Product liability

Product liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. Although the word "product" has broad connotations, product liability as an area of law is traditionally limited to products in the form of tangible personal property.

Product liability in the United States

Theories of liability

In the United States, the claims most commonly associated with product liability are negligence, strict liability, breach of warranty, and various consumer protection claims. The majority of product liability laws are determined at the state level and vary widely from state to state. Each type of product liability claim requires different elements to be proven to present a successful claim.

Types of liability

Section 2 of the *Restatement (Third) of Torts: Products Liability* distinguishes between three major types of product liability claims:

- manufacturing defect,
- design defect,
- a failure to warn (also known as marketing defects).

However, in most states, these are not legal claims in and of themselves, but are pleaded in terms of the theories mentioned above. For example, a plaintiff might plead negligent failure to warn or strict liability for defective design.[1]

Manufacturing defects are those that occur in the manufacturing process and usually involve poor-quality materials or shoddy workmanship. Design defects occur where the product design is inherently dangerous or useless (and hence defective) no matter how carefully manufactured; this may be demonstrated either by showing that the product fails to satisfy ordinary consumer expectations as to what constitutes a safe product, or that the risks of the product outweigh its benefits.[2] Failure-to-warn defects arise in products that carry inherent nonobvious dangers which could be mitigated through adequate warnings to the user, and these dangers are present regardless of how well the product is manufactured and designed for its intended purpose.

Breach of warranty

Warranties are statements by a manufacturer or seller concerning a product during a commercial transaction. Warranty claims commonly require privity between the injured party and the manufacturer or seller; in plain English, this means they must be dealing with each other directly. Breach of warranty-based product liability claims usually focus on one of three types: (1) breach of an express warranty, (2) breach of an implied warranty of merchantability, and (3) breach of an implied warranty of fitness for a particular purpose. Additionally, claims involving real estate may also take the form of an implied warranty of habitability. Express warranty claims focus on express statements by the manufacturer or the seller concerning the product (e.g., "This chainsaw is useful to cut turkeys"). The various implied warranties cover those expectations common to all products (e.g., that a tool is not unreasonably dangerous when used for its proper purpose), unless specifically disclaimed by the manufacturer or the seller.

Negligence

A basic negligence claim consists of proof of

1. a duty owed,
2. a breach of that duty,
3. the breach was the cause in fact of the plaintiff's injury (actual cause)
4. the breach proximately caused the plaintiff's injury.
5. and the plaintiff suffered actual quantifiable injury (damages).

As demonstrated in cases such as *Winterbottom v. Wright*, the scope of the duty of care was limited to those with whom one was in privity. Later cases like *MacPherson v. Buick Motor Co.* broadened the duty of care to all who could be foreseeably injured by one's conduct.

Over time, negligence concepts have arisen to deal with certain specific situations, including negligence *per se* (using a manufacturer's violation of a law or regulation, in place of proof of a duty and a breach) and res ipsa loquitur (an inference of negligence under certain conditions).

Strict liability

Rather than focus on the behavior of the manufacturer (as in negligence), strict liability claims focus on the product itself. Under strict liability, the manufacturer is liable if the product is defective, even if the manufacturer was not negligent in making that product defective.

The difficulty with negligence is that it still requires the plaintiff to prove that the defendant's conduct fell below the relevant standard of care. However, if an entire industry tacitly settles on a somewhat careless standard of conduct, then the plaintiff may not be able to recover even though he or she is severely injured, because although the defendant's conduct *caused* his or her injuries, such conduct was not negligent in the legal sense. As a practical matter, with the increasing complexity of products, injuries, and medical care (which made many formerly fatal injuries survivable), it is quite a difficult and expensive task to find and retain good expert witnesses who can establish the standard of care, breach, and causation.

Therefore, in the 1940s and 1950s, many American courts departed from the *MacPherson* standard and decided that it was too harsh to require seriously injured consumer plaintiffs to prove negligence claims against manufacturers or retailers. To avoid having to deny such plaintiffs any relief, these courts began to look for facts in their cases which they could characterize as an express or implied warranty from the manufacturer to the consumer. The *res ipsa loquitur* doctrine was also stretched to reduce the plaintiff's burden of proof. Over time, the resulting legal fictions became increasingly strained.

