

Key Concept 4: Understanding Product Liability Law ¹

Suppose that you are the president of a firm making products for sale to the public. One of your worries would be the company's exposure to civil liability for defects in those products. In particular, you might worry about changes in the law that makes such liability more likely or more expensive. In other situations, however, the same changes might appeal to you. This is especially true if you are harmed by defective products you purchase as a consumer. You might also appreciate such changes if your firm wants to sue a supplier that has sold it defective products.

Each of these situations involves the law of *product liability*. Product liability law is the body of legal rules governing civil suits for losses resulting from defective goods.

[Note: In order to better understand product liability law a brief sketching of the historical evolution of this law will be helpful. There are several theories of product liability recovery. These theories are rules of law saying that, once plaintiffs prove certain facts, they will recover for losses resulting from defective goods. Our discussion here will be limited to product liability recovery based on the torts of negligence and strict liability. Contractual theories of recovery (i.e., express warranty, implied warranty of merchantability and implied warranty of fitness) will not be discussed.]

The Evolution of Product Liability Law

The 19th Century

A century or so ago, the rules governing suits for defective goods were very much to sellers' and manufacturers' advantage. This was the era of *caveat emptor* (let the buyer beware). In contract suits involving defective goods, there usually was no liability unless the seller had made an express promise to the buyer and the goods did not conform to that promise. Some courts even required that the words *warrant* or *guarantee* accompany the promise before liability would exist. In negligence suits, the "no liability without fault" principle was widely accepted, and plaintiffs often had difficulty proving negligence because the necessary evidence was under the defendant's control. In both contract and negligence cases, finally, the doctrine of "no liability outside privity of contract" - that is, no liability without a direct contractual relationship between plaintiff and defendant - often prevented plaintiffs from recovering against parties with whom they had not directly dealt.

One reason for these pro-defendant rules was the laissez-faire values that strongly influenced public policy and the law. One expression of those values was the belief that sellers and manufacturers should be contractually bound only when they deliberately assumed such liability by actually making a promise to someone with whom they dealt directly. Another factor limiting manufacturers' liability for defective products, some say, was the desire to promote industrialization by preventing potentially crippling damage recoveries against infant industries. Yet another explanation for this limited liability is that it might not have been too harmful to plaintiffs. Chains of distribution tended to be short, so the no-liability-outside-privity defense was not always available to sellers. Because goods tended to be simple, buyers sometimes could inspect them for

¹ Excerpts taken from Jane P. Mallor, et. al., *Business Law and the Regulatory Environment*, (11th ed. 2001)

defects. Before the emergence of large corporations late in the 19th century, sellers and buyers often were of relatively equal size, sophistication, and bargaining power. Thus, they could deal on a relatively equal footing.

The 20th Century

Today, laissez-faire values, while still influential, do not pack the weight they did a century ago. Instead, a more protective, interdependent climate has emerged. With the development of a viable industrial economy, there has been less perceived need to protect manufacturers from liability for defective goods. The emergence of long chains of distribution has meant that consumers often do not deal directly with the parties responsible for defects in the products they buy. Because large corporations tend to dominate the economy, consumers are less able to bargain equally with such parties in any event. Finally, the growing complexity of goods has made buyer inspections more difficult.

In response to all these changes, product liability law has moved from its earlier *caveat emptor* emphasis to a stance of *caveat venditor* (let the seller beware). To protect consumers, modern courts and legislatures intervene in private contracts for the sale of goods and impose liability regardless of fault. As a result, sellers and manufacturers face greater liability and higher damage recoveries for defects in their products. Underlying the shift toward *caveat venditor* is the belief that sellers, manufacturers, and their insurers are best able to bear the economic costs associated with product defects, and that they usually can pass on these costs through higher prices. Thus, the economic risk associated with defective products has been effectively spread throughout society, or "socialized."

Tort Theories of Product Liability Recovery

Negligence

Product liability suits based on the **negligence** theory usually allege that the seller or manufacturer breached a duty to the plaintiff by failing to eliminate a reasonably foreseeable risk of harm associated with the product. Such suits typically claim one or more of the following: (1) negligent *manufacture* of the goods (including improper materials and packaging), (2) negligent *inspection*, (3) a negligent failure to provide *adequate warnings* of hazards or defects, and (4) negligently defective *design*.

