
PRODUCT LIABILITY LITIGATION



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Product Liability Litigation

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*To
Duncan Matthew Reynolds Kinzie
and
Reneé*

Preface

THE PRACTICAL APPLICATION OF PRINCIPLES IN PRODUCT LIABILITY CASES

Just as all areas of law embrace change, so does product liability. Here especially, product liability has been through common law development, adoption, and modification of statutes by state legislatures, and honorable mention in older restatements, such as the well-recognized § 402A of the *Restatement (Second) of Torts* (1965). Even as recently as May 20, 1997, the American Law Institute unanimously adopted the *Restatement (Third) of Torts: Products Liability*, codifying the most recent development of black letter law on the subject. Without incorporating these recent changes and understanding their visceral impact across the entire chronology of this practice area, this study would be incomplete.

Product cases also hold a unique position in the trial court. Many of the product liability suits filed in 1998 and 1999 were actually tried before juries in state and federal courts. In fact, three out of the top ten jury verdicts recorded in 1999 were in product liability lawsuits. They were *Anderson v. General Motors Corporation* (burns from an automobile fire—\$4.93 billion), *Cowart v. Johnson Kart Manufacturing, Inc.* (burns from a go-kart fire—\$1.024 billion, later settled), and *Romo v. Ford Motor Company* (rollover of a Ford Bronco—\$295.3 million, later reduced to \$5 million). Other high jury trial verdicts included *Washington v. American Home Products* (class action for fen-phen side effects—\$150 million), *Henley v. Philip Morris, Inc.* (lung cancer from tobacco products—\$51.5 million, later reduced to \$26.5 million), *Gordon v. BRK Brands, Inc.* (wrongful deaths from failed smoke detector—\$50 million, later settled), *Rodriquez v. Suzuki Motor Corporation* (rollover of Suzuki Samurai—\$36.9 million upon retrial in 1997, later settled), *Smith v. Cutter Biological* (wrongful death from contaminated blood products resulting in HIV and AIDS—\$35.3 million, simultaneously dismissed; appeal pending). See *National Law Journal*, February 28, 2000 at C1–C22.

Fact issues such as the inherently dangerous quality of the product, misuse, reasonable alternative designs, inadequate and nonexistent warnings, the required standard of care in negligence actions, and the appropriate measure of damages for one's personal injury become the sovereign province of the jury and cannot, despite the urging of some, be resolved in a dispositive motion practice. A comprehensive study of product liability requires some limited instruction in the litigation practices that prepare the product lawsuit for trial, including the use and understanding of written discovery, document production, depositions, expert witnesses, product identification and testing, case management orders, and the trial itself. For practical reasons, the student-soon-to-be-practitioner must be ready to apply the theoretical concepts set forth here and to do

so in a way that will advance the discovery of facts that comprise the particular product lawsuit and, ultimately, will maximize the effective representation of the individual or corporate client. Without this practical application, the concepts embraced herein simply remain concepts that do not accomplish these goals and do not further the representation of the client beyond academic and theoretical discussions.

For these reasons, this text does not exclusively embrace the traditional Socratic method of learning typically found in ABA-accredited law schools and para-professional classes. Instead, this field merits an inclusive discussion of the law that gathers case law, statutes, federal regulations, restatements, treatises, and law reviews into a comprehensive approach to grasp this field and, ultimately, to apply it in day-to-day circumstances. Case law remains inherent in this study, but it alone cannot communicate the spectrum of legal issues touched upon in the product liability lawsuit, let alone adequately illustrate its historical development from negligence to warranty to strict liability.

What the product liability student cannot avoid—nor can any practicing professional—is an understanding of this practice area that arises only through the development of theory and its relentless application to facts on a case-by-case basis. The more exposure to more scenarios and their resulting application of principles that derive a finding of fact, a conclusion of law, or the progression of theory, the more embedded the individual practitioner becomes in the concept and its application to day-to-day legal problems. So while the Socratic method may in its own abstract way inherently foist this education upon the student, the practical application of other traditional educational tools makes a realistic departure from typical legal education and offers a valid vehicle for learning the law. But this approach requires that the *student*, then, be responsible for applying principles to scenarios, concepts to hypotheticals, and, ultimately, law to facts. Failure to do so will result in little more than a theoretical education—perhaps memorization—of legal principles that will be of little, or no, use to the practitioner. The outcome will be an incomplete education that will manifest itself in the student's inevitable inability to analyze legal problems, derive fully developed causes of action, define case strategy, seize opportunities for defense, and, most importantly, provide value to the client.

