

Aspen Casebook Series

PRODUCTS LIABILITY
Problems and Process
Seventh Edition

James A. Henderson, Jr.
Frank B. Ingersoll Professor of Law
Cornell Law School

Aaron D. Twerski
Irwin and Jill Cohen Professor of Law
Brooklyn Law School



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

© 2011 James A. Henderson, Jr. and Aaron D. Twerski

Published by Aspen Publishers. All Rights Reserved.

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

To contact Customer Care, e-mail customer.care@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-0738-8

Library of Congress Cataloging-in-Publication Data

Henderson, James A., 1938-

Products liability : problems and process / James A. Henderson, Jr., Aaron D. Twerski.-7th ed.

p. cm. — (Aspen casebook series)

Includes index.

ISBN-13: 978-0-7355-0738-8

ISBN-10: 0-7355-0738-4

1. Products liability-United States. I. Twerski, Aaron D. II. Title.

KF1296.H43 2011

346.7303'8-dc22

2010052086

This book contains paper from well-managed forests to SFI standards.

PRODUCTS LIABILITY

EDITORIAL ADVISORS

Vicki Been

Elihu Root Professor of Law
New York University School of Law

Erwin Chemerinsky

Dean and Distinguished Professor of Law
University of California, Irvine, School of Law

Richard A. Epstein

Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law
The University of Michigan Law School

Richard K. Neumann, Jr.

Professor of Law
Hofstra University School of Law

Robert H. Sitkoff

John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky

Professor of Law
University of California at Berkeley School of Law

Kent D. Syverud

Dean and Ethan A. H. Shepley University Professor
Washington University School of Law

Elizabeth Warren

Leo Gottlieb Professor of Law
Harvard Law School

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

From Jim
To
Marcie

From Aaron
To
Kreindel

Preface to the Seventh Edition

Preparing the Seventh Edition of our Products Liability casebook was an interesting enterprise. Between the last edition and this new seventh edition a major conference was held noting the tenth anniversary of the Products Liability Restatement. Scholars from throughout the country shared their views as to the impact the Restatement has had on the law. The conference also challenged the authors of this casebook (and the Restatement) to undertake a thorough analysis of every state on the issue of the governing rule for design defect. We are pleased that in general the Restatement has received a warm reception in the courts. However, we have been careful to be brutally honest in setting forth the opposing authority in this casebook. We believe the trends are clear but they are not unanimous.

One area in particular has undergone a sea change. The United States Supreme Court has decided a series of cases on federal preemption of state law. The most important case, *Wyeth v. Levine*, will be the subject of much litigation in the lower courts before its contours become clear. The chapter on federal preemption has undergone substantial revision.

In almost every chapter we found new material, both case law and scholarly, that will challenge the reader. After all these years, the authors continue to find the subject to be fascinating. We hope that our enthusiasm comes through to the reader.

James A. Henderson, Jr.
Aaron D. Twerski

January 2011

Acknowledgments

The authors wish to thank Jylanda Diles, at Cornell, and Golda Lawrence, at Brooklyn, who helped to prepare the manuscript. We could not have seen this through without them.

Research assistants provided invaluable help in assembling these materials. John Baumann (Cornell '86), Jay Bohn (Cornell '88), and Grace Lee (Brooklyn '87) helped us on the first edition. On the second edition, Ron Jenkins and David Ludwick (Cornell '93), Claire Kelly (Brooklyn '93), and Marni Schlissel (Brooklyn '92) provided invaluable assistance. On the third edition, Jordan Anger (Cornell '98), Hanna Liebman (Brooklyn '98), Allison Sealove (Brooklyn '97), and Victoria Ostrovsky (Brooklyn '97) were all of great help to us. On the fourth edition, Thomas Ciarlone (Cornell '01), Jesse Eggert (Cornell '01), Debbie Sternberg Tyler (Brooklyn '00), Kim Houghton (Brooklyn '01), and Michael Heydrich (Brooklyn '00) helped us meet very tight deadlines. On the fifth edition, Mason Barney (Brooklyn '05), Erez Davy (Brooklyn '05), Jennifer Lee (Brooklyn '05), Daniel London (Brooklyn '05), Carl Berry (Cornell '05), and Katharine Burns (Cornell '05) helped us to complete a very substantial revision of these materials. On the sixth edition, Helder Agostinho (Cornell '09), Daniel Hendrick (Cornell '09), and Michael Siegel (Cornell '09) helped with the revisions. On the seventh edition, Colin Leslie (Cornell '11), Steve Beytenbrod (Brooklyn '11), John-Paul Gonzalez (Brooklyn, Elina Shindelman (Brooklyn '11), Sarah A. Westby (Brooklyn '11), Noor I. Alam (Brooklyn '12), Yonah Jaffe (Brooklyn '12), and Shimon Sternhell (Brooklyn '12), provided valuable research assistance. We are grateful to them for their contributions.

