

STRICT LIABILITY IN TORT:
The Shifting Sand of the Law of Torts

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Tort

- A. A civil wrong
- B. Our system of Justice is based upon Fault

- 1. Liability follows fault

- To be liable to someone else in tort, you must first have done something wrong, and that wrong must have caused the other damage.

- a. You are not liable for anything caused by some force other than your wrong,
 - b. You are not liable for anything caused by the injured person's own fault.
 - c. You are not liable for anything caused by someone else's fault
 - d. **Our system of justice is based upon fault!**

- 2. Proximate cause,

- (a) Moving or producing cause

- (b) That event "but for which" the damage (injury) would not have occurred.

- (c) Natural consequence foreseeably flowing from your action

2 kinds of Tort:

Negligence and Strict Liability

A. Negligence:

- 1. The want of ordinary care.
- 2. The doing of something that an ordinarily prudent person would not do, or the failure to do something that an ordinarily prudent person would do.

B. Strict liability in tort

- 1. Throw away all of your intuitive thought about the law of torts, negligence, right, wrong and justice.

2. Some categories of activity are considered to be so inherently dangerous that the Common Law, (through activist judges for several hundreds of years), has carved out a form of liability even in the absence of fault.

3. The doctrine of strict liability in tort had its genesis in the common law of England upon which most of our law is based.

4. Storing water on your land: If the water escaped through no fault or want of ordinary care of the possessor of that land, the landowner was liable for ALL damages.

It was as though the fault was the act of storing the water even though that was a perfectly legal and perhaps societally beneficial activity

5. Using or storing dynamite: if the explosion harmed another, the party using the explosive, or storing the dynamite, was liable for all damages caused even in the exercise of all due care or in the absence of fault!

The liability imposing event was the storing or use of explosives.

C. Creating a product with a defect which renders the product “unreasonably dangerous” renders the creator of that defect, and all in the chain of distribution between that person and the injured party, strictly liable for ALL damages.

1. Unreasonably dangerous:

Dangerous beyond the expectation of the user

More dangerous than other products of like kind that pass in the industry

Two tests of “unreasonably dangerous:”

Whether the danger is greater than an ordinary consumer with knowledge of the product’s characteristics would expect, and

Whether the danger outweighs the utility of the product?
“Risk/utility is becoming a less favored test”

Restatement of the Law of Torts, second: Section 402 A:

The product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary common knowledge to the community as to its characteristics.
(Does this sound a little like a negligence standard?)

2. Special Liability of Seller of Products for Physical Harm to User of Consumer

(1) One who sells any 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

This is Strict Liability!

- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The important key phrase is “unreasonably dangerous!”

3. History

- a. 1266 criminal statutes for victualers, vintners, brewers, butchers cooks and other suppliers of food and drink who provided adulterated product..
- b. 1950 the rule was extended into other products, not intended for human consumption to those intended for bodily use of any kind.
- c. 1958 extended to a cinder block and to any product which, if defective, may cause physical harm to a consumer or his property.
- d. 1970 Iowa, and most states, adopted strict liability applied to all products for defects rendering the product “unreasonably dangerous.”

4. Public Policy:

The burden of accidental injuries caused by products is placed on those marketing such products and is a normal cost of production against which insurance can be purchased.

5. Normally or expectedly dangerous products.

Many products cannot be made entirely safe for all uses, any food or drug involves risk of harm, if only from over-consumption.

“The article sold must be dangerous to an 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. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.”
Restatement of Torts, 2d comment I to section 402 A

Unreasonable danger is one not contemplated by the ordinary consumer with the ordinary amount of knowledge possessed by the common or ordinary consumer; The reasonably prudent consumer!

