or application of foreign laws
         5. Jury duty burden on citizens in unrelated forum.

9. Note: Forum non conveniens review is on abuse of discretion only—C of A cannot substitute its own judgment.

10. Note: Some state courts don’t adopt *Piper*.

ii. *Union Carbide*—when is an alternate forum inadequate?

1. India’s court system does not allow expansive pretrial discovery, has no juries, no contingency fees, and there is a huge backlog of cases that result in large delays. Also does not permit comparable class actions.
2. Private interests weigh heavily for dismissal—witnesses and information are in India and cannot be compelled to appear in U.S. Also, India has an interest in having its values adjudicated, not having U.S. values imposed on it.
3. Lower court tries to mitigate the problems by dismissing, but requiring that Union Carbide consent to jurisdiction of Indian courts, waive SOL defenses, be subject to U.S. discovery rules, and pay the judgment.
4. C of A affirms dismissal, removes the discovery and judgment conditions. Holds that India is adequate alternate forum.
5. *Cf. Bhatnagar*, where court holds that long delays (approx. 25 years) make India an inadequate forum. Ct. notes that India will not always be an inadequate forum.
iii. *Lueck*—does lack of tort remedy render a forum inadequate?

1. NZ had abolished tort suits for compensatory damages, replacing them with a statutory no-fault compensation scheme.
2. Ct. held that Ps did not show that NZ’s remedy is so inadequate that it is no remedy at all. Analysis is not whether the same suit could be brought, or whether there is an identical judicial remedy, but whether there is a remedy for the loss. Here, there is a statutory remedy.
3. *My note*: this is consistent with respecting foreign nation’s interest in its own substantive law. Allowing the suit in the U.S. would tread on their policy choices.
4. S. Ct. has held that an alternate forum ordinarily exists when D is amenable to service of process in the foreign forum. It is very rare when the alternative forum is found to be inadequate. A foreign forum is adequate unless it offers *no* remedy at all.
5. This decision is as far as *Piper* has been stretched.

c. Choice of Law

i. *Kozoway*—if case is not dismissed on forum non conveniens, whose law applies?

1. When you choose a forum, you may not get their substantive law, but you will get their choice of law rules. Every state has its own choice of law analysis, so will lead to inconsistent results. In federal diversity cases, law of forum state applies.
2. Rstmt. (2nd) Conflict of Laws § 145 states that “rights and liabilities of parties with respect to an issue in tort are to be determined by the local law of the state which…has the most significant relationship to the occurrence and the parties.” Contacts to be taken into account:
   a. Place where injury occurred
   b. Place where conduct causing injury occurred (locus of tort)
   c. Domicile, residence, nationality, place of incorporation and place of business of parties
   d. Place where the relationship, if any, between parties is centered.
3. Rstmt. (2nd) Conflict of Laws § 146 states, “in an action of a personal injury, the local law of the state where the injury occurred determines the rights and liabilities…unless…some other state has a more significant relationship to the occurrence and the parties.”
   a. This is a presumption that can be overcome by applying the “most significant relationship test”
      i. This test is used because it helps to provide a “fair level of predictability and uniformity.”
   b. In this case, the presumption is overcome, because the court finds that the tortious conduct occurred in IA, and it was merely fortuitous that the injury occurred in Alberta. Ct. applies IA law.
4. Both §§ 145 and 146 are analyzed under § 6 factors:
   a. Needs of the interstate and international systems
   b. Policies of the forum
   c. Relevant relative policies of other interested states
d. Protection of justified expectations
e. Basic policies underlying that field of law
f. Certainty, predictability, and uniformity of result
g. Ease in the determination and application of the law to be applied.

5. Default rule—Lex loci delecti—court should apply the substantive law of the place where the injury occurred.

6. When talking about place of tort, is it where the negligence occurred or where the injury occurred? Ct. seems to say it’s where negl. occurred.

7. See class notes on this case for more information.

ii. *Dorman*

1. Applied MO choice of law rules (“most significant relationship test”), and found that Canada law applied.
2. Note: In MO, if most significant relationship unclear, then ct. should use lex loci delecti.
3. See Powerpoint slides for specific analysis and comparison with *Kozoway*.
4. Accordingly struck causes of action not permitted in Canada (SPL, warranty, and res ipsa loquitur).
5. See class notes for more information.