Deans Stewart Siliciano at Cornell and Michael Gerber and Joan Wexler at Brooklyn also deserve thanks for their generous support.

We would like to thank the authors and publishers of the following works for permitting us to include excerpts from these works:

American Bar Association, Model Rule of Professional Conduct, Rule 3.3 Candor Toward the Tribunal (1983). Model Code of Professional Responsibility, Disciplinary Rule 7-102, Representing a Client Within the Bounds of the Law (1980). Copyright © 1983 by the American Bar Association. Reprinted by permission of the American Bar Association. Copies of the ABA Model Rules of Professional Conduct and the ABA Model Code of Professional Responsibility are available from the Service Center, American Bar Association, 321 N. Clark Street, Chicago, IL 60654, (800) 285-2221.

American Law Institute, Restatement of Torts (Second), §310, §311, §402A, and Comments *b*, *f*, *i*, *k*, and *n*; and §402B. Copyright © 1965, 1977 by The American Law Institute. Reprinted with permission.

American Law Institute, Restatement of Torts (Third): Apportionment of Liability §22, §23. Reporters Note to §7, §32. Copyright © 2000 by The American Law Institute. Reprinted with permission. U.C.C. §2-302 and Comment *I*; §2-313 and

- Comments 3 and 8; §2-316 and Comment 1; §2-719 and Comment 3; §2-725. Copyright © 1995 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Uniform Contribution Among Tortfeasors Act, 1995 and the National Conference of Commissioners on Uniform States Laws. Reprinted with permission.
- American Law Institute, Restatement of Torts (Third): Products Liability, §1, §2, and Comments *c, d, e, f, g, i, j, k, m, and n*; §3 and Comment *b*; §4 and Comments *d, and e*; §5 and Comment *b*; §6 and Comments *b, d, e, f, and h*; §7 and Comments *a and b*; §8, §9, and Comments *a and b*; §10 and Comments *a and j*; §15, §16, §17, §18, §19, §20, §21, and Comment *e*. Copyright © 1998 by The American Law Institute. Reprinted with permission.
- Conk, G., The True Test: Alternative Safer Designs for Drugs and Medical Devices in a Patent-Constrained Market, 49 UCLA L. Rev. 737, 738-739, 756-758, 783-784, 787-788. Copyright © 2002 by the Regents of the University of California. Reprinted by permission of the Regents of the University of California.
- Hansmann & Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts. Copyright © 1991 by the Yale Law Journal. Reprinted by permission of the authors, the Yale Law Journal Company, Inc., and the Fred B. Rothman Company from the Yale Law Journal, vol. 100, pages 1879-1934.
- Henderson, Why Negligence Dominates Tort, 50 UCLA L. Rev. 377, 390-400. Copyright © 2002 by the Regents of the University of California. Reprinted by permission of the Regents of the University of California.
- _____, Coping with the Time Dimension in Products Liability. Copyright © 1981 by the California Law Review. Reprinted from California Law Review, vol. 69, No. 4, 919, 931-939 by permission of the Review.
- Henderson & Twerski, Manufacturer's Liability for Defective Product Designs: The Triumph of Risk Utility, 74 Brooklyn L. Rev. 1061, 1077-1099 (2009). Copyright © 2009 by The Brooklyn Law Review. Reprinted by permission of the authors, The Brooklyn Law Review.
- _____, Drug Designs Are Different. Copyright © 2001 by The Yale Law Journal Company, Inc. Reprinted by permission of the authors, The Yale Law Journal Company, and Fred B. Rothman & Company from The Yale Law Journal, vol. 111, No. 1, pages 151-153, 155-157-159, 162-164, 168-169, 171-172, 180-181.
- _____, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263, 1298-1300, 1305-1306, 1316-1318. Copyright © 1991 by the New York University Law Review. Reprinted by permission of the New York University Law Review.
- _____, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265, 292-294. Copyright © 1990 by the New York University Law Review. Reprinted by permission of the New York University Law Review.
- Kobayashi & Furuta, Products Liability Act and Transnational Litigation in Japan, 34 Tex. Int'l Law J. 93, 94-101. Copyright © 1999 by University of Texas at Austin School of Law Publications, Inc. Reprinted by permission.
- Kraakman, Corporate Liability Strategies and the Costs of Legal Controls. Copyright © 1984 by The Yale Law Journal Company, Inc. Reprinted by permission of the author, The Yale Law Journal Company, Inc., and Fred B. Rothman & Company from the Yale Law Journal, vol. 93, pages 857, 897.
- Kysar, D., The Expectations of Consumers. Copyright © 1981 by The Directors of the Columbia Law Review Association, Inc. All rights reserved. This Article originally

