FAQs

- What is the difference between a "patent" defect and a "latent" defect?

- What is "state of the art" for purposes of determining whether a product has a "design" defect?

- Are the concepts of "defectiveness" and "unmerchantability" the same? (i.e., Can a product be "defective" but still "merchantable" under the U.C.C.?)

- What is an "open and obvious" danger?

- Is there any difference between "strict liability in warranty and the concept of "strict liability in tort"?

What is the difference between a "patent" defect and a "latent" defect?

A "patent" defect simply refers to any defect that is discoverable upon a reasonable inspection. In other words, a "patent" defect is one that is otherwise "open and obvious" to anyone who makes a reasonable inspection of the product. For example, a car that has a broken or missing steering wheel would be an example of a "patent" defect, since no reasonable person could ever use such a car without discovering the presence of this defect.

By contrast, a "latent" defect is one that cannot be discovered by a reasonable inspection. It is "hidden" from ordinary view in the sense that it would not be seen or otherwise discovered merely by looking at or using the product. In the previous example, supra, if the steering wheel on the car appeared to be normal but in fact it contained some hidden defect (such as a crack in the internal steering mechanism) then this would likely be classified as a "latent" defect.

Since "patent" defects are open and obvious, they present far less potential danger to users or consumers of a product who are expected to recognize (and avoid) such obvious product–related hazards. "Latent" defects are potentially more dangerous, simply because they act as hidden dangers that are not readily apparent to those who use or consume the product.

What is "state of the art" for purposes of determining whether a product has a "design" defect?

For purposes of determining whether a particular product design is defective, the term "state of the art" refers to the entire technological environment that exists at the time when the product was manufactured. That environment includes (1) the entire body of available scientific knowledge (i.e., what in fact was actually known about the product’s design within the industry at the time of manufacture); (2) the economic feasibility of creating a safer product design (i.e., did a safer alternative product design even exist at the time of manufacture, and, if so, was it also feasible from an economic perspective to actually produce that alternate design, as opposed to being merely theoretically "possible"); and (3) the practicalities of actually implementing that alternative design at the time when the product was manufactured (i.e., in addition to being economically feasible, was it otherwise practical to actually manufacture the product with the alternative design, given all of the various other circumstances existing within the manufacturing industry at the time of manufacture).

Are the concepts of "defectiveness" and "unmerchantability" the same? (i.e., Can a product be "defective" but still "merchantable" under the U.C.C.?)

The legal concepts of "defectiveness" and "merchantability" are sometimes treated by courts as being synonymous, but they are not. Instead, these concepts must be analyzed separately and distinctly from one another. As such, it is possible for the same product to be both "defective" and
yet still "merchantable" under the U.C.C., or vice versa.

The reason for this is because both of these concepts (at least potentially) are determined by the application of DIFFERENT legal tests. A product is said to be "unmerchantable" under section 2–314 of the U.C.C. if it is not "fit for the ordinary purposes for which goods of the type are used." This fitness for their "ordinary purposes" determination in almost all U.C.C. jurisdictions is resolved under section 2–314 by the application of a traditional "consumer-expectation" test, and that same test is applied irrespective of what type of product defect may be involved. By contrast, depending upon the particular jurisdiction and also the specific type of product defect involved, the determination as to whether a particular product is "defective" is quite often (although certainly not always) based upon the application of a "risk-utility" test (particularly with respect to design and often marketing defects). Thus, in a jurisdiction where a product has been found to be "defective" under the "risk-utility" test, that same product might still not be considered as "unmerchantable" under the "consumer-expectation" test for purposes of imposing liability for breach of the implied warranty of merchantability under U.C.C. section 2–314. Likewise, the converse is also true. A product might be found to be "unmerchantable" under section 2–314 of the U.C.C. (as determined by the application of the "consumer-expectation" test), even though that same product was determined to be NON-defective under the "risk-utility" test. Thus, because of the different results that can occur through the application of these different legal "tests," the concepts of "defectiveness" and "unmerchantability" are NOT synonymous.

What is an "open and obvious" danger?

An "open and obvious" danger is one that can be discovered upon a reasonable inspection. Thus, an "open and obvious" danger would be classified as a "patent" danger, as opposed to a "latent" danger.

The legal concept of an "open and obvious" danger presents several significant analytical issues in defective consumer product cases. The most obvious one relates to WHO gets to decide whether a given product–related danger is "open and obvious." Typically, such determinations are ordinarily matters for the jury to resolve, by application of the traditional "consumer-expectation" test. However, where reasonable minds could not otherwise disagree, the court may declare a certain product–related risk to be "open and obvious" as a matter of law. In either case, it is always for the court (1) to articulate the precise nature of the danger itself, and then (2) to determine if "reasonable minds could disagree" as to whether such a danger is "open and obvious."

