

Product Liability Law and Its Effect on Product Safety¹

Does the Law Provide Useful Guidance?

By Kenneth Ross

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Products liability is one of the most important U.S. legal developments in the last 100 years for consumers, product users, manufacturers and others who produce and sell products, government regulators, insurance companies who insure the defendants in these claims and lawsuits, and, of course, lawyers for the plaintiffs and defendants. This liability has bankrupted manufacturers and insurance companies, caused manufacturers to stop making and selling certain products, and has created an entire industry of those who seek compensation for injuries and loss, those who seek to make products safer, and those who seek to make money prosecuting or defending the parties in these claims and lawsuits.

The goal of any manufacturer is to prevent or minimize the possibility of incidents, ensure compliance with all applicable legal, safety and technical requirements, and do what they can to make themselves and their products defensible in the event incidents or alleged non-compliances occur. To do that and to minimize or prevent liability, manufacturers need to understand the legal requirements, standards, and best practices so they can design, manufacture, and sell reasonably safe and compliant products, and adequately monitor their products after sale and comply with any resulting regulatory requirements.

Negligence and Strict Liability

Negligence, which has been in existence for hundreds of years, is the original theory used by product users against product sellers. A jury uses the following variables to decide whether the manufacturer or product seller was negligent: (1) the probability that injury would result from the manufacturer's conduct; (2) the gravity of the harm that could be expected to result should injury occur; and (3) the burden of taking adequate precautions to avoid or minimize the injury.

In other words, if the probability of harm and the gravity of the harm are greater than the burden of taking precautions to reduce the risk, then the manufacturer could be deemed negligent if they do not minimize the risk. Another way to state it is that the manufacturer failed to exercise reasonable care in manufacturing its product and that this failure was the cause of the injury.

In negligence cases, the injured party had to prove that the product caused plaintiff's harm, that the product was unsafe when it left the hands of the manufacturer or product seller, and that the lack of safety was brought about through the negligence of a specific person at the manufacturer.

In the 1960s, strict liability was adopted. What strict liability did was eliminate the need for the injured party to prove negligence and who was negligent. All they had to prove was that there

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was a defect in the product, that the defect was in existence at the time the product left the manufacturers or sellers control, and that the defect caused the injury. The jury was allowed to infer that someone was negligent because the product was defective, but it was unimportant to identify that person.

Under strict liability, the manufacturer was liable even if their quality control and manufacturing procedures were reasonable and not negligent. In other words, even if they did a good job of designing or manufacturing the product, the manufacturer could be liable if the product turned out defective and dangerous and it injured a consumer.

The adoption of strict liability started an explosion of claims and lawsuits because consumers and lawyers believed that they could more easily recover against manufacturers and, most importantly, more lawyers were therefore willing to take their cases and sue.

Defects

Over the years, the focus in any product liability case has evolved so that it now deals with any of three clearly separate defects. So, when we look at the law to help us understand whether the product is reasonably safe, we need to look at these three defects.

- Manufacturing Defects

A manufacturing defect exists if the product “departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.” In other words, even if the manufacturer’s quality control was the best in the world, the fact that the product departed from its intended design meant that it had a manufacturing defect. The plaintiff need not prove that the manufacturer was negligent, just that the product was defective. The focus is on the product, not on the conduct of the manufacturer.

Common examples of manufacturing defects are products that are physically flawed, damaged, incorrectly assembled, or do not comply with the manufacturer’s design specifications. The product turned out differently from that intended by the manufacturer. If that difference caused injury, the manufacturer will be liable. There are very few defenses.

Of course, the best way to defend against this allegation is to have good documentation that the product complied with design and manufacturing specifications so that the manufacturer can argue that, if there was something wrong, it was caused by someone else in the chain of distribution or by the consumer.

- Design Defects

Design defects are very different. With manufacturing flaws, usually there are only a handful of products that have the problem. And it usually is proven or can be inferred that someone made a mistake or was negligent.

With design defects, the manufacturer intended for the product to be designed and manufactured in a certain way. And the product was manufactured in the way it was designed. The problem was that there was something deficient with the design.

Under the law in most states, a product is deemed to be defective in design if a foreseeable risk of harm posed by the product “could have been reduced or avoided by the adoption of a reasonable alternative design” and the failure to use this alternative design makes the product not

reasonably safe. With this definition, the jury can hold the manufacturer liable if they believe that the product could have been and should have been made safer.

This test is much more subjective than the test for manufacturing defects and this subjectivity is the cause of most of the problems in products liability today. Manufacturers cannot easily determine how safe they need to make their product and cannot predict how a jury will judge their products based on this test. It is up to the jury to decide whether the manufacturer was reasonable or should have made a safer product.