- appeared at 103 Colum. L. Rev. 1700, 1763-1764, 1767, 1773-1774. Reprinted by permission.
- LoPucki, L., *The Death of Liability*. Copyright © 1996 by The Yale Law Journal Company, Inc. Reprinted by permission of the author, The Yale Law Journal Company, Inc., and Fred B. Rothman & Company from The Yale Law Journal, vol. 106, pages 23-28, 88-90.
- Pasquale & Krieger, *Combustion Engineering and the Interpretation of Section 524(g)*, Norton Ann. Survey of Bank. L. 149 (2007 ed.)
- Polinsky & Shavell, *The Uneasy Case for Product Liability*. 123 Harv. L. Rev. 1437, 1491-92 (2010). Copyright © 2010 by the Harvard Law Review Association. Reprinted by permission.
- Posner, R., *A Theory of Negligence*, 1 J. Legal Stud. 29, 32. Copyright © 1972 by the University of Chicago. Reprinted with permission of the author and the publisher.
- Reimann, Mathias, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 Am. J. Comp. L. 751 (Fall 2003)
- Van Tassel, K., *Adding Biotech Foods to the Torts System*, The Western Massachusetts Law Tribune (2003). Reprinted with permission of the author and publisher.
- Wertheimer, E., *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 Tenn. L. Rev. 1429. Copyright © 1994 by The Tennessee Law Review Association, Inc. Reprinted by permission of the Tennessee Law Review Association, Inc.
- Wolfram, C., *Modern Legal Ethics* 594-596, 653-657. Copyright © 1986 by West Publishing Co. Reprinted with permission of the author and the West Group.
- Zuckerman & Raskoff, *Environmental Insurance Litigation: Law and Practice* §27.8 (2007)

PRODUCTS LIABILITY

Summary of Contents

Contents	xi
Preface to the Seventh Edition	xxi
Acknowledgments	xxiii

PART I

Liability for Manufacturing Defects 1

Chapter One	Manufacturers' Strict Liability for Defect-Caused Harm	3
Chapter Two	Assigning Responsibility Inside and Outside the Commercial Chain of Distribution	73
Chapter Three	Causation	125

PART II

Liability for Generic Product Risks 179

Chapter Four	Liability for Defective Design	181
Chapter Five	Liability for Failure to Warn	335
Chapter Six	Express Warranty and Misrepresentation	415
Chapter Seven	Federal Preemption	441
Chapter Eight	Affirmative Defenses	483

PART III

Special Problem Areas 535

Chapter Nine	Special Products and Product Markets	537
Chapter Ten	Special Elements of the Plaintiff's Recovery	611

PART IV

Institutional Perspectives 687

Chapter Eleven	Special Features Reflecting the Fact That Most Products Defendants Are Corporations	689
Chapter Twelve	Adjusting the Liability System to the Demands of a National Economy	713
Chapter Thirteen	International Perspectives on Products Liability	729