Of the various U.S. states, California was the first to throw away the fiction of a warranty and to boldly assert the doctrine of strict liability in tort for defective products, in 1963 (under the guidance of then-Associate Justice Roger J. Traynor). See *Greenman v. Yuba Power Products*, 59 Cal. 2d 57 [3] (1963). The importance of *Greenman* cannot be overstated: in 1996, the Association of Trial Lawyers of America (now known as the American Association of Justice) celebrated its 50th anniversary by polling lawyers and law professors on the top ten developments in tort law during the past half-century, and *Greenman* topped the list.[4]

In *Greenman*, Traynor cited to his own earlier concurrence in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462 [5] (1944) (Traynor, J., concurring). In *Escola*, now widely recognized as a landmark case in American law,[6] Justice Traynor laid the foundation for *Greenman* with these words:

> Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The year after *Greenman*, the Supreme Court of California proceeded to extend strict liability to *all* parties involved in the manufacturing, distribution, and sale of defective products (including retailers)[7] and in 1969 made it clear that such defendants were liable not only to direct customers and users, but also to any innocent bystanders randomly injured by defective products.[8]

Since then, many jurisdictions have been swayed by Justice Traynor's strongly persuasive arguments on behalf of the strict liability rule in *Escola*, *Greenman*, and subsequent cases—including nearly all U.S. states, the European Union, Australia, and Japan— and have adopted it either by judicial decision or by legislative act. Notably, South Africa, New Zealand, and the U.S. state of North Carolina have soundly rejected strict liability; Canada continues to officially reject it but under American influence has gradually adjusted certain aspects of negligence and warranty law to make them more favorable to consumers.

Oddly, although the *Greenman* rule was transmitted to most other states via Section 402A of the Restatement of Torts, Second (published in 1964 after *Greenman*), the Supreme Court of California refused to adopt Section 402A's "unreasonably dangerous" limitation upon strict liability in 1972.[9] Thus, strict liability in California is truly strict, in that the plaintiff need not show that the defect was unreasonable or dangerous. On the other hand, in California, the defendant is allowed to introduce evidence in a strict products liability action that the plaintiff contributed to his or her own injuries.[10]

Although the Supreme Court of California has since become more conservative, it continues to endorse and expand the doctrine. In 2002 it held that strict liability for defective products even applies to makers of component products that are installed into and sold as part of real property.[11]

Consumer protection

In addition to the above common law claims, many states have enacted consumer protection statutes providing for specific remedies for a variety of product defects. Statutory remedies are often provided for defects which merely render the product unusable (and hence cause economic injury) but do not cause physical injury or damage to other property; the "economic loss rule" means that strict liability is generally unavailable for products that damage only themselves. The best known examples of consumer protection laws for product defects are lemon laws, which became widespread because automobiles are often an American citizen's second-largest investment after buying a home.

Product liability in the European Union

Moves towards a strict liability regime in Europe began with the Council of Europe Convention on Products Liability in regard to Personal Injury and Death (the **Strasbourg Convention**) in 1977.[12] On July 25, 1985, the European Economic Community adopted the Product Liability Directive 85/374/EEC. In language similar to Traynor's, the Directive stated that "liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production." However, the Directive also gave each member state the option of imposing a liability cap of 70 million euros per defect.

Rationale for and debate over strict liability

The fundamental rationale of strict liability is to force producers to internalize the external costs they impose on society. By placing liability for all injuries caused by a product on its manufacturer, the manufacturer is forced to take into account, when deciding whether and how much to produce the product, the harm caused by it. If this internalized harm is so great that the manufacturer cannot profit from producing the product, it will discontinue the product, or sell it only at a higher price to consumers who value it especially highly (in economic terms, modify its activity level). In this way, strict liability provides a mechanism for ensuring that the societal good of products in the marketplace outweighs their societal harm.

Moreover, proponents of strict liability for defective products argue that strict liability is sensible because between two parties who are not negligent (manufacturer and consumer), one will still have to suffer the economic cost of the injury. They argue that it is preferable to place the economic costs on the manufacturer because it can better absorb them and pass them on to other consumers by the way of higher prices. As such, the manufacturer becomes the insurer of consumers that are injured by its defective products, with premiums paid by other consumers.

A related argument arises from the fact that the distribution of information about any given product is highly asymmetrical; the manufacturer of any given product is in a better position than the consumer to know of its particular dangers. Therefore, in order to fulfill the public policy of minimizing injury, it is more reasonable to impose the burden of finding and correcting such dangers upon the manufacturer as opposed to imposing the burden of finding and avoiding unsafe products upon the consumer. These arguments are often mentioned in cases of design and warning defects and less so in the case of manufacturing defects, since the latter are thought to be less preventable by the manufacturer because he is already acting with due care.

