

3. Ultimate user defined as reasonably foreseeable user of defective product.

D. "Going for the deep pocket": Plaintiff's philosophy in products liability litigation is to sue virtually everybody, but especially wealthiest members of seller chain, usually manufacturer.

III. ELEMENTS OF PRODUCTS LIABILITY

A. Strict liability for seller or manufacturer for injuries caused to ultimate user by defective product.

B. No privity of contract requirement.

C. Negligence and intent are irrelevant.

D. Typical formula (statutory and/or common law in most states):

1. Defect renders product unreasonably dangerous to use.
2. Seller or manufacturer must be in business of selling products such as flawed one.
3. Product cannot have been substantially changed between time it left seller or manufacturer's hands and time it reached ultimate user.
4. Ultimate user must have used product properly (i.e., in way product was designed to be used).

E. Additional elements (used in some jurisdictions):

1. Ultimate user must have been foreseeable (foreseeable plaintiffs theory).
2. Seller or manufacturer must have been responsible for condition in which product was maintained.
3. In a few states product sale must have occurred.

F. Proximate cause.

1. Defective product must proximately cause ultimate user's injuries.

G. *Restatement (Second) of Torts* § 402A:

1. Seller of defective products that are unreasonably dangerous to user or consumer or user's property is liable for physical harm caused to ultimate user or consumer or user's property, if:
 - a. Seller is engaged in business of selling such products.
 - b. Product is expected to, and does, reach user or consumer without substantial change in condition in which it was sold.
2. Liability rule applies although:
 - a. Seller has exercised all possible care in preparing and selling defective product.
 - b. User or consumer has not bought product from, or formed contract with, seller (no privity of contract requirement).

3. Unreasonably dangerous defective products:

a. Fault in product design:

- (1) Product is unreasonably dangerous because of faulty design.
- (2) Court tests for faulty design:
 - (a) Consumer contemplation test—Product is unreasonably dangerous if consumer ordinarily would not reasonably anticipate danger created through its design.
 - (b) Danger/Utility test—Product is unreasonably dangerous if danger created by its design outweighs benefits derived from its use.
 - (c) State-of-the-art discoverability test—If manufacturer could have discovered hazards created by defective product designs, using current, state-of-the-art technologies, then failure to do so makes design-flawed product unreasonably dangerous.

b. Error in product manufacture or assembly: Defects were created while product was being manufactured or assembled.

c. Improper product maintenance:

- (1) Seller failed to properly maintain product before injured user used it.
- (2) This failure makes product unreasonably dangerous.

d. Manufacturer or seller's failure to warn user of product dangers: Product becomes unreasonably dangerous because of manufacturer's or seller's failure to warn user of potential dangers.

IV. DEFENSES TO PRODUCTS LIABILITY

A. Ultimate user's misuse of product:

1. If user does not use product properly, i.e., in fashion in which product was not designed to be used, then manufacturer or seller is *not* liable even if defective product is unreasonably dangerous.
2. Misuse = uses that were *not* reasonably foreseeable.

B. Assumption of risk: Ultimate user assumes risk of using defective product by:

1. Discovering defect but disregarding it and using product anyway.
2. Failing to properly maintain product.
3. Failing to follow instructions or heed warnings for safe product use.

C. Contributory negligence is *not* a defense.

1. Some statutes, however, specifically allow comparative negligence.

2. Contributory and comparative negligence can apply to other types of absolute liability cases.

V. COMPARISON OF PRODUCTS LIABILITY TO CONTRACT LAW WARRANTIES

- A. Warranty = contractual guarantee that seller gives buyer that product will meet certain standards.
- B. If product fails to satisfy guaranteed standards, then warranty is breached, and buyer may sue seller for damages.
- C. Similarities between warranties and products liability:
 1. Breach of warranty is similar to products liability, as breach renders seller liable to buyer without regard to fault or intent.
 2. Both typically involve defective and unreasonably dangerous products.
 3. Many warranty statutes anticipate reasonably foreseeable product user (ultimate user) in coverage of product warranties.
- D. Differences between warranties and products liability:
 1. Breach of warranty has *contract* requirement; products liability does not.
 2. Privity of contract is still applied in many states' common law (or even statutory) warranties. Not so with products liability.
 3. Obvious difference—Warranties involve contract law, products liability involves tort law.

LECTURE HINTS

1. To illustrate the practical applications of the theories discussed in this chapter, you may wish to use a "sanitized" products liability case that you or one of your law firm's attorneys has handled. (*Sanitizing* means making anonymous by changing or removing names.) Of course, all distinguishing details must be eliminated before disseminating the example to your class. You might also wish to secure client consent before using even a sanitized file.
2. Encourage students to watch the newspapers or news magazines for reports on products liability cases. These could be clipped and discussed hypothetically in class.
3. Some instructors prefer a detailed discussion of product warranties while discussing products liability. Students who have not yet had business law courses confuse the contractual and tort elements of warranties and strict liability.

CASE QUESTION ANSWERS

Boutte v. Nissan Motor Corporation

1. Even if it was the plaintiff's act that set the accident into motion, this does not change the fact that there was a defective lap belt that Nissan is responsible for as the manufacturer of the vehicle.
2. Fault was apportioned 25% to Boutte and 75% to Nissan. Facts from the case would need to be relied on to allocate fault any differently.

Delahanty v. Hinckley

1. The court seems to suggest that such a malfunction would have been necessary for Delahanty to recover under products liability theory. Under *Restatement (Second) of Torts* § 402A, the ultimate user may recover. But was Delahanty an ultimate user (a reasonably foreseeable plaintiff) who could have been injured as a result of the gun's hypothetical defect? Unlikely. The person actually firing the gun would certainly be an ultimate user, as it is clearly foreseeable that he or she would be harmed. Courts probably would rule Delahanty to fall outside the zone of foreseeability, because he was not affiliated with Hinckley nor involved in the gun's use. The manufacturer could not reasonably anticipate that an innocent bystander would be hurt by an exploding gun. Of course, the argument can be made that anyone standing near the gun user could be hit by flying shrapnel, and thus would be a foreseeable plaintiff.
2. Bullets, by their very nature, are obviously dangerous if fired into a human being. The applicable products liability theory would be the seller or manufacturer's failure to warn of the inherent risks presented by the bullets. But, as the court noted, the *Second Restatement* § 402A, Comment j, states that there is no duty to warn when the potential danger is generally known and recognized.

The ultimate user aspect of this question need not be reached, because there is no duty to warn. However, as question 1 discusses, Delahanty is probably not an ultimate user.

Higgins v. E.I. Dupont de Nemours & Co.

1. Anyone shifting Imron paint into unmarked containers would plainly be disregarding DuPont's label warnings by removing them from subsequent users' review. Thus, it would not be the dangers inherent in the paint that proximately caused the ultimate users' injuries; rather, it would be the superseding, intervening cause that originally placed the paint into