To help determine whether a product was “reasonably safe,” in many states, the jury is told that they can consider the following factors:

- Usefulness and desirability of the product.
- Safety of the product – the likelihood that it will cause injury and the probable seriousness of the injury.
- The availability of a substitute product that performed the same function and was safer.
- Ability of the manufacturer to eliminate the unsafe characteristic of the product without lessening its usefulness or making it too expensive.
- User’s ability to avoid harm by being careful when using the product.
- User’s awareness of the risk, either because it is obvious or because of suitable warnings and instructions.
- Feasibility by the manufacturer to spread the risk by way of price increases or purchasing insurance.

These factors provide a more comprehensive and understandable basis for a jury to make a decision. They also provide more guidance to the litigants to evaluate their case. Also, as importantly, they provide a basis for the manufacturer to evaluate the safety of its product before sale and decide what is “reasonably safe.”

These factors definitely should be considered by a manufacturer when designing the product so that someone can testify as to why they believe the product is reasonably safe.

There are several other legal concepts that need to be discussed that can help a manufacturer understand if the finished product or any of its components has a design defect.

- Foreseeability

The manufacturer can only be held liable for design defects where the risk of harm relates to foreseeable product use that could have been reduced by adoption of a reasonable alternative design. Therefore, the risk of harm from unforeseeable product use should not create potential liability. Thus, a manufacturer is not liable if the product was misused, abused, or altered after it left the manufacturer’s control if the misuse, abuse, or alteration that caused the harm was not foreseeable.

It is clear in the law that a manufacturer must design a product so that it is reasonably safe for reasonably foreseeable use and misuse. It is not a defense to say that the product was misused if the misuse was reasonably foreseeable. For example, automobile manufacturers must consider safety in crashes even though crashes are not intended uses and frequently constitute misuse of the product. However, thousands of crashes occur each year and therefore courts have deemed it “foreseeable misuse.”

Likewise, if a manufacturer provides a safety guard that makes it difficult to use the product, they may not have a defense if the user removes the guard or disengages it. It is foreseeable that the user will do so, and the manufacturer should have foreseen the difficulty and designed a better guard.

Unforeseeable misuse has been defined to be a “use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it – a use which the seller, therefore, need not anticipate or provide for.”

Everything is foreseeable but not everything is reasonably foreseeable. The trouble is that there is very little guidance in the law about how to distinguish the two. And, in fact, sometimes different courts rule differently on the same misuse.

- Compliance with Standards, Law, and Regulations

Another complex area involves laws, standards, and regulations. As part of the initial risk assessment, a manufacturer must identify those laws, standards and regulations that apply to the product. Sometimes, that is not easy to determine or there are numerous and different ones that must be considered and reconciled.

Laws and regulations enacted by a government that apply to the product’s design must be complied with. If the product does not comply and this noncompliance caused the injury, then the manufacturer most likely would be liable. Unfortunately, compliance with all applicable laws and regulations is not, for most products, an absolute defense in a product liability case. Therefore, a jury could come back and say the laws and regulations are a minimum and that a manufacturer should have exceeded them. In other words, the manufacturer could have utilized a “reasonable alternative design” and made the product even safer.

Voluntary industry standards and even certifications like UL are also considered minimum requirements. They are also not mandatory unless adopted by some government agency by reference. As a result, compliance with voluntary standards and certifications is not absolutely necessary and is not an absolute defense although it is pretty good evidence that the product was reasonably safe. Noncompliance is a problem if it caused or contributed to the injury. The reason is that the standard creates the “state of the art” and establishes a reasonable alternative design.

Manufacturers should absolutely comply with all mandatory laws, regulations, and standards. They should also comply with all applicable voluntary standards and consider exceeding them, especially if their competitor’s products exceed the standard. Where there are different safety standards in different states or different countries where the product is being sold, manufacturers should consider selling the safest version of the product worldwide. If they try to sell less safe products in certain jurisdictions, they should think about how to justify not using the safest version of the product.

- Optional safety devices

The focus of a product liability case is whether the product should have and could have been made safer. Was there a “reasonable alternative design” that was technologically and commercially feasible?

However, when it comes to optional safety devices, it gets even more complex. Some courts have said that there is no such thing as an optional safety device. The reason is that the manufacturer has developed and has in existence an alternative design. So, assuming this design makes the product safer, how could it be optional?

The manufacturer must be careful in selling a product that is unassembled or lacks certain safety devices that are manufactured by them or by someone else. Some courts say that the manufacturer cannot delegate the obligation to install safety equipment to someone else, including the plaintiff's employer. As a result, it is important that there be a clear understanding by the ultimate user that it is their responsibility to purchase and install appropriate safety devices for safe use of the product. If you don't have this understanding and the customer doesn't do it and their employee is hurt, the manufacturer may find it hard to defend themselves.