This text endeavors to provide the concept—a black-letter understanding of commonly adopted legal principles in product liability law. It is incumbent on the student to do more. It is the charge of the instructor to make broader challenges. It is essential that the student engage in a relentless pursuit of applying law to facts. The intermittent pursuit of this educational objective is not enough. It must be incessant.

This text endorses an intense study of important case law because these materials have an intrinsic value in the development of strict liability and in the student's need to understand—and develop for themselves—the reasoning of legal scholars that have addressed, ruled upon, and challenged the development of this practice area. Without the input of judges, professors, and commentators such as Prosser, Keeton, Hand, Henderson, Schwartz, Priest, and Twerski, this area of law would not be quite so developed and portions of it would, quite literally be non-existent. We benefit from their insight. There, however, we depart from the recognized norm of learning this practice area. Use of the *Restatements*—particularly the *Restatement*

(Third) of Torts: Products Liability—is fundamental in obtaining the unfolding perspective of the entire practice area. In addition, the practical application of negligence, warranty, and strict liability theories through pleadings, jury instructions, discovery, and trial is essential to bridge the gap between theoretical concepts and service to the client.

This text embraces the student's practical application of fully developed concepts in product liability law. The collective resources of case law study, restatements, jury instructions, discovery, dispositive motion practice, and trial work bring the full force of all these disciplines to bear on the products liability problem. The absence of any one of these leaves empty the full development of the legal student. The celebration of them all creates a greater understanding of the law, a genuine understanding among teaching disciplines, a comprehensive education for the student, and, ultimately, the unbeatable practitioner.

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Introduction to Product Liability

WHAT IS A PRODUCT?

Individuals injured by defective products deserve protection and, ultimately, recovery from product manufacturers, suppliers, or sellers. This area of the law is generally categorized as product liability, which “refers to the legal liability of manufacturers and sellers to compensate buyers, users, and even bystanders for damages or injuries suffered because of defects in goods purchased,” BLACK’S LAW DICTIONARY, 1089 (5th ed. 1979).

Civil lawsuits filed to enforce these rights may be based upon negligence, warranty, or strict liability theories, none of which are mutually exclusive. All three theories may be found in any one lawsuit and, together, these three theories comprise the entire scope of product liability litigation. In addition to these common law rights, federal statutes, such as the Magnuson-Moss Act, 15 U.S.C. § 2301-2312 and the Lanham Act, 15 U.S.C. § 1051-1127, and individual state statutes concerning consumer protection issues and deceptive trade practices also govern product manufacturers and sellers. Other common law rights govern such concepts as the misrepresentation of a product, the disparagement of a good, and the likelihood of confusion between products or product packaging. They address ideas about products and not the inherent defectiveness of the product itself. This text is designed to address only product defectiveness; laws concerning ideas about products are not included here.

Historically, individuals injured by defective products have been required to pursue the enforcement of their rights through the proof of fault and proximate cause in a negligence action or through the proof of privity of contract in a warranty action. For example, in a negligence action, a plaintiff must plead and prove that a manufacturer did, in fact, act in an unreasonable manner by producing a defective product that was the proximate cause of plaintiff’s injury and damages. In a warranty action, a plaintiff must prove privity of contract, which requires proof of a direct contractual relationship between plaintiff as purchaser and the manufacturer as seller, as well as a breach of an express or implied promise between the two that created the basis of the bargain. Moreover, warranty actions are subject to the disclaimers and requirements of notice of the Uniform Commercial Code (U.C.C.). Under either theory, a plaintiff in a product liability suit was required to overcome these hurdles in order to recover. Although these theories are still available to the individual injured by a defective product, these hurdles were eliminated when the no-fault principles of strict liability were adopted.