III. PL Litigation Outside the U.S.

a. Great Britain and Commonwealth

i. Foundations

1. Seminal case: *M’Alister (Donoghue)*—Has P pleaded a c of a for negligence? Issue is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.
2. Defines negligence: One must take reasonable care to avoid acts or omissions that are reasonably foreseeable to be likely to injure your neighbor.
3. Who is your neighbor? Persons who are so closely and directly affected by an act that one ought reasonably to contemplate the effect on them when considering the act or omission in question.
4. **M’Alister Rule:** A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care. *Sounds a lot like MacPherson, which is cited with approval.*
5. Without this new rule, P would have had no remedy—no one else was negligent, and no privity of contract unless the consumer purchased the bottle, so no warranty of fitness.
6. This rule is confined to articles of common household use, such as food, cleaning supplies, etc., where the manufacturer knows they will be used by others than the purchaser.

ii. Canada

1. Each province has its own laws—not national law. However, the Canadian Supreme Court establishes general trends of common law, which guide jurisprudence in the provinces. In this way, unlike the U.S., Canada has a pretty uniform common law throughout the country.
2. Canada has historically drawn from U.K. and Australian jurisprudence, but increasingly from U.S.
3. U.S. principles of strict liability stand in stark contrast to traditional U.K. reliance on traditional negligence principles that require proof of a lack of reasonable care.
4. *McMorran*—Soda bottle case
   a. Sealed bottles, no possibility of inspection by retailer or consumer
   b. Balance of probabilities = preponderance of evidence
   c. 1st claim: P prevails against retailer on breach of K theory under Sale of Goods Act—implied warranty of fitness—seller would know by implication of the use to which this good would be put.
      i. Since defect likely existed when bottle purchased, retailer is liable.
   d. Ct. notes that use to which bottle is put is ordinary use.
   e. Although there was a warning on the cap, it was not designed to prevent this type of accident and could not have.
   f. 2nd claim: against manufacturer is negligence, because no privity of contract
   g. No strict liability, but where there is a manufacturing defect, the inference of negligence is irresistible. Either the manufacturing system is at fault or an employee is at fault
   h. Possibility of intermediate examination does not excuse mfr. because even close inspection would not have revealed the defect.
   i. 3rd claim: Retailer sues for indemnity from manufacturer. Rule on indemnity is that where one D is exposed to liability without fault of his own by the negligent act of a co-defendant, indemnity is implied unless the act is clearly illegal in itself.
   j. Manufacturer required to indemnify retailer.
   k. *Ellis note:* These cases get very close to SPL. Questions whether they are achieving essentially similar results.

5. *Nicholson v. John Deere*—tractor fire set woman’s house on fire
   a. 1st claim: Against manufacturer for negligent design, failure to correct defect, and failure to warn
b. State of art
c. Reasonable alternative design (RAD)
d. 2nd claim: Against retailer/repair shop for negligent servicing and failure to warn.

6. Buchan v. Ortho Pharmaceutical—duty to warn of risk of stroke (oral contraceptives)

iii. Great Britain
1. Carroll v. Fearon
2. Norbury

b. Civil Law Systems
i. Background
1. Historically rooted in attitudes re: the nature of law, role of law in society and polity.
2. Oldest law tradition—since 450 B.C.
3. Most influential and widespread: Continental Europe (including Central Europe), Latin America, Much of Africa & Asia (e.g. Japan, Korea, China?), Louisiana, Quebec, Puerto Rico.
4. They believe civil law to be superior to disorganized common law
5. Both civil law and common law originated in Europe, but both have influence vastly beyond Europe—only Islamic law originated outside Europe
6. Role of Codes. Not simply statutory law, like CA Code or UCC.
7. Codification is an ideology
8. Judges are civil servants, career track, anonymous.
   a. They follow the law. Their interpretive function is very limited. Stare decisis is rejected—they are not required to follow other opinions, although they are persuasive.
   b. Assumption that judges do not interpret the law, only apply it to the facts. Reality is that the codes are not self-applying. Judges must engage in some interpretation. The sheer variety of cases requires this. Codes are not clear and comprehensive, judges have to fill gaps
   c. In reality, statutes are reinterpreted to fit changing circumstances
9. Unlike common law, there is no consolidated trial. There is no jury, little oral testimony, evidence rules are unimportant, there are no pretrial proceedings, little discovery, and no cross-examination.
10.

ii. Germany
1. German Civil Code adopted in 1896. Was historically based, scientific, and professional. Did not abolish prior law, rather adopted traditional German law in code. The drafters looked not only to German tradition, but also to Roman law. It is not a laymen’s text. It unified German law.
2. Court structure:
   a. Constitutional court
   b. Federal Supreme Courts with specialized jurisdiction
c. Lander courts (specialized jurisdiction, 24 courts of appeal, 120 trial courts, 750 local courts)

iii. France
    1. After French Revolution, adopted Code Napoleon (1804)—it repealed all prior law. Adopted in spirit of nationalism (rise of nation-state in Europe), rationalism, egalitarianism (wanted to eliminate feudalism—property, also against “government of judges” that supported aristocracy by acting like it was common law—instead they wanted a government where “every man was his own lawyer”—should be able to read the law), and separation of powers.
    2. Cassation—quash incorrect decisions of lower courts. Originally no power to tell them correct principles. Gradually assume interpretive authority—now the “Supreme Court of Cassation.”
    3. Evolutive interpretation: French code attempts to regulate tort law in five section.
    4. “Things in one’s charge"