6. Manufacturing defect:

Essentials of recovery, I. U. J. I. 1000.1

In order to recover on a claim that the defendant’s product contains a manufacturing defect, the plaintiff must prove all of the following propositions:

- a. The defendant sold or distributed the product;
- b. The defendant was engaged in the business of selling or distributing the product
- c. The product at the time it left the defendant’s control contained a manufacturing defect that departed from its intended design, in one or more of the following ways:
 - i.
 - ii.
 - iii.
- d. The manufacturing defect was a proximate cause of plaintiff’s damages; and
- e. The amount of damages.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. [If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount] or [If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in another instruction.].

7. Design defect

Essentials of recovery, I. U. J. I. 1000.2

In order to recover on the claim that the defendant's product was defective in design, the plaintiff must prove all of the following propositions:

- a. The defendant sold or distributed the product;
- b. The defendant was engaged in the business of selling or distributing the product
- c. The product was in a defective condition at the time it left defendant's control, in one or more of the following ways:
 - i.
 - ii.
 - iii.
- d. A reasonably alternative safer design could have been practically adopted at the time of sale or distribution.
- e. The alternative design would have reduced or avoided the foreseeable risk of harm posed by the product.
- f. The omission of the alternative design renders the product not reasonably safe;
- g. The alternative design would have reduced or prevented the plaintiff's harm;
- h. The design defect was a proximate cause of the plaintiff's damage; and
- i. The amount of damages

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. [If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.] or [If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in other instructions. }

8. Reasonable alternative design: I. U. J. I. 1000.4

Concerning propositions 4, 5 and 6 of the instruction on design defect, you may consider the following factors and their interaction to determine whether an alternative design is reasonable and whether its omission renders the product not reasonably safe:

The magnitude and probability of the foreseeable risk of harm

The instructions and warnings accompanying the product

Consumer expectations about product performance and the dangers attendant to the use of the product, including expectations arising from product portrayal and marketing;

Whether the risk presented by the product is open and obvious to, or generally known by, foreseeable users;

The technological feasibility and practicality of the alternative design;

Whether the alternative design could be implemented at a reasonable cost;

The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed;

The likely effects of the alternative design on product longevity, maintenance, repair, esthetics and on the efficiency and utility of the product;

The range of consumer choice among similar products, with and without the alternative design;

The overall safety of the product with and without the alternative design and whether the alternative design would introduce other dangers of equal or greater magnitude;

Custom and practice in the industry and how defendant's design compares with other competing procedures in actual use; and

Any other factor shown by the evidence bearing on this question.

9. Inadequate Instructions or Warnings

a. Essentials for recovery: I. U. J. I. 1000.3

In order to recover on a claim that defendant's product was defective because of inadequate instructions or warnings, the plaintiff must prove all of the following propositions:

- (1) Defendant sold or distributed the product;
- (2) The defendant was engaged in the business of selling or distributing the product;
- (3) The foreseeable risk of harm produced by the product could have been reduced or avoided by the provision of reasonable instructions or warnings in one or more of the following ways:

- i.
- ii.
- iii.

- (4) The omission of the instruction or warning renders the product not reasonably safe;
- (5) The risk to be addressed by the instruction or warning was not obvious to, or generally known by foreseeable product users;
- (6) The omission of the instruction or warning was a proximate cause of plaintiff's damages, and;
- (7) The amount of damages.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. [If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount] or [If the plaintiff has proved all of these propositions, then you will consider the affirmative defense as explained in other instructions.]

There must be evidence that any warning or different warning would have altered the users behavior.

There must be proof that the need for the warning was reasonably foreseeable to the merchant.

There must be evidence that the hazard was other than open and obvious.

Warning /instruction defect was the first to be removed from the strict liability category.

b. Post-Sale directions or warnings I. U. J. I. 1000.7

A supplier of a product has a duty to warn the user of the product following sale or distribution if:

- (1) The supplier knows or should reasonably know that the product poses a substantial risk of harm to persons or property; and
- (2) The supplier can identify those to whom a warning should be provided and it may reasonably be assumed those persons are unaware of harm; and
- (3). A warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
- (4) The risk of harm is sufficiently great to justify the burden of providing the warning.

Under these circumstances, the supplier has a duty to exercise reasonable care to inform the user of the product of the dangerous condition or of the facts which make it likely to be dangerous.

