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Introduction to Product Liability Law

Product liability refers to the legal liability of manufacturers or sellers to compensate buyers, users, and even bystanders for damages or injuries suffered because of defects in goods purchased. This report provides an introduction to the basic concepts of product liability law, including the historical development of the law; common elements of product liability claims; theories of law on which these claims are based; types of product defects; persons involved in product liability lawsuits; damages available; and defenses to liability.

Product liability is a term used to describe the legal liability of manufacturers or sellers of goods to compensate buyers, users, and even bystanders for damages or injuries suffered because of defects in goods purchased. Product liability law is the area of law governing product liability litigation.

A typical product liability case will involve a claim for damages against the manufacturer or seller of a product by a person injured by a product. The injured party, or plaintiff, will seek to prove that the injury was caused by some deficiency in the way that the product was made or marketed (i.e., that the product was defective).

Product liability law is a type of private law that is concerned with the definition, regulation, and enforcement of rights among private individuals, associations, and corporations. It is different from public law, which is concerned with the determination of rights between private individuals and their respective governments.

Products liability is civil law. This is law that is concerned with the rights of individual parties to seek redress for alleged harms, as opposed to criminal law, which is concerned with the rights of society to regulate the conduct of its citizens. This is important because there are different rules of procedure and substantive law that apply to each field of law. One important distinction is the standard of proof for civil law cases is generally “proof by a preponderance of evidence,” which can be roughly translated as “more likely than not.” This is an easier standard to meet than the criminal law standard of “proof beyond a reasonable doubt.”

Legal Bases for Product Liability Law

The law of products liability is derived from both tort law and contract law. In addition, many state legislatures have enacted product liability statutes that define the scope of products liability within the state. Currently, there is no uniform federal products liability law.

Tort Law

Torts are civil wrongs recognized by law as grounds for a lawsuit. These wrongs result in an injury or harm constituting the basis for a claim by the injured party. While some torts are also crimes punishable with imprisonment, the primary aim of tort law is to provide relief for the damages incurred and deter others from committing the same harms. The injured person may sue for an injunction to prevent the continuation of the tortious conduct or for monetary damages. Among the types of damages the injured party may recover are: loss of earnings capacity, pain and suffering, and reasonable medical expenses. They include both present and future expected losses.

Tort law is state law that is created through judges (i.e., common law) and by legislatures (i.e., statutory law). Many judges and states utilize the Restatement of Torts (2nd) as an influential guide. Restatements are publications prepared by a private legal organization, the American Law Institute (ALI), whose aim is to present an orderly statement of the general law of the United States. Each restatement consists of individually designated sections along with notes and comments of the persons who developed the document, called reporters notes and comments. One widely cited section of the Restatement (2nd) is Section 402A that defines the concepts of strict product liability in tort.

In 1997, the ALI published the Restatement of Torts (3rd): Product Liability, which focuses solely on product liability-related aspects of tort law. The "Third Restatement," as it is commonly known, contained significant revisions to the legal concepts of product liability. Courts have slowly begun to adopt many of its concepts.

Contract Law

Contract law is concerned with regulating agreements made between parties. It includes ways of defining the rights of product buyers and sellers. Like tort law, contract law is based on state law.

A subset of contract law is the law of sales, which is concerned with regulating commercial transactions. To allow the orderly sale of goods between persons in different states, all states except Louisiana have adopted the Uniform Commercial Code (UCC) into their state laws. The UCC is a model law that was developed by a private organization, the Uniform Code Congress, to align divergent state laws. Because the UCC is a model law, states have the authority to make changes to the law as they see fit.

Article 2 of the UCC deals with the sales of goods and it has been adopted by most states. In it, the most important products liability sections are the implied and express warranties of merchantability in the sales of goods, §§ 2-314 and 2-315.

State Product Liability Statutes

Product liability is a state matter. Many states have enacted legislation to address product liability. This legislation may address specific issues, such as statutes of limitation or repose, or comprehensively address product liability actions within the state. There may also be numerous other state statutes, such as general tort statutes concerning joint and several liability, limitations on non-economic damages, or fault schemes.

Federal Law

There is no federal product liability law, although federal laws may be relevant in product liability litigation. In 1979, the U.S. Department of Commerce proposed a model uniform product liability law. The purpose of this law was to provide a template that state legislatures could use to pass their own state product liability laws.

Historical Background

The idea that manufacturers should be held responsible for damages or injuries suffered because of defects in their products is not a recent concept. The Code of Hammurabi,

published circa 2200 B.C., contained an organized scheme for providing recourse to people injured by defective products.