Almost all state courts eventually adopted the strict-liability principles cast in *Restatement of Tort (Second)* § 402A (1965), and many state courts are beginning to recognize the evolution of these principles as set forth in the *Restatement of Torts (Third): Products Liability* (1997), both of which provide a clear enunciation of strict liability as it applies to defective products. The *Restatement (Second)* § 402A states the following:

- (1) One who sells a 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.

The *Restatement (Third)* at § 1 sets forth a similar, but more concise, general standard that requires the following:

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

In either instance, the imposition of strict liability places the burden of the product user's loss squarely on the manufacturer or seller without the proof of fault, causation, privity, or breach of an express or implied promise. It is here that courts derive the true definition of product for purposes of product liability claims.

The social policy justifications underlying the imposition of strict liability in torts in cases in which a product is defective or otherwise inherently dangerous have their roots in protecting the general public from these defective products and, thus, placing the product user's loss on the manufacturer or supplier. This guiding principle defines *products* for purposes of strict-liability litigation. In *Boddie v. Litton Unit Handling Systems*, 455 N.E.2d 142, 147 (Ill. App. 1 Dist. 1983), an Illinois appellate court enunciated these policy justifications as

1. the public interest in human life and health;
2. the invitations and solicitations of the manufacturer to purchase the product;
3. the justice of imposing the loss on the manufacturer who created the risk and reaped the profit;
4. the superior ability of the commercial enterprise to distribute the risk of injury proximately caused by the defective condition of its product by passing the loss onto the public as a cost of doing business.

Few courts have embraced the common language meaning, but overly broad definition, of the term. In fact, courts have consistently rejected dictionary definitions of the term *product* and instead adopt the policy-based doctrine underlying strict liability. See *Lowrie v. City of Evanston*, 365 N.E.2d 923 (Ill. 1977); *Appleby v. Miller*, 544 N.E.2d 773,

775 (Ill. 1990); *Papp v. Rocky Mountain Oil & Minerals*, 769 P.2d 1249, 1253 (Mont. 1989); *Jackson v. City of Franklin*, 554 N.E.2d 932, 938 (Ohio 1988). Webster's defines "product" as "that which is produced by nature or made by industry or art," WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, 1436 (2d ed. 1983). Similarly, the American Heritage Dictionary defines the term as "anything produced by human or mechanical effort or by a natural process," THE AMERICAN HERITAGE DICTIONARY, 1044 (1976). Even Black's Law Dictionary references "product" as "[g]oods produced or manufactured, either by natural means, by hand, or with tools, machinery, chemicals, or the like. Something produced by physical labor or intellectual effort or something produced naturally or as a result of natural process as by generation or growth," BLACK'S LAW DICTIONARY, 1209 (6th ed. 1990).

These definitions define the substantive item at issue in the lawsuit but fail to bring the requisite focus necessary to consider the very purpose of product liability litigation: to protect the public from defective products without proof of fault. The residual effect of this places the burden of producing safe products squarely on the manufacturer or seller. These dictionary definitions fail to endorse this policy-based approach in defining products that fall within § 402A or *Restatement (Third)* protection.

Generally, and for instructive purposes here, a product is ordinarily regarded as tangible personal property, usually a good or chattel. The *Restatement (Third) of Torts: Product Liability* (1997) defines a product as follows:

- a. A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.
- b. Services, even when provided commercially, are not products.
- c. Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.

See also definitions of "good" at UCC § 2-105(1) and "product" at § 102(C) Uniform Model Product Liability Act (1979).

That which is ordinarily regarded as a product is constantly being challenged by the plaintiffs' bar in an effort to apply the no-fault principles of strict liability to more and more products. This has created more and more opportunities to avoid the rigid proof requirements of privity and breach of a promise in warranty suits, and fault, causation, and proximate cause in negligence actions. Items such as household appliances, household products, industrial equipment, automobiles, boats, pharmaceuticals, medical devices, chemicals, and foods are typically regarded as products and are often included in *Restatement (Second)* § 402A and *Restatement (Third)* protection. Because the *Restatement (Third)* concerns itself only with product liability, the twenty sections following the general statement of strict liability in defective product cases provide guidance about the application of strict liability principles under specific circumstances, such as categories of product defects (§ 2), compliance with safety regulations (§ 4), bulk suppliers and manufacturers of component parts (§ 5), manufacturers and sellers of pharmaceuticals and medical devices