- Component parts

The original equipment manufacturer (OEM) buys components from a variety of sources. The law holds the OEM liable for defects in its components and raw materials and for their installation into a final product. The OEM is also responsible for the final selection of the components used in its product. The component part manufacturer may be fully or partially at fault, but the OEM has the ultimate potential liability.

The kinds of safety analyses that are available, such as risk assessment, need to be applied to the parts manufactured by the OEM and by the component part supplier. But how far to go is not easily determined. Does the OEM have to go to the parts suppliers' location and do its own analysis? How much does the OEM have to do to ensure that the component parts it buys and incorporates into its products are designed safely?

First, OEMs need to identify "safety-critical" parts. For these parts, the OEM needs to do more to ensure that they are safe than they would for parts that are not critical for safety. Also, the OEM must make an initial decision whether to make or buy such parts, and if they buy them, whom to buy them from.

The OEM should at least confirm that the component part supplier did a risk assessment for use of their component in the OEM's product. And they may want to look at the supplier's risk assessment to confirm that they agree with the supplier's decision on design, warnings, and instructions. The OEM should not redo the risk assessment themselves for the component and if the supplier has not performed a risk assessment, they should consider whether it is a good idea to buy from that manufacturer.

However, the risk assessment done by the OEM must confirm the safety of the finished product with all of its components.

Warnings and Instructions

The third main kind of defect involves inadequacies in warnings and instructions. The definition is similar to that of design defect and says that there is a defect if foreseeable risks of harm posed by the product "could have been reduced or avoided by ...reasonable instructions or warnings" and this omission makes the product not reasonably safe.

Again, this is an extremely subjective test so that it is difficult for a manufacturer to know how far to go to warn and instruct about safety hazards that remain in the product. It is up to the jury to decide whether a warning or a better warning would have made a difference and prevented the

accident. It can be assumed that the jury would believe that the manufacturer could have easily provided a better warning.

This requirement applies to the finished product and all of its components. Therefore, the manufacturer should consider the adequacy of the warnings and instructions on the components that will be seen by the end user and possibly request the supplier to make improvements.

Post-Sale Duties

One other theory of liability that could be very important in a products liability case involves post-sale duties. A manufacturer or product seller may have a duty, after sale, to warn customers about hazards the manufacturer learns about after sale. This duty can arise even if the product was not defective or hazardous when sold. While this duty can involve any of the three kinds of defects described above, the legal theory that the jury can use is negligence. When accidents are occurring, this is fairly easy to prove.

In those states that have adopted this theory, the common law generally says that a product manufacturer or seller can be liable for failing to provide a warning after sale or distribution if a reasonable person in the seller's position would have provided such a warning. There are four factors that can be considered by the jury to determine if a post-sale warning should be required:

- The first is that a seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property.
- The second factor is that those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm.
- The third requirement is that a warning can be effectively communicated to and acted on by those to whom a warning might be provided.
- The fourth factor is that the risk of harm is sufficiently great to justify the burden of providing the warning.

The common law is clear that allegations concerning negligence in performing post-sale duties are independent of an allegation that the product was defective when sold. Therefore, selling a defective product can result in a claim that the product was defective at the time-of-sale and an additional claim that the manufacturer failed to issue a post-sale warning or that a post-sale recall was negligently performed.

In addition, the common law makes it clear that if the product was defective when sold, the manufacturer cannot avoid liability for selling a defective product merely by issuing a post-sale warning. Therefore, a manufacturer may be deemed to have complied with its post-sale duties but still held liable for selling a defective product. And the manufacturer could be held liable for post-sale negligence even if the product was not defective when sold.

Another part of the common law provides that the seller or distributor is not liable for a failure to recall the product unless the recall is required by statute or regulation. However, the law also says that if the seller or distributor voluntarily undertakes to recall the product and does so negligently, they can be held liable. So, recall adequacy can be a big issue if not done well.

The common law also makes it clear that the manufacturer has no duty to inform product customers of safety improvements. However, if the safety improvement was made because of some problem in the field, then arguably, the manufacturer is fixing a defective product and should have offered this “fix” to its prior customers.

Manufacturers need to establish a robust post-sale information gathering system that captures potential and real safety issues received through various channels such as phone calls, emails, blogs, and mail and from entities such as distributors and retailers and service providers. And then the manufacturer has to have a good system for investigating, analyzing, and cataloging this information so that trends and real problems can be identified and taken care of. A failure to do all of this can result in missed opportunities to prevent accidents resulting in a need to defend itself against the consequences.

Conclusion

Despite the fact that the jury ultimately gets to decide if the manufacturer should be held liable, the law does provide some good guidance on which a manufacturer can use to make decisions during the design and manufacturing process and after sale. Having the opportunity to say that the company was very aware of the law and tried to adhere to it could be very helpful in trying to defend itself in a lawsuit.