Unfortunately, even in the simplest of factual scenarios, it is not always easy for anyone (regardless whether a jury or a court) to determine that a given product–related danger is truly "open and obvious" upon a reasonable inspection.

To illustrate the difficulty of utilizing the "consumer-expectation" test to determine whether a danger is "open and obvious," consider the fairly straightforward example of a shirt made of 100% rayon fabric that is known to be highly flammable when it comes into direct contact with a source of heat or flame. See Hollister v. Dayton Hudson Corp., 201 F. 3d 731 (6th. Cir. 2000), applying Michigan law. The general danger that any article of clothing (regardless of what it was composed of) might ignite if it comes into direct contact with fire or flame is certainly "open and obvious" to most consumers. Therefore a court might easily make such a determination as a matter of law. However, as the "general" nature of this (or any) product–related risk is articulated in a more specific and detailed manner, it becomes less and less likely that such a risk will be anticipated by the ordinary consumer of that product. Thus, while the ordinary consumer might still reasonably be expected to understand and anticipate that a shirt made entirely of 100% rayon fabric might ignite and burn more quickly than the same shirt made of an entirely different fabric, say a heavy flannel fabric, that same consumer would likely have no way of knowing or anticipating that one particular rayon shirt would be significantly more flammable than any other shirt made of rayon fabric. A court articulating this first danger, supra, would probably at least allow the jury to
determine whether the 100% rayon fabric presented an "open and obvious" danger when compared to the heavy flannel fabric (although the final decision by that jury would by no means be certain). By contrast, however, if this same danger was articulated with even greater specificity, as by the court as in the second example, supra, it is far less likely that any jury would conclude that such a danger was "open and obvious." Thus, as shown quite clearly from these fairly simple illustrations, the final outcome as to whether a danger is "open and obvious" in any given case can vary significantly, even when analyzed by the same "consumer-expectation" test in each instance, based solely upon how general or how specific the particular product-related danger is first characterized by the court.

Is there any difference between "strict liability" in warranty and the concept of "strict liability in tort"?

From a purely technical standpoint any liability based upon breach of warranty constitutes a FORM OF strict liability, since causes of action based upon breach of warranty (just like causes of action based upon strict liability in tort) BOTH do impose liability (if otherwise established) without regard to a finding of any FAULT by the defendant. In warranty actions, the defendant is held "strictly" liable by virtue of breaching a warranty that was either expressly made or created automatically by operation of law simply by virtue of selling the product. As a result, some courts do occasionally refer to breach of warranty as imposing "strict liability." See Hollister v. Dayton Hudson Corp., 201 F. 3d 731 (6th Cir. 2000). However, this "warranty" FORM of strict liability is based entirely upon CONTRACT law and not TORT LAW. As such, the warranty FORM of strict liability is not at all the same thing as the TORT cause of action. For one thing, as we have discussed, warranty is subject to many different legal defenses (e.g., horizontal privity, sometimes "notice," disclaimer, etc.) that are totally inapplicable in any TORT-based cause of action such as strict liability in TORT. Therefore, in terms of distinguishing among the various different legal causes of action that are utilized in defective consumer product cases, breach of warranty is generally NOT considered to represent a FORM of STRICT LIABILITY IN TORT.

Prior to the Greenman case there was NO SUCH strict liability IN TORT cause of action at all. It simply did not exist, and the only form of strict liability was the CONTRACT form of strict liability which, as discussed above, really was not a true tort cause of action at all. As discussed in class, STRICT LIABILITY IN TORT is a new and totally unique legal cause of action that is completely different from anything that had ever previously existed in the law before the Greenman case was decided (in 1963). Therefore, in Products Liability law we typically now refer to this new cause of action as "strict liability IN TORT."

Subsequent to the 1963 Greenman case and its creation of the Greenman version of "strict liability in tort," the Restatement (Second) Torts, section 402A was adopted by the American Law Institute in 1965, and then even more recently in 1998 the American Law Institute adopted the current Restatement (THIRD) Products Liability. Each of these now represent three different versions of "strict liability IN
TORT causes of action, all of which seek (in one way or another) to establish liability based upon TORT (as opposed to contract or warranty) principles. As such, each of these three different causes of action are now commonly referred to as imposing "strict liability IN TORT."