

Section 5

Product Liability

Product Liability

5.1 Definition and Background

Product liability is the area of law in which the liability of sellers of products falls. It is one of many kinds of torts, which are defined as injuries or wrong to a person or personal property. The number of product liability claims is increasing very rapidly because of recent changes in the interpretation of the law. Not only has the number of legal actions increased by a factor of 20 over a 15-year period but the cost of product liability insurance also has increased five-fold in ten years.

For over 100 years the legal concept of privity restricted the widespread use of product liability actions. Privity is the relationship which exists between the buyer and the seller or two or more contracting parties. The courts held that the injured party could sue only the party in privity. Thus, if a consumer was injured by a power tool, he could sue only the retailer who sold him the tool; the retailer, in turn, could sue only the wholesaler, who in turn could sue the manufacturer. Now that the courts have abandoned the concept of privity in product liability, the injured consumer can sue all members in the manufacturing chain. From the viewpoint of recovering damages it obviously is an advantage to be able to directly sue the manufacturer, whose resources are likely to be much greater than those of the owner of the neighborhood hardware store.

A second major change in the law of product liability is the almost universal adoption by the courts of the standard of strict liability. Previously manufacturers or sellers were liable only when they could be proved negligent or unreasonably careless in what they made or how they made it. It had to be proved that a reasonable manufacturer using prudence would have exercised a higher standard of care. However, today in most states a standard of strict liability is applied. Under this theory of law the plaintiff must prove that: 1) the product was defective and unreasonably dangerous, 2) the defect existed at the time the product left the defendant's control, 3) the defect caused the harm, and 4) the harm is appropriately assignable to the identified defect. Thus, the emphasis on responsibility for product safety has shifted from the consumer to the manufacturer of products.

A related issue is the use for which the product is intended. A product intended to be used by children will be held to a stricter standard than one intended to be operated by a trained professional. Under strict liability a manufacturer may be held liable even if a well-designed and well-manufactured product injured a consumer who misused or outright abused it.

5.2 Goals of Product Liability Law

Only 100 years ago it was the practice in American and British law not to respond to accidental losses. It was generally held that the accident victim, not the manufacturer, should bear the economic burdens of injury. Starting in the mid-twentieth century the law began to assume a more active role. Product liability law evolved to serve four basic societal goals: loss spreading, punishment, deterrence, and symbolic affirmation of social values. Loss spreading

seeks to shift the accidental loss from the victim to other parties better able to absorb or distribute it. In a product liability suit the loss is typically shifted to the manufacturer, who theoretically passes this cost on to the consumer in the form of higher prices. Often the manufacturer has liability insurance, so the cost is spread further, but at the price of greatly increased insurance rates.

Another goal of product liability law is to punish persons or organizations responsible for causing needless loss. It is important to recognize that under liability law the designer, not just the company, may be held responsible for a design defect. In extreme cases, the punishment may take the form of criminal penalties, although this is rare. More common is the assessment of punitive damages for malicious or willful acts. A third function is to prevent similar accidents from happening in the future, i.e., deterrence. Substantial damage awards against manufacturers constitute strong incentives to produce safer products. Finally, product liability laws act as a kind of symbolic reaffirmation that society values human safety and quality in products.

5.3 Negligence

A high percentage of product litigation alleges engineering negligence. Negligence is the failure to do something that a reasonable man, guided by the considerations that ordinarily regulate human affairs, would do. In product liability law the seller is liable for negligence in the manufacture or sale of any product that may reasonably be expected to be capable of inflicting substantial harm if it is defective. Negligence in design is usually based on one of three factors.

- That the manufacturer's design has created a concealed danger.
- That the manufacturer has failed to provide needed safety devices as part of the design of the product.
- That the design called for materials of inadequate strength or failed to comply with accepted standards.

Another common area of negligence is failure to warn the user of the product concerning possible dangers involved in the product use. This should take the form of warning labels firmly affixed to the product and more detailed warnings of restrictions of use and maintenance procedures in the brochure that comes with the product.

5.4 Strict Liability

Under the theory of strict liability it is not necessary to prove negligence on the part of the manufacturer of the product. The plaintiff need only prove that 1) the product contained an unreasonably dangerous defect, 2) that the defect existed at the time the product left the defendant's hands, and 3) the defect was the cause of the injury. The fact that the injured party acted carelessly or in bad faith is not a defense under strict liability standards. More recently the courts have acted so as to require the manufacturer to design his product in such a way as to anticipate foreseeable use and abuse by the user.