The law of products liability has evolved since Hammurabi. Three important stages in the evolution of modern product liability law include the rejection of the doctrine of caveat emptor, the erosion of the doctrine of privity, and the advent of strict product liability in tort.

Caveat Emptor

During the seventeenth and eighteenth centuries in Europe, the prevailing legal theory of product liability was the concept of caveat emptor, a Latin phrase for “let the buyer beware.” Under this rule, the purchaser was responsible for examining, judging, and testing goods for sale to make sure that they were as described and could protect themselves by requiring the seller to provide an express warranty that the quality or condition of the goods would be the same as the sample provided. Absent this warranty, the seller was under no legal obligation to warrant the quality of his goods. This theory was adopted in the United States in the early 19th century and persisted in many states into the early twentieth century.

Privity of Contract

An important concept in early product liability law was the doctrine of privity of contract. Under this doctrine, an injured person could only bring a legal action against a product manufacturer or seller for their injuries if they were in a direct contractual relationship with the manufacturer or seller. So, a person who bought a product through a retailer had a claim against the retailer, but not against the product manufacturer since they had a direct relationship with the retailer but not the manufacturer. Further, a passenger or bystander injured because of a product had no recourse against either the retailer or the manufacturer since they were not in a contractual relationship with either party. The erosion of the privity requirement in product liability actions is one of the most important developments of

product liability law, and the New York Court of Appeals’ effective abolishment of this defense in the case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) is widely seen as the start of “modern” product liability law. The privity defense was later abandoned for express warranty cases (*Baxter v. Ford Motor Co.* 168 Wash. 456 [1932]), and for implied warranty cases (*Henningsen v. Bloomfield Motors, Inc.* 32 NJ 358 [1960])

Strict Product Liability

The adoption of strict liability in tort for product liability by the California Supreme Court (*Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 [1963]) is the most important development of modern product liability law. This theory of liability makes the product manufacture and seller responsible for all defective products that unreasonably threaten the personal safety of a consumer or the consumer’s property, without regards to fault. Almost every state has since adopted some form of this liability, either by judicial decision or statute, and it is the dominant theory of product liability law.

Common Elements of PL Claims

There are three common elements to all product liability lawsuits, regardless of the legal theory that the lawsuit is brought under. The lawsuit must involve a product, the product must be found to be defective, and the product defect must be found to be the proximate cause of the injury. As such, a plaintiff may allege several different theories in his lawsuit to take advantage of the differences in proof required for each claim.

Definition of Product

For the law of products liability to apply, the claim must involve a product. Products are typically thought of as discrete, tangible pieces of personal property that are moveable at the time of sale (e.g., a tool or an article of clothing). However, some courts have taken an expansive view of products to mean anything produced

by physical labor or intellectual effort. As such, courts have determined that intangible items, such as electricity delivered to a customer, may be considered products for the purposes of products liability, as well as animals, real estate, and writings.

Product Defect

A plaintiff must prove that a product is defective in order to recover damages against a product manufacturer or seller. It is universally recognized that a manufacturer is not an insurer against all risks of injury associated with a product and will not be liable for injuries caused by a properly functioning product.

In a broad sense, a defect is an imperfection that renders a product unsafe for its intended use. This defect can be associated with the product itself, or with the product's packaging, labeling, display or advertising. A product is not defective if it performs as intended or is safe for normal handling and consumption.

Types of Defects

Most product defect claims fall into one of three categories: manufacturing defects, design defects, or communication defects.

Manufacturing defects may arise when errors in production cause a product not to meet its intended design specifications. The errors may affect a single product or, in the case of mass-produced products, an entire production run.

Design defects exist when a whole class of products is inadequately planned in such a way as to pose unreasonable hazards to consumers. Products with design defects may be built in exact conformance to their production specifications; however, the design is flawed.

Communication defects can occur in products that are otherwise not defective. They occur because the manufacturer fails to provide instructions on the safe use of the product or warnings about concealed hazards, or makes improper claims about the quality or performance of the product.

Time of Defect

In general, an injured party must prove that the product was defective or dangerous at the time when it left the possession or control of the defendant. The seller is not liable for injuries caused by parties' mishandling or other actions that make the product harmful at the time it was consumed by the purchaser.

There is no immediate presumption that a product, which was defective at the time of an accident, was defective when it left the control of the manufacturer or seller. Plaintiff may have to show that defect was not due to improper intermediate handling. Lapse of time in itself is not a bar to recovery. Plaintiff may have to negate an inference of intervening causes of defect, such as mishandling or damage after delivery. Long or continued use of the product before the injury is an important factor, but not conclusive evidence that the defect did not exist at the time of sale.