Negligent Manufacture Negligence suits alleging the manufacturer's improper assembly, materials, or packaging often encounter problems because the evidence needed to prove a breach of duty is under the defendant's control. However, liberal modern discovery rules and the doctrine of *res ipsa loquitur* (the thing speaks for itself) can help plaintiffs establish a breach in such situations.

Improper Inspection Manufacturers have a duty to inspect their products for defects that create a reasonably foreseeable risk of harm, if such an inspection would be practicable and effective.

Most courts have held that middlemen such as retailers and wholesalers have a duty to inspect the goods they sell only when they have actual knowledge or reason to know of a defect. In addition, such parties generally have no duty to inspect where this would be unduly difficult, burdensome, or time-consuming. Unless the product defect is obvious, for example, middlemen usually are not liable for failing to inspect goods sold in the manufacturer's original packages or containers.

On the other hand, sellers who prepare, install, or repair the goods they sell ordinarily have a duty to inspect those goods. Examples include restaurants, automobile dealers, and installers of household products. In general, the scope of the inspection need only be consistent with the preparation, installation, or repair work performed. Thus, it is unlikely that such sellers must unearth hidden or latent defects.

Failure to Warn Sellers and manufacturers have a duty to give an appropriate warning when their products pose a reasonably foreseeable risk of harm. But in determining whether there was a duty to warn and whether the defendant's warning was adequate, courts often consider other factors besides the reasonable foreseeability of the risk. These include the *magnitude or severity* of the likely harm, the *ease or difficulty of providing an appropriate warning*, and the *likely effectiveness of a warning*. There is, however, no duty to warn where the risk is *open and obvious*.

Design Defects Manufacturers have a duty to design their products so as to avoid reasonably foreseeable risks of harm. Like failure-to-warn cases, however, design defect cases frequently involve other factors besides reasonable foreseeability. As before, one of these factors is the *magnitude or severity* of the foreseeable harm. Three others are *industry practices* at the time the product was manufactured, the *state of the art* (the state of existing scientific and technical knowledge) at that time, and the product's compliance or noncompliance with *government safety regulations*.

Sometimes courts employ risk-benefit analysis when weighing these factors. In such analyses, three other factors - the design's social utility, the effectiveness of alternative designs, and the cost of safer designs - may figure in the weighing process. Even where the balancing process indicates that the design was not defective, courts still may require a suitable warning.

[Note: Regardless of the nature of the alleged negligence (i.e., negligent manufacture, design defects, or failure to warn) one of the most difficult, if not the most difficult, aspect of proof facing the plaintiff is establishing a breach of duty by the defendant. The discussion above illustrates that in determining whether a manufacturer has breached its duty to not expose users or consumers of its products to an unreasonable risk of harm, negligence law attempts to calculate the magnitude of the risk plaintiff is exposed to as a result of the manufacturers conduct. The calculation of the risk is at times an easy process. However, there are also many instances where the calculation of the risk is difficult to determine. The application of the calculus of the risk is a weighing process. On one side of the scale we find factors such as the chances and the severity of harm. Based upon defendants conduct what are the chances of harm to the plaintiff that may flow from such conduct. In addition, what is the severity of the harm plaintiff may suffer

as a result of the defendants conduct. Obviously the greater the chances of harm and the greater the severity of the harm that will be suffered by the plaintiff greater care on the part of the defendant will be required.

As mentioned previously, the calculus of the risk is a weighing process. Given the previous discussion regarding the chances of the harm and the severity of the harm we now look to the other side of the scale. On this side of the calculus of the risk scale we consider the social utility that we assign to the defendant's conduct. We also consider the ease or difficulty of avoiding the risk (cost of adequate prevention). The higher the value placed on the utility of the defendants conduct and the higher the cost that must be incurred to lessen the risk of harm the greater the likelihood that defendant will be deemed to have exposed plaintiff to a reasonable risk or harm rather than an unreasonable one.

The most important development of strict product liability law (discussion below) was the elimination of the requirement on the part of the plaintiff to establish that the defendant had breached the duty owed to the plaintiff.. The often complex application of the calculus of the risk process is thus eliminated if the plaintiff's claim is based in strict product liability.]

