

# Defenses

IT'S NOT THE CRIME...IT'S THE COVER-UP.

# WHO WET MY PANTS?



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Come and get 'em!  
I got all your favorites.

Chocolate frosted for Jared  
and Julia, pink for Oskar,  
rainbow sprinkles for Linzie,  
gross maple-bacon for Tim  
and Teddy, Boston cream  
for Kelly...

and blueberry crunch in a  
separate bag for Bigfoot,  
who thinks it's weird when  
donuts touch.







Ahem.







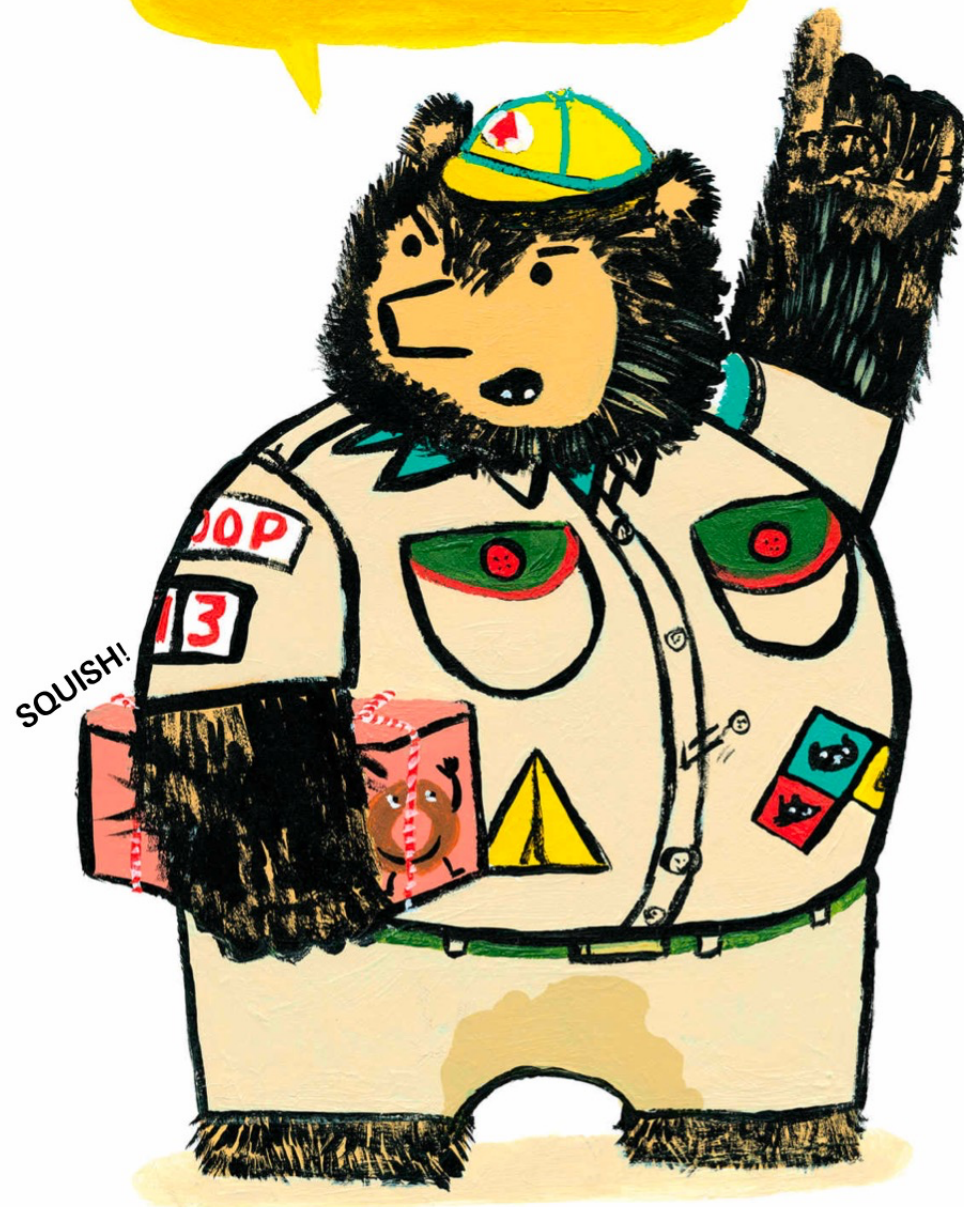


Somebody better come clean about my wet pants.

Oh, sure, it's all chipper, cheery Chattytown when I bring donuts, but when someone wets my pants, everybody clams up.



Fine. NO ONE gets donuts until I get answers!



I'll get to the bottom of my wet pants if it's the last thing I do!



Hey, Tim. Bet you picked up some pretty great tricks before you ran away from the circus. What was the Big Top Showstopper? Was it...





**WETTING  
MY PANTS?**



Tim didn't wet your pants, Reuben. It was probably just an accident.







You seem to know an awful lot about who-wet-what-when vis-à-vis my pants. Well, Mr. All-the-Answers, here's one simple question....

**DID YOU WET MY PANTS?**



Gosh, I used to wet my pants all the time. We all understand.