iv. The European Union
    1. Member states: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom
    2. Institutions:
       a. European Parliament (elected by the peoples of the Member States)
          i. 626 representatives (MEPS)
          ii. Elected by citizens of 15 member states
          iii. Power to legislate, but shares power with the Council
          iv. Power of the purse—plays decisive role in adoption of EU budget
          v. Power to supervise the executive—legislative oversight, especially Commission
       b. Council of the Union (composed of the governments of the Member States)
          i. Community’s legislative body—often exercises legislative power in codecision with European Parliament
          ii. Coordinates general economic policies of Member States
          iii. Concludes international agreements for Community
          iv. Budgetary authority with European Parliament
          v. Defines and Implements common foreign and security policy
          vi. Coordinates Member States activities and adopts measures for police and judicial cooperation on criminal matters
       c. European Commission (driving force and executive body)
          i. 20 members—5 year term
          ii. Initiates community policy and represents the general interest of the EU
iii. Acts as the guardian of the EU treaties to ensure that European legislation is applied correctly
iv. Manages policies and negotiates international trade and cooperation agreements

d. Court of Justice (compliance with the law)
i. President, 6 chambers, 3 or 5 judges
ii. Jurisdiction:
   1. Action for failure to fulfill Treaty obligations
      a. Commission against Member state
      b. Member state against another member state
   2. Action for annulment—judicial review of the legality of Community acts
   3. Actions for failure to act—against Parliament, Council, or Commission
   4. Actions for damages—against Community institutions or servants
   5. Preliminary rulings on the interpretation or validity of Community law—references from national courts
   6. Appeals against judgments of the Court of First Instance.

iii. Court of First Instance
   1. President, 15 judges, 4 chambers, 3 or 5 judges
   2. Jurisdiction:
      a. Actions for annulment, failure to act, or damages against the Community
      b. Competition proceedings and ECSC cases
      c. Disputes between Community and its officials and other servants
   e. Court of Auditors (sound and lawful management of the EU budget)

3. Subordinate Institutions
   a. European Central Bank
   b. Economic and Social Committee
   c. Committee of the Regions
   d. European Investment Bank
   e. European Ombudsman

4. Legislative powers
   a. Treaty of Rome (Amsterdam)—Art. 100. In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council, and the Commission shall make regulations and issue directives, take decisions, make recommendations, or deliver opinions.
i. Regulation—general application, binding in its entirety on all member states.
ii. Directive—binding on each member state as to the result to be achieved, but leaves to each state the choice of form and method
iii. Decision—binding on those to whom it is addressed.
iv. Recommendations and opinions have no binding force

5. Product liability directive is binding, member states must ensure that it is enacted in their countries.
   a. Producer shall be liable for damage caused by defect
   b. Product means all movable except agricultural products and game. Member states may include agricultural products and game if they wish
   c. Producer = manufacturer and anyone who represents himself as manufacturer
   d. Product is defective when it does not provide safety a person is entitled to expect
   e. Producer not liable if he proves:
      i. He did not put the product into circulation
      ii. It is probable the product was not defective when put into circulation or came into being afterwards
      iii. Product not manufactured by him in the course of his business
      iv. Defect due to compliance with mandatory regulations
   v. State of art—optional—member states can choose whether to accept this defense or not—wording: state of scientific and technical knowledge when product put into circulation did not enable the product to be discovered
      1. U.K. has adopted
   vi. For component manufacturer, defect attributable to design of product containing component or to product manufacturer’s instructions

6. Joint and several liability
7. Comparative fault permitted but not required
8. Cannot disclaim or limit liability by contract
9. Member states may limit liability to not less than 70 million ECU

   a. E.C. Commission sues member state U.K. in E.C.J., seeking a declaration that U.K. did not comply with PL Directive. EC claims the UK statute did not conform to the directive with re: state of art defense (more lenient).
   b. U.K. language: defense to show that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.
c. E.C. claims that imposes a negligence standard incompatible with strict liability—that the EU standard is objective, while UK is subjective (perhaps industry custom instead of state of the art).
d. U.K. says there is no difference in effect, and the U.K. courts required by statute to interpret consistent with directive.
e. Held: Burden of proof on Commission, that it is implicit in the directive that scientific and technical knowledge be accessible when product put in circulation, that it is not clear that Commission’s aim is thwarted by the U.K. statute, because it has not yet been interpreted by U.K. courts
f. (I agree with EC that UK law not the same!)