The criteria by which the defective and unreasonably dangerous nature of any product may be tested in litigation are:

- The usefulness and desirability of the product
- The availability of other and safer products to meet the same need
- The likelihood of injury and its probable seriousness
- The obviousness of the danger
- Common knowledge and normal public expectation of the danger
- The avoidability of injury by care in use of the warnings
- The ability to eliminate the danger without seriously impairing the usefulness of the product or making the product or making the product unduly expensive

5.5 Design Aspect of Product Liability

Court decisions on product liability coupled with consumer safety legislation have placed greater responsibility on the designer for product safety. The following aspects of the design process should be emphasized to minimize potential problems from product liability.

- Take every precaution that there is strict adherence to industry and government standards. Conformance to standards does not relieve or protect the manufacturer from liability, but it certainly lessens the possibility of product defects.
- All products should be thoroughly tested before being released for sale. An attempt should be made to identify the possible ways a product can become unsafe, and tests should be devised to evaluate those aspects of the design. When failure modes are discovered, the design should be modified to remove the potential cause of failure.
- The finest quality-control techniques available will not absolve the manufacturer of a product liability if, in fact, the product being marketed is defective. However, the strong emphasis on product liability has placed renewed emphasis on quality engineering as a way to limit the incidence of product liability.
- Make a careful study of the system relations between your product and upstream and downstream components. You are required to know how malfunctions upstream and downstream of your product may cause failure to your product. You should warn users of any hazards of foreseeable misuses based on these system relationships.
- Documentation of the design, testing, and quality activities can be very important. If there is a product recall, it is necessary to be able to pinpoint products by serial or lot number. If there is a product liability suit, the existence of good, complete records will help establish an atmosphere of competent behavior. Documentation is the single most important factor in winning or losing a product liability lawsuit.
- The design of warning labels and user instruction manuals should be an integral part of the design process. The appropriate symbols, color, and size and the precise wording of the label must be developed after joint meetings of the engineering, legal, marketing, and manufacturing staffs. Use international warning symbols.

- Create a means of incorporating legal developments in product liability into the design decision process. It is particularly important to get legal advice from the product liability angle on new innovative and unfamiliar designs.

5.6 Business Procedures to Minimize Risk

In addition to careful consideration of the above design factors, there are a number of business procedures that can minimize product liability risk.

- There should be an active product liability and safety committee charged with seeing to it that the corporation has an effective product liability loss control and product safety program. This committee should have representatives from the advertising, engineering, insurance, legal, manufacturing, marketing, materials, purchasing, and quality-control departments of the corporation.
- Insurance protection for product liability suits and product recall expenses should be obtained.
- Develop a product usage and incident-reporting system just as soon as a new product moves into the marketplace. It will enable the manufacturer to establish whether the product has good customer acceptance and detect early signs of previously unsuspected product hazards or other quality deficiencies.

5.7 Problems with Product Liability Law

As product liability has grown so rapidly certain problems have developed in the implementation of the law. There has been a dramatic shift in the doctrine of the product liability law from negligence to strict liability but the law has proved incapable of defining the meaning of strict liability in a useful fashion. The rules of law are vague, which gives juries little guidance, and as a result verdicts appear capricious and without any definitive pattern. Another problem concerns the computation of damages once liability is established. There is great uncertainty and diversity in awarding damages for pain and suffering. Our adversarial legal system and the unfamiliarity of juries with even the rudiments of technical knowledge lead to high costs and much frustration.

The great increases in the number of product liability claims and the dollars awarded by the courts to consumers, other companies, and government have brought a clamor to bring some restraint to the situation before we become a no-fault economy in which producers and sellers will be held responsible for all product-related injuries. Advocates of reform point to product liability insurance costs and damage awards as a significant factor in reducing American competitiveness. National product liability legislation has been introduced in the U.S. Congress to ease the situation. It aims at making tort law on product liability uniform in all the states and on speeding up product liability disputes. It proposes a limit on joint and several liability, a doctrine by which a defendant responsible for only a small portion of harm may be liable for an entire judgement award. It also calls for a limit on a product seller's liability to cases in which the harm was proximately caused by the seller's own lack of reasonable care or a breach of the seller's warranty.

Probably the best thing that could happen in product liability would be the adoption of standardized liability laws on a nationwide basis. Such standardization would mean more predictability, less litigation, and lower premiums for liability insurance.