Oh, really? All the time, you say? Wet pants are old hat, are they?

You know something, Bigfoot? I'm not even sure I believe in you. If I did, I'd have one thing to say.



**DID YOU  
WET MY  
PANTS?**



Don't worry about it, Reuben. It could happen to anyone.

But it didn't happen to anyone! It happened to me! All I want is JUSTICE! Justice and dry pants.



You know what's worse than the damp, uncomfortable feeling? My so-called friends trying to cover it up.

Well, guess what? I blame all of you. That's right....





**YOU ALL WET MY PANTS!**

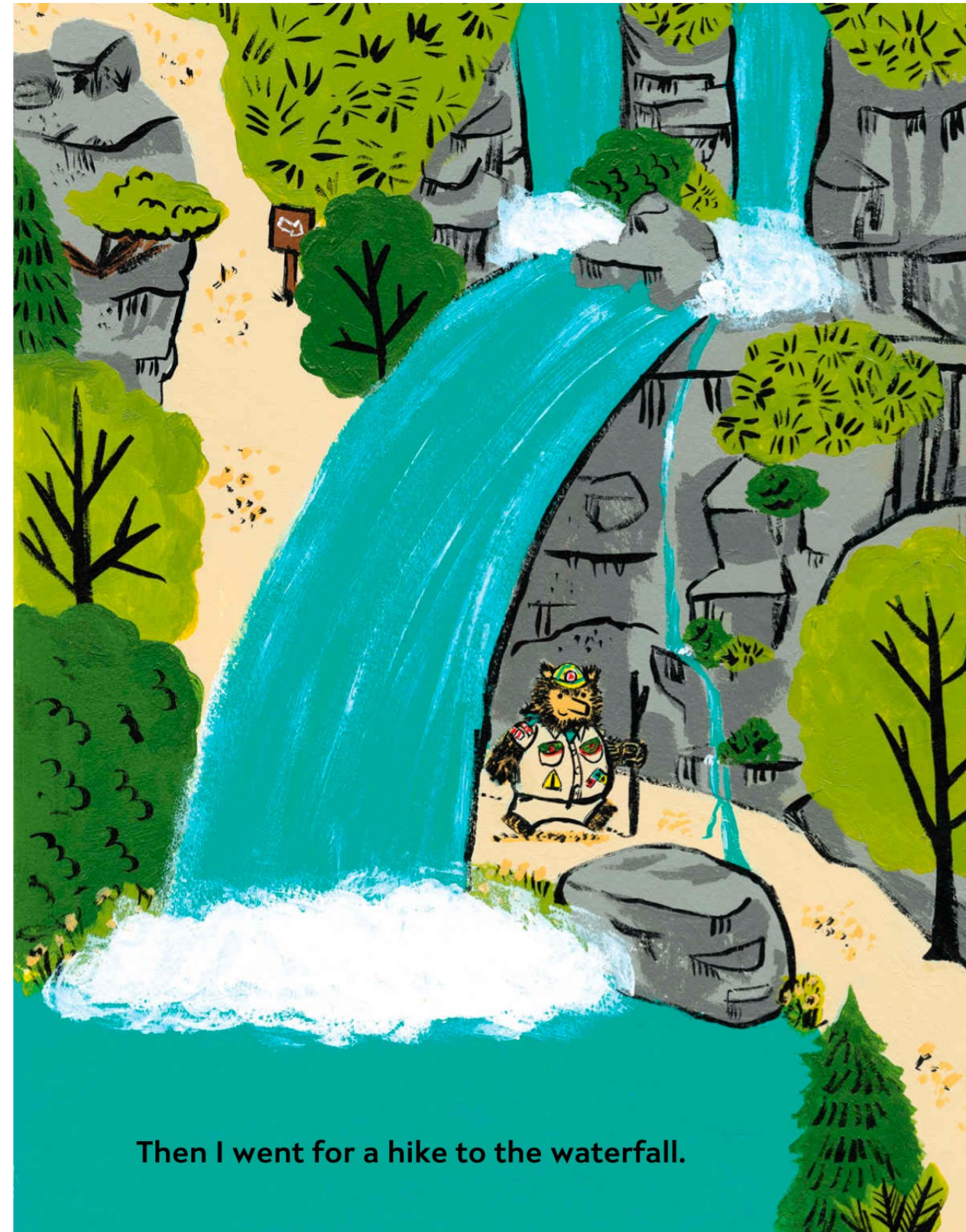




Look, here's all I know.



This morning I helped out at the lemonade stand.



Then I went for a hike to the waterfall.





Later I fell asleep playing with my tropical fish.



When I woke up, I got donuts and came straight here.