Tests for Defectiveness

Courts use several different tests for proving whether a product is defective. The two principle tests for defectiveness are the consumer expectation test and the risk-utility test.

The consumer expectations test is the historical standard used to determine whether a product is defective. Under the consumer expectation test, a product is determined to be defective if it is "dangerous to the extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." The test sets an objective standard for determining defect (e.g., it is based on the expectations of the "ordinary consumer" who has the "ordinary knowledge of the community").

Under the risk-utility test, courts balance the cost of making a product safer against the risk of injuries present if the safety measures are not implemented. If the cost of safety is determined to be less than the cost of injury, then the benefit of making the product safer out-

weighs the risk and the product is determined to be defective. Conversely, if the risk is minimal compared to the cost of changing the product, then the product is deemed not to be defective.

Causation

Proximate cause is commonly defined as “that cause, which, in a natural and continuous sequence, unbroken by any efficient, intervening cause produces the injury, and without which the result would not have occurred.” The alleged cause does not have to be the sole cause of injury. Two components to causation are: cause in fact and legal cause.

Cause in Fact

There are two basic rules used by courts for determining whether a product was the cause in fact of an injury: the “but for” (sine qua non) test and “substantial factor” test. To apply the “but for” test, the trier of fact will assess whether the injury would not have occurred “but for” the conduct of the defendant. To apply the substantial factor test, the trier of fact will evaluate whether negligent act was a substantial factor in bringing about the harm.

Legal Cause

Legal cause evaluates whether the defendant should be held legally responsible as a matter of public policy. It must be socially and economically desirable to hold the wrongdoer liable for the injury.

Parties

In general, there are three categories of persons who may serve as plaintiffs in product liability actions. These are injured product purchasers, non-purchasing users, and bystanders. The type of persons that are suitable plaintiffs has expanded as product liability theories have shifted from claims based in negligence and warranty to claims involving strict liability.

Historically, privity limited the types of persons and business entities that could be

defendants in product liability action to only those parties in direct relationships with the injured person. Thus, actions could not be sustained against entities involved in the manufacture and sale of the product, but who were remote from the injured person. This requirement has been abolished in virtually all jurisdictions and now any entity involved in the manufacture and sale of a product may become a defendant in a product liability action, subject to some general limitations.

Manufacturers are the most common defendants in product liability actions. Other persons who may be liable for product liability include:

- Product designers
- Component manufacturers
- Suppliers of materials
- Distributors & wholesalers
- Retailers
- Trademark licensors
- Used product sellers
- State and federal governments

The scope of the liability for these parties will vary depending upon the legal theory under which the lawsuit is brought.

Theories of Liability

There are four principal theories that underlie product liability lawsuits. They are:

- Negligence
- Breach of warranties
- Strict liability in tort
- Misrepresentation

These theories are not mutually exclusive; a plaintiff can bring one or more in the same lawsuit. The theories are summarized below.

Negligence

Negligence may be defined as conduct failing below the standard established by law for the protection of others against unreasonable risk of harm. In terms of product liability, a product manufacturer or seller is negligent if it acts, or fails to act, in such a way as to create an unreasonable risk of harm or loss to the user of the product. Actions will differ for the various entities involved in making and selling the product. Risk of harm may be created because the product was deficiently designed, mis-manufactured, or sold with inadequate warnings or instructions for safe use. The entity committing the negligent act may be liable for injuries and damages caused as a result of that negligence. Most product liability cases are based upon theories of negligence.

Breach of Warranty

Breach of warranty refers to the failure of a product seller to fulfill the terms of a promise, claim, or representation made concerning the quality or type of product. Product liability claims for breach of warranty are based upon the product seller's failure to honor his/her promise. Warranty claims may be based upon state or federal law.

Express Warranty

An express warranty is an assertion of fact or a promise made about the quality, performance, construction, or durability of a product that induces a buyer to purchase it. This warranty may be created in writing, orally, or through the provision of physical representations, such as product samples.

Implied Warranties

Implied warranties arise out of the sales transaction by operation of law. The two types of warranties that are important to product liability are the implied warrant of merchantability and the implied warranty of fitness for a particular purpose. An implied warranty of merchantability is a promise that the product sold is in proper condition and is reasonably suited for the purpose to which it was manufactured. An implied warranty of fitness for a particular purpose is a

special warranty that applies when the consumer relies on the seller's advice that a particular product can be used for a particular purpose.