Table of Cases	763
Table of Statutes and Other Authorities	779
Index	785

Contents

Preface to the Seventh Edition	xxi
Acknowledgments	xxiii

PART I

Liability for Manufacturing Defects

CHAPTER ONE	Manufacturers' Strict Liability for Defect-Caused Harm	3
A.	The Role of Negligence in the Formative Period	4
1.	Negligence from First-Year Torts	4
2.	The Fall of the Privity Rule	6
3.	The Rise of Res Ipsa Loquitur	8
	<i>Escola v. Coca-Cola Bottling Co.</i>	9
	Authors' Dialogue 1	13
B.	The Modern Rule of Strict Liability in Tort	14
1.	Implied Warranty as a Bridge to Strict Liability in the 1950s and Early 1960s	14
	<i>Greenman v. Yuba Power Products, Inc.</i>	16
2.	Adoption of §402A of the Restatement (Second) of Torts in 1965	19
	<i>Pulley v. Pacific Coca-Cola Bottling Co.</i>	20
3.	Codification of the Strict Liability Rule in the Restatement (Third) of Torts in 1998	22
	Problem One	23
4.	Policy Objectives Supporting Strict Liability in Tort	24
	James A. Henderson, Jr., Coping with the Time Dimension in Products Liability	25
	Problem Two	28
5.	Why Strict Liability for Manufacturing Defects Is a Workable Liability System	28
	James A. Henderson, Jr., Why Negligence Dominates Tort	30
6.	Do We Need Products Liability at All?	32
	A. Mitchell Polinsky and Steven Shavell, The Uneasy Case for Product Liability	32
C.	Defect as the Linchpin of Strict Products Liability	33
1.	What Makes a Product Defective? (The Conceptual Dimension)	33
	<i>Cronin v. J. B. E. Olson Corp.</i>	33
	Problem Three	37
2.	How Does the Plaintiff Prove Original Defect? (The Practical Dimension)	38

<i>Speller v. Sears, Roebuck & Co.</i>	40
<i>Rutledge v. Harley-Davidson Motor Co.</i>	45
Note: Sanctions for Spoliation in Products Liability Litigation	47
Problem Four	48
D. The Boundaries of Strict Products Liability	49
1. What Are (and What Are Not) Products?	49
<i>Winter v. G. P. Putnam's Sons</i>	51
Problem Five	55
Postscript on Blood and Other Human Tissue	56
2. Which Activities Constitute "Selling or Otherwise Distributing" in a Commercial Context?	57
<i>Magrine v. Krasnica</i>	60
3. When Is a Product Seller or Other Distributor "In the Business of Selling or Distributing"?	66
Authors' Dialogue 2	66
<i>Jaramillo v. Weyerhaeuser Company</i>	67
 CHAPTER TWO	
Assigning Responsibility Inside and Outside the Commercial Chain of Distribution	73
 A. Allocating Responsibility Between Product Distributors and Other Defendants and Among Members of the Distributive Chain	73
1. Joint and Several Liability	73
2. Letting Retailers and Wholesalers Out of the Litigation	76
Authors' Dialogue 3	78
<i>Smith v. Alza Corporation</i>	80
Problem Six	85
3. Contribution Among Members of the Distributive Chain	85
4. Indemnity Rights up the Distributive Chain	87
5. Settlement and Release Between the Plaintiff and Members of the Distributive Chain	89
B. Assigning Responsibility Collectively to the Distributive Chain	91
1. Holding Members of the Distributive Chain Liable Collectively in the Normal Course of Events	93
2. Special Circumstances that May Justify a More Aggressive Approach to Shifting Responsibility to the Entire Chain	94
<i>Anderson v. Somberg</i>	94
Problem Seven	99
Delaware Lawyers' Rules of Professional Conduct	103
Charles W. Wolfram, Modern Legal Ethics	104
C. Assigning Responsibility for Product-Related Workplace Accidents	106
1. Direct Attack by the Employee Against the Employer	106
a. The Worker Compensation Bar to Employer Tort Liability	106
b. The Intentional Tort Exception to the Worker Compensation Bar	107
<i>Laidlow v. Hariton Machinery Co.</i>	108
c. The Dual Capacity Doctrine	116