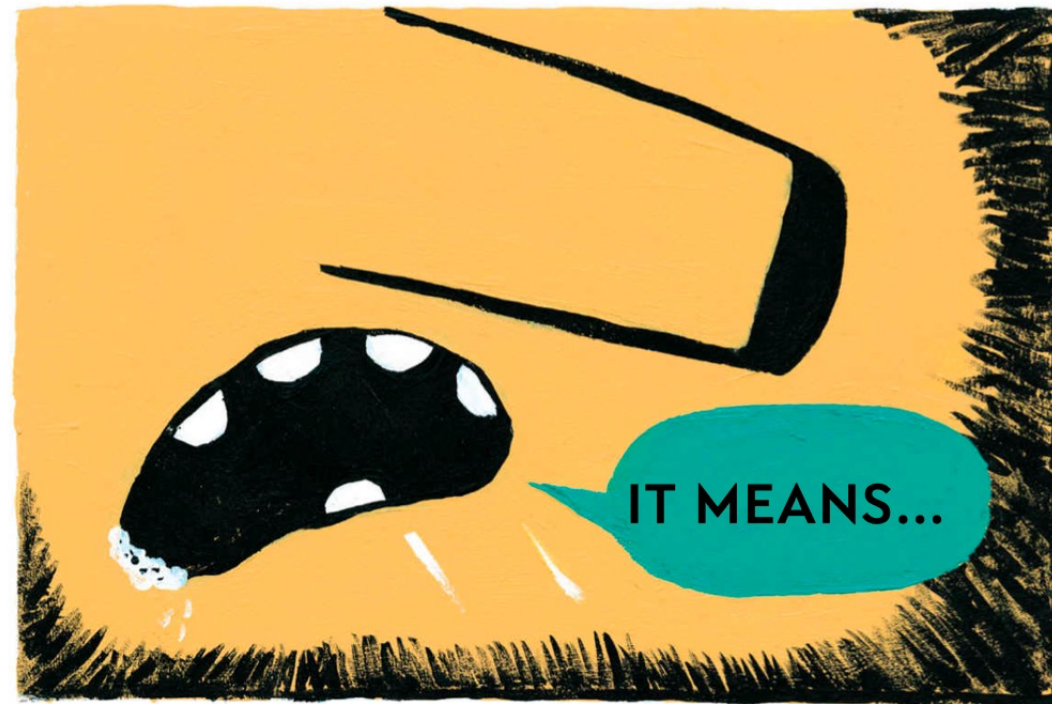
Then...POOF!  
My dry pants are wet.  
Pants that have never  
been out of my sight...  
pants I have been wearing  
the **WHOLE TIME**.



Which can mean  
one thing and one  
thing only.



IT MEANS...





**THESE PANTS ARE  
BROKEN!**



They sprung a leak.



Ugh! Thanks for nothing, leaky broken pants! Making me blame all my super great friends.



BUT if one of you guys DID wet my pants...



I'd forgive you.









**What products liability claims might Reuben the bear assert against the manufacturer of his pants?**



**We all have an intuition that Reuben should lose his case,  
but for what reason?**

Because of Reuben role in the harm

- Causal
- Responsibility

Expectations

Fluke aberration / not foreseeable by pant manufacturer



# What were our defenses for negligence?

????????

????????



# What were our defenses for negligence?

Contributory / Comparative Negligence

Assumption of Risk

## Do these apply with strict liability?



# General Motors Corp. v. Sanchez



# Restatement (Second) of Torts

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.

## State Statute on Comparative Responsibility

Statute expressly includes suits based on strict tort liability and defines “[p]ercentage of responsibility” as the percentage that a party “cause[d] or contribute[d] to cause [the harm] in any way, whether by negligent act or omission, . . . [or] by other conduct or activity violative of the applicable legal standard.”



# Tension between Restatements

## Restatement Second

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.

## Restatement Third

[W]hen the defendant claims that the plaintiff failed to discover a defect, there must be evidence that the plaintiff's conduct in failing to discover a defect did, in fact, fail to meet a standard of reasonable care. In general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it.



# Comparative Responsibility is Hard



# Disclaimers and Waivers



# Products Liability Exercise Part 1

You are a junior associate at a plaintiff-side firm. A partner at the firm has brought you in to work on an interesting new case. The potential plaintiff, a nine-year-old boy named Augustus Gloop, choked on a hot dog during lunch in his elementary school cafeteria. The child survived — thanks to a gym teacher’s training in first aid and CPR — but suffered serious injuries. His family is now interested in suing Oscar Mayer Weiner, the company that produced this hot dog.

The partner at your firm doesn’t typically litigate products liability cases, so she wants you to catch her up to speed. She’d like you to sketch out arguments supporting a failure to warn claim, a design defect claim, and a manufacturing defect claim. For each claim, provide an example of a piece of evidence that would help our client win. And let her know which claims have the best chance of success. On the failure to warn claim, you should know that Oscar Mayer Weiner will seek protection from the “learned intermediary” doctrine as the company does inform elementary schools that hot dogs are a choking hazard.



## Products Liability Exercise Part 2

You are a junior associate at a firm representing Oscar Mayer Weiner.

Same set of facts. A potential plaintiff, a nine-year-old boy named Augustus Gloop, choked on a hot dog during lunch in his elementary school cafeteria. The child survived — thanks to a gym teacher’s training in first aid and CPR — but suffered serious injuries. His family is now interested in suing Oscar Mayer Weiner, the company that produced this hot dog.

A partner at your firm would like you to sketch out arguments defending Oscar Mayer Weiner the plaintiff’s potential failure to warn claim, design defect claim, and manufacturing defect claim.