Strict Liability in Tort

The strict liability doctrine imposes liability on the seller of a defective product without requiring that the injured party prove fault. The rule was established to hold the seller or manufacturer of a product liable for product-related injuries for which it would be difficult or impossible to recover under a breach of warranty or negligence theory. The doctrine has been recognized by an overwhelming majority of jurisdictions. Currently, it is the most important theory in product liability.

Misrepresentation

Manufacturers and product sellers have a duty to provide true and accurate information about their products in their advertising and sales. The innocent, negligent, or intentional misrepresentation about the quality of a product may support a cause of action if the hearer of the statement relied on the statement and was injured.

Defenses

In a product liability lawsuit, product manufacturers or sellers being sued may defend themselves two basic ways. They may directly refute the facts and arguments made by the person who commenced the lawsuit; for example, by proving that they did not manufacture or sell the allegedly defective product, that the product was not defective, or that the product defect was not the proximate cause of the plaintiff's injuries. The defendant may also raise additional facts and arguments, which, if true, might defeat or mitigate the plaintiff's claim, even if everything in the plaintiff's claim was true; for example, by showing that the person caused their own injury by using the product in a manifestly unreasonable or unexpected manner. This second type of defense is commonly called an affirmative defense.

Types of Defenses

In general, product liability defenses can be grouped into statutory defenses, conduct defenses, and contract defenses. Other defenses commonly raised in product liability actions include compliance with government and industry standards, unusually susceptible consumers, sealed containers, and contract specification defenses.

Statutory Defenses

State laws may provide defenses to product liability claims. These defenses may be included in general statutes applicable to all types of tort and contract claims, or they may be contained in state product liability statutes and apply solely to products liability actions. Common types of statutory defenses include statutes of limitation and statutes of repose.

Conduct Defenses

The conduct of the product user or a third party may be relevant for determining whether the product was the proximate cause of the plaintiff's injury. The conduct of the manufacturer may be relevant for determining the level of care they followed in producing the product. Conduct-based defenses include contributory negligence, comparative negligence, assumption of risk, and misuse.

Contract Defenses

Manufacturers may incorporate defenses to product liability in their contracts. The primary contract defenses are requiring prompt notice of breach, disclaimers of warranties, and limitations on remedies available in the event of a breach. These defenses have all been discarded in actions seeking recovery for a consumer's injuries and are typically used only in transactions between commercial parties.

Availability of Defenses

The type of defenses that will be available will depend upon the location of the lawsuit and the facts of the case. Defenses may arise from common law (i.e., from prior legal decisions) and statute. Because of this, different jurisdictions may allow different defenses or

may modify traditional defenses to meet local needs. There are different defenses available for defending contract and tort claims.

In addition, the conduct of the parties may waive or create defenses for the specific transaction. For further information on available defenses, see *Product Liability Defenses* on Hanover's Risk Solution Website.

Damages

Damages are monetary compensation awarded by a court in a civil lawsuit to an individual who has been injured by the wrongful conduct of another. Damages attempt to measure, in financial terms, the extent of the harm a plaintiff suffered because of the defendant's action. They are the main remedy awarded in product liability lawsuits.

The following section summarizes the main types of damages.

Compensatory Damages

Compensatory or actual damages are damages that are awarded to compensate an injured party for all the direct and natural consequences of the defendant's wrongful act. They may be provided for both losses caused directly or immediately from the wrongful conduct (i.e., direct losses) and for other losses that occur as a result of the act (i.e., consequential damages). Compensatory damages represent an attempt to put the injured party back in the same, or an equivalent, position that he or she was in prior to the loss. Types of compensatory damages awarded in product liability include lost earnings, destroyed property, medical expenses, physical impairment, disfigurement, loss of enjoyment of life, emotional distress, and loss of consortium. Most damages in product liability are compensatory.

Punitive Damages

Punitive or exemplary damages are damages on an increased scale that are awarded to an injured party over and beyond the actual damages they incurred. There are two fundamental

purposes of this type of damages. They are to punish the wrongdoer and to deter the wrongdoer and others from acting similarly in the future. Most jurisdictions permit punitive damages only in cases where the wrongdoer's action is particularly reprehensible, such as when the doer intended to cause the harm, or when the doer knew or should have known that their action would cause the harm, but ignores these facts and proceeds on with disregard for the consequences.

Economic Losses

Damages in product liability cases are intended to address injuries to persons or property. In general, purely economic losses, which involve damage only to the product itself and associated business losses, such as lost profits, are not compensable injuries in product liability. Instead, these types of business losses, or "bad bargain" type claims, are covered by other areas of law, primarily the law of sales.

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3. Owen, D., et al. *Products Liability Cases and Materials*. 3rd Ed. New York, NY: Foundation Press, 1996.

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