2. Allocating Responsibility Between the Employer (the Worker Compensation System) and the Product Manufacturer (the Products Liability System)	118
<i>Kotecki v. Cyclops Welding Corp.</i>	118
Authors' Dialogue 4	124
CHAPTER THREE Causation	125
A. Did the Product Actually Cause the Plaintiff's Harm?	126
1. But-For Causation in General	126
2. Special Problems of Proof: Circumstantial Evidence	127
3. Special Problems of Proof: Reliance on Experts	128
<i>Rider v. Sandoz Pharmaceutical Corp.</i>	133
Authors' Dialogue 5	137
<i>King v. Burlington Northern Santa Fe Railway Co.</i>	140
Problem Eight	146
Authors' Dialogue 6	147
B. Did the Defendant Supply the Product?	148
1. Defendant Identification in General	148
2. Creative Attempts to Solve a Unique Problem: Market Share	149
Problem Nine	154
C. Did the Defect in the Defendant's Product Contribute to Harming the Plaintiff?	154
1. All-or-Nothing Causation	155
<i>Midwestern V.W. Corp. v. Ringley</i>	155
<i>Gigus v. Giles & Ransome, Inc.</i>	158
Problem Ten	159
Authors' Dialogue 7	160
2. Enhanced Injury	160
<i>Lahocki v. Contee Sand & Gravel Co.</i>	160
Authors' Dialogue 8	166
3. Loss-of-a-Chance	167
Problem Eleven	168
D. Did the Defective Product Proximately Cause the Plaintiff's Harm?	169
<i>Union Pump Co. v. Allbritton</i>	169
Authors' Dialogue 9	173
Problem Twelve	176
Problem Thirteen	178
PART II	
Liability for Generic Product Risks	179
CHAPTER FOUR Liability for Defective Design	181
A. Preliminary Puzzlements	183
1. Do We Need Governmental Review of Product Designs? Why Not Leave Responsibility for Design Safety Entirely to the Market?	183

2. If We Need Governmental Review of Product Designs, Why Not Rely Exclusively on Nonjudicial Regulatory Agencies? Why Rely on Tort?	184
3. If We Must Rely on the Tort System, Why Limit Liability to Defect-Caused Harm? Why Not Adopt Broad-Based Enterprise Liability?	186
James A. Henderson, Jr., Why Negligence Dominates Tort	187
B. When the Fact of the Accident Speaks for Itself—Inferring Defect from Product Malfunction	189
C. Risk-Utility: The Reasonable Alternative Design Standard for Determining Design Defect	191
1. Defining the Standard for Determining Design Defect	192
<i>Smith v. Louisville Ladder Co.</i>	192
<i>Bourne v. Marty Gilman, Inc.</i>	201
Problem Fourteen	207
Authors' Dialogue 10	208
Problem Fifteen	210
2. The Time Dimension: Post-Sale Increases in Knowledge of Risks	211
3. The Time Dimension: Post-Sale Improvements in Risk-Avoidance Techniques	213
a. State of the Art	213
<i>Boatland of Houston, Inc. v. Bailey</i>	213
b. Admissibility of Evidence of Subsequent Remedial Measures	220
c. Manufacturers' Responsibility for Post-Sale Shifts in Public Attitudes Toward Risk	224
4. How Do Negligence and Strict Liability Theories Differ? Should Design Claims Be Submitted to Juries on Both Theories?	226
<i>Lecy v. Bayliner Marine Corp.</i>	228
5. Can a Warning Substitute for a Reasonable Alternative Design?	232
<i>Uniroyal Goodrich Tire Co. v. Martinez</i>	233
D. Risk-Utility: Product Category Liability	239
<i>O'Brien v. Muskin Corp.</i>	240
James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect	248
Ellen Wertheimer, The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement	251
<i>Parish v. Jumpking, Inc.</i>	254
<i>Dawson v. Chrysler Corp.</i>	257
Authors' Dialogue 11	262
E. The Consumer Expectations Standard for Determining Design Defect	266
1. Consumer Expectations as a Sword to Impose Liability	267
<i>Heaton v. Ford Motor Co.</i>	267
<i>Potter v. Chicago Pneumatic Tool Co.</i>	271
Problem Sixteen	278