Even if when manufactured a product is state of the art, when a manufacturer later learns of a defect that is unreasonable dangerous, the manufacturer has a duty to warn.

A manufacturer has a duty to warn of latent defects which become known after the product has been placed in the market when reasonable to do so.

THIS IS THE STATE OF THE LAW IN MOST JURISDICTIONS IN THE COUNTRY AT THIS TIME!

NOW, AS TO WHERE THE LAW SEEMS TO BE GOING

D.. Restatement (Third)of the Law of Torts: Products Liability, section 1.

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.

No mention of “unreasonably dangerous” just “defective product.”

“DEFECTIVE:” Products Restatement Section 2.

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warning. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(Reference to “even though all possible care” tips us off that this is “strict liability)

(b) is defective in design when the foreseeable risk of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonable safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

(Use of the words “foreseeable” and “reasonable” tip us off that they are now talking about simple negligence, ie: traditional concepts of “fault!”)

1. Authority of the restatement: A consensus of legal scholars, judges and legal writers as to the prevailing dominant rule in American Law.

Not binding until the court in a jurisdiction adopts it!

Persuasive authority

A good indication of the direction of the law

Sometimes it leads the law.

2. Manufacturing Defect: Inquiry is directed to the Product. The product gets made differently than the manufacturer intended.

The product, as manufactured, does not conform to the design criteria.

The product is judged against the manufacturer's own standards

Sometimes, only the manufacturer could know that.

Strict liability: a manufacturer can be held liable even though it was not negligent and breached no duty!

3. Design Defect: Inquiry is directed to the conduct of the designers of the product. Did they act reasonably on some sort of a risk/utility balancing basis?

A consumer expects the manufacturer to exercise reasonable care in designing the product and using the technology available at the time.

A reasonably suitable alternative design, available or knowable at the time of manufacture must be shown.

A balancing of the probability of harm against the cost of taking precautions, relevant factors include the availability of alternative design, cost and feasibility of adopting the alternative designs, and frequency or infrequency of injury resulting from the design.

Negligence: there must be a duty and a failure to act in a reasonable manner. Comparative fault can be a factor.

4. Failure to give proper instructions or warnings: Inquiry is directed to the actions or inactions of the manufacturer or seller: What was reasonably foreseeable? What could be reasonably communicated to the ultimate user? Could the conduct of the ultimate user have been altered?

Too many warnings or ambiguous warnings can actually exacerbate the risk of harm by being ignored, overlooked or obscuring other warnings.

Should the manufacturer have known that even a relatively few possible users could not use the product without serious injury, **and** whether a proper warning would have helped prevent the harm?

Grain auger case:

‘ There are some people that even a 2 X 4 up against the side of the head wouldn’t help!’ Richard Moll @ 1980

“Platform ends here!”

“Pavement wet during rain!”

“Do not iron on body”

A manufacturer is not charged with warning of possible danger where the risk and injury result from some unusual use or some personal idiosyncrasy of the consumer.

Negligence: there must be a duty, someone the manufacturer should expect to come in contact with the product, the manufacturer should have reasonably foreseen the hazard and that it would be lessened by a reasonable warning, and the conduct is likely to have been altered by the warning.

5. Consumer knowledge is only one factor to be considered in design and failure to warn cases, it is not dispositive .

6. There is a fine line between a design defect and the duty to warn.

A defect can either be designed out or warned against.

A defect can be guarded, but that is really a function of design.

Should a reasonable manufacturer have altered the product or the labeling to make it reasonable safe?

7. Query: Does a manufacturing defect, design defect or warning/instruction flaw render the product not of merchantable quality?

Most jurisdictions say “not necessarily” but Iowa says, “possibly.” It depends on the nature of the defect claimed!

The implied warranty of “merchantability” contemplated by the commercial code deals with *commercial* fitness and suitability not the broader obligation to warrant against health hazards when the *commercial fitness* has been met.

THE END