Critics charge that strict liability incentivizes product misuse (particularly in jurisdictions where this may not be a defense) and creates a moral hazard problem on the part of potential buyers. Reasoning that consumers will recover regardless of the amount of care they take in using the product, critics assert that consumers will underinvest in care even when they are the least-cost avoiders, thus leading to a lower aggregate level of care than under a negligence standard.

While proponents assert that the producer can build the cost into the price as insurance, critics argue that this assertion is ignorant of economics and only holds true in inelastic regions of the demand curve. As a result of strict liability for their products, manufacturers may not produce the socially optimal level of goods. Particularly with elastic regions of the demand curve, where consumers are very price-sensitive, the manufacturer by definition cannot pass on the economic costs to the consumers as a form of insurance without pricing many of those consumers out of the market for that good. However, because consumers are not willing to pay for this insurance, proponents of strict liability would argue that this is evidence of a product whose harm outweighs its good, in which case it should be removed from the market.

Critics also argue that applying strict liability to products results in substantially higher transaction costs. One example of these transaction costs is the creation of maintenance of legal disclaimers on products that would be unnecessary to the reasonable person– such as the improperly algorithmic "lather, rinse, repeat" instructions on shampoos and the ubiquitous "not for human consumption" labelling on an inordinate number of non-food items. This results in a waste of time and resources for the producers who have to create these warnings, decreasing the producer surplus from trade. This also lowers the consumer surplus from these transactions, as all reasonably diligent consumers will read the unnecessary instructions, whereas the consumers likely to misuse the product are unlikely to be sufficiently diligent to read the instructions.

On the other hand, strict liability likely reduces litigation costs, because a plaintiff need only prove causation, not imprudence. When it is clear that the product caused the plaintiff's harm, parties under a strict liability regime are prone to settle out of court, because only damages are in dispute.

References

[1] See, e.g., *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465 (http://online.ceb.com/calcases/C4/26C4t465.htm) (2001).

[2] *Barker v. Lull Engineering,* 20 Cal. 3d 413 (http://online.ceb.com/calcases/C3/20C3d413.htm) (1978).

[3] http://online.ceb.com/CalCases/C2/59C2d57.htm

[4] White, Robert Jeffrey. "Top 10 in torts: evolution in the common law." *Trial* 32, no. 7 (July 1996): 50-53.

[5] http://online.ceb.com/CalCases/C2/24C2d453.htm

[6] See, e.g., Lawrence M. Friedman, *American Law in the 20th Century* (New Haven: Yale University Press, 2004), 356-357, and Jay M. Feinman, *Law 101: Everything You Need to Know About the American Legal System*, rev. ed. (New York: Oxford University Press, 2006), 165-168.

[7] *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256 (http://online.ceb.com/CalCases/C2/61C2d256.htm) (1964)

[8] *Elmore v. American Motors Corp.*, 70 Cal. 2d 578 (http://online.ceb.com/CalCases/C2/70C2d578.htm) (1969).

[9] *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121 (http://online.ceb.com/CalCases/C3/8C3d121.htm) (1972).

[10] *Daly v. General Motors Corp.*, 20 Cal. 3d 725 (http://online.ceb.com/calcases/C3/20C3d725.htm) (1978).

[11] *Jimenez v. Superior Court (T.M. Cobb Co.)*, 29 Cal. 4th 473 (http://online.ceb.com/calcases/C4/29C4t473.htm) (2002) (finding window manufacturers liable to homebuyers for defective windows that had been installed by developers into new homes).

[12] "European Convention on Products Liability in regard to Personal Injury and Death" (http://conventions.coe.int/treaty/en/Treaties/Html/091.htm). Council of Europe. 1977. . Retrieved 2008-04-30.

External links

- Congressional Research Service (CRS) Reports regarding Product Liability (http://digital.library.unt.edu/govdocs/crs/search.tkl?type=subject&q=Products liability&q2=LIV)
- Product Liability in Israel - Overview (http://www.israelinsurancelaw.com/index.php?option=com_content&task=view&id=157&Itemid=72)
- Product Liability Forum - British Institute of International and Comparative Law (http://www.biicl.org/plf)

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