v. Post E.U. decisions
   1. Bundesgerichtshof
   2. Richardson

vi. Japan
   1. Taishi v. Matsushita
   2. Katsurakawa v. McDonald

vii. Latin America
   1. Generally
      a. Latin American liability really not comparable to U.S.
      b. Speaker proposed bizarre idea of applying the law of the nation where the product originated
      c. Definition and traditional requirement for imposition of civil liability is the occurrence of an “hecho ilicito”--

   d. Division between contractual and extracontractual liability in Civil Codes
   e. Traditional remedies inadequate in cases where consumers with no privity are injured
   f. Products liability claims generally must be maintained as individual actions
   g. Legislation allows collective determination of liability in some multiple injury cases, but requires individual proof of damages
   h. Damages laws generally uniform
      i. Amounts recoverable generally low
         1. Dano emergente
         2. Lucro cesante (lost profits)
      ii. No punitive damages
      iii. Compensatory
         1. Not intended to punish
         2. Intended as reparation of damage caused by the defect
         3. Cover all monetary loss
         4. Moral damages for pain and suffering (“dano moral”) allowed
   i. Defenses available
i. Controversy exists as to defenses available in strict liability actions
ii. Absence of causation always a defense
iii. Compliance with government regulations or standards
iv. Misuse, abuse, or unintended use.

2. Scholars have great influence on court decisions (even more than previous court decisions)

3. Future Trends
   a. Law has evolved over recent years
   b. Law varies from country to country
   c. Trend is towards expanded liability, but with some limitations
   d. Problems of uncertainty and risk assessment for industry
      i. Concern for negative impact on economic development

4. Brazil
   a. Civil law system
   b. Brazil has the most developed products liability law in South America
   c. Most favorable to plaintiffs of leading Latin American nations
   d. Traditional approaches are being modified, and products liability is increasingly treated as autonomous.
   e. Consumer Defense Law –1990—modifies 1916 Civil Code—major changes in regard to liability, burden of proof, and damages
   f. Requirement of hecho ilicito has practically disappeared
   g. State of the art/risk of development generally not a defense
   h. New developments in law allow consumers to bring actions against all entities in the distributive chain
   i. New laws have led to development of “responsabilidad objetiva” (strict liability), which eliminates need to prove negligence where defective product causes injury

5. Argentina
   a. Civil law system
   b. 1993 and 1998 consumer defense laws make important modifications of existing law
   c. Has substituted “damage” for “hecho ilicito” as basis of liability in products liability cases, (“hecho ilicito” not required).
   d. State of the art/risk of development generally not a defense
   e. New developments in law allow consumers to bring actions against all entities in the distributive chain
   f. New laws have led to development of “responsabilidad objetiva” (strict liability), which eliminates need to prove negligence where defective product causes injury

6. Uruguay
   a. Civil law system
   b. 1990 modification to Civil Code, combines consumer defense law with existing legislation.
c. Requirement for hecho ilícito has practically disappeared.
d. State of art/risk of development may be a defense
e. New developments in law allow consumers to bring actions against all entities in the distributive chain
f. New laws have led to development of “responsabilidad objetiva” (strict liability), which eliminates need to prove negligence where defective product causes injury

7. Chile
   a. Civil law system
   b. Changes to code deal with restitution and reparation, not personal injuries
   c. Most conservative of southern countries
   d. Least favorable to plaintiffs of leading Latin American nations
   e. Still recognizes need for hecho ilícito, but with specific exceptions
   f. Continues to require proof of negligence, does not accept strict liability

8. Mexico
   a. Civil law system
   b. Still governed by original code
   c. Still recognizes need for hecho ilícito, but exceptions for dangerous activities
d. Allows strict liability for dangerous objects

9. Costa Rica
   a. Civil law system
   b. Still governed by original code
   c. Still recognizes need for hecho ilícito, but exceptions for dangerous activities
d. Allows strict liability in specific situations

10. Colombia
    a. Civil law system
    b. Still governed by original code
c. Still recognizes need for hecho ilícito, but exceptions for dangerous activities
d. Allows strict liability in specific situations

11. Mercosur coalition (Brazil, Uruguay, Paraguay, and _____)
    a. Proposes regulations governing products liability, but they haven’t been adopted yet. These regs may have future influence in and beyond Mercosur countries.
b. Adopts strict liability

IV. Reasons why Ps prefer to sue in U.S.
a. Contingency fees
b. Larger awards
c. Jury trial
d. Flexibility of the common law
e. Strict products liability
f. Broader standing to sue in some instances (like *Piper*)
g. Liberal Pretrial Discovery
h. Loser not liable for costs of winner
i. Availability of class action suits
j. Causes of action that do not exist elsewhere
   i. RICO
   ii. Antitrust
   iii. Securities laws
k. Damages
   i. Availability of punitive damages
   ii. Loss of consortium
   iii. Availability of multiple damage awards

V. Other notes
a. Since American taxpayers pay for U.S. court system, there is a good argument that foreign suits should be limited. They burden our overtaxed system.