Strict Liability

Strict products liability is a relatively recent development. Only during the 1960s did courts begin to impose such liability in significant numbers. The movement toward strict liability received a big boost when the American Law Institute promulgated section 402A of the *Restatement (Second) of Torts* in 1965. By now, the vast majority of the states have adopted some form of strict products liability. The most important reason is the socialization-of-risk strategy discussed earlier. By not requiring plaintiffs to prove a breach of duty, strict liability makes it easier for them to recover; and sellers then are supposed to pass on the costs of this liability through higher prices. Another justification for strict products liability is that it stimulates manufacturers to design and build safer products.

Section 402A's Requirements Because it is the most common version of strict products liability, we limit our discussion of the subject to section 402A.

[Note: Section 402A provides in full:

- 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if*
 - a. the seller is engaged in the business of selling such a product, and*
 - b. it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.*

2. *The rule stated in Subsection (1) applies although*
 - a. *the seller has exercised all possible care in the preparation and sale of his product, and*
 - b. *the user or consumer has not bought the product from or entered into any contractual relation with the seller.]*

This rule applies even though "the seller has exercised all possible care in the preparation and sale of his product." Thus, section 402A states a rule of strict liability that does not require plaintiffs to prove a breach of duty. As discussed previously, the requirement to prove a breach of duty in a product liability case based on negligence is under most cases a very difficult requirement to establish.

However, the liability imposed by section 402A is not absolute, for the section applies only if certain tests are met.

1. The seller must be *engaged in the business of selling the product that harmed the plaintiff*. Thus, section 402A binds only parties who resemble UCC merchants (manufacturers, wholesalers, distributors, retailers, restaurant operators) because they regularly sell the product at issue.

[Note: Because it applies to sellers, section 402A covers retailers and other middlemen who market goods containing defects that they did not create and may not have been able to discover. Even though such parties often escape negligence liability, some courts have found them liable under section 402A's strict liability rule. However, other states have given middlemen some protections against 402A liability, and/or have required the manufacturer or other responsible party to indemnify them. Nevertheless, it must be remembered that anyone in the chain of distribution that enabled the product to reach the marketplace is a potential defendant. The term "seller" has been interpreted by the courts broadly so as to include all those responsible for placing the product in the stream of commerce even if an actual sale may not have been involved. Thus, businesses have been held liable for injuries caused by defective products that were leased or were given away as free samples. The occasional or casual seller who is not engaged in the business of selling products, however, is excluded from liability. Therefore the section does not apply to a college student's sale of a pre-owned car or to a consumer who sells a product at a rummage sale.]

2. The product must be in a *defective condition* when sold, and also must be *unreasonably dangerous* because of that condition. The usual test of a product's defective condition is whether the product meets the reasonable expectations of the average consumer. An unreasonably dangerous product is one that is dangerous to an extent beyond the reasonable contemplation of the average consumer.

[Note: For example, suppose an automobile manufacturer intends that each of the four tires on their automobile are to be secured with five bolts. If during the manufacturing process, an assembly line employee attaches only three bolts to each tire, the automobile would have a manufacturing defect.]

3. The unreasonable dangerous condition must have caused the plaintiff's injury or damage.
4. Finally, defendants can avoid section 402A liability where the product was substantially modified by the plaintiff or another party after the sale, and the modification contributed to the plaintiff's injury or other loss.

Products liability cases often involve alleged defects in the design of the product. Applications of Section 402A Design defect and failure-to-warn suits can be brought under section 402A.

[Note: Classes of Permissible Plaintiffs

Under section 402A liability for personal injury and property damage extends only to the "ultimate user or consumer." However, court decisions have extended protection to bystanders and others who are injured by the product. Given the rationale for strict product liability there appears to be no reason to distinguish between injuries caused to the user or consumer of the product and those caused to persons unfortunate enough to be in the area when the product malfunctions.

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The ***noted materials in italics*** are based partly upon the following references:

Business Law and the Regulatory Environment, Concepts and Cases, Eleventh Edition, by Mallor et. al. Published by McGraw-Hill/Irwin.

Business Law, Principles, Cases, and Policy, Fifth Edition, by Mark E. Roszkowski. Published by Prentice Hall.

The remaining materials are taken directly from:

Business Law and the Regulatory Environment, Concepts and Cases, Eleventh Edition, by Mallor et. al. Published by McGraw-Hill/Irwin.

