# The USA!
# Recent Developments in Products Liability Law in the United States

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## 1. Background

Manufactured products are often very useful, but defectively made they can cause death or serious bodily injury. A developing country, as the United States was in the 19th century, could well develop a judicially articulated public policy that product-caused injury simply has to be borne by those harmed.[1] The English doctrine of *caveat emptor* properly met the economic needs of a new nation committed to the accumulation of industrial capital through rugged individualism and free enterprise.[2] It was widely accepted that liability could not be imposed without fault and, in cases involving a sales contract, the negligent manufacturer of a defective product owed no duty to a remote purchaser or bystander. American courts embraced the English "privity of contract" doctrine of *Winterbottom v. Wright*[3] as

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1 "The general principle of our law is that loss from accident must lie where it falls." *Holmes*, The Common Law (1881), p. 94.

2 Concentrating on private law, *Horwitz*, The Transformation of American Law 1780-1860, Cambridge; Harvard University Press, 1977, found that American courts in the 19th century were creating rules of law that had the effect of "subsidizing" private entrepreneurial activity. *Caveat emptor* was early introduced into U.S. law. See *Seixas v. Woods*, 2 Caines Reports 48 (New York Supreme Court of Judicature, 1804), reinforced by the U.S. Supreme Court in *The Monte Allegro*, 22 U.S. (9 Wheaton) 616, 632 (1824): "An implied warranty as to quality is wholly unknown to the common law."

3 10 Meeson & Welsby 109, 152 English Reports 402 (Exchequer of Pleas, 1842).

an efficacious means of social policy designed to protect infant industries from the costs of burdensome litigation. In time, and after a solid industrial base had been established, the social consciousness of the nation was raised. A reaction set in. Courts began to impose an implied warranty of quality on manufacturers, at first restricted to foodstuffs and products intended for intimate bodily use (cosmetics, pharmaceuticals), but gradually extended to include durable goods such as automobiles,[4] power tools,[5] airplanes,[6] and boats,[7] until today virtually every manufactured product is covered by an implied warranty of merchantability and fitness for a particular purpose.[8] As *Prosser* noted, the 1960 *Henningsen* case[9] signaled the fall of the citadel of privity.[10] *Prosser* had earlier pointed out the inconsistency of using "warranty", a concept derived from the contract law of sales, to impose liability in the absence of contract.[11] He was of course right in pointing out that a "warranty" without privity was not a contractual warranty at all. It was really strict liability in tort. Honesty in legal terminology was served when *Prosser* wrote the concept of strict products liability into Section 402A of the 1965 Second Restatement of Torts. Seldom has the common law experienced such an astonishingly swift change in a rule of law. Attention could now focus, not so much on the manufacturer (was he negligent? what did he warrant?) as on the product itself (was it defective? and did the defect cause harm to the plaintiff?). Received into the American legal system was a new branch of law, products liability law, a dramatic example of how the common law contains within itself the capacity to adapt to what *Holmes* called "the felt necessities of the times."[12]

## 2. Positive Law

Succinctly stated, the law of products liability deals with the civil liability of manufacturers and others for product-caused harm. As noted above, several theories – negligence, warranty, misrepresentation, strict liability in tort – have been applied in order to determine producer liability. Central to all of them, however, has been

4 *Mac Pherson v. Buick Motor Company*, 111 N.E. 1050 (New York, 1916). *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (New Jersey, 1960).

5 *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (California, 1963).

6 *Lamon v. McDonnell Douglas Corporation*, 588 P.2d 1346 (Washington, 1979).

7 *Schedbauer v. Chris-Craft Corporation*, 160 NW2d 889 (Michigan, 1968).

8 Uniform Commercial Code, §§ 2-314 and 2-315.

9 See (Fn. 4).

10 *Prosser*, Strict Liability to the Consumer in California, 18 Hastings Law Journal p. 9, at 14 (1966).

11 *Prosser*, The Assault Upon the Citadel, 69 Yale Law Journal p. 1099, at 1134 (1960).

12 *Holmes*, (Fn. 1) p. 1.

the concept of *defect*. No monetary recovery is possible unless the harm to the plaintiff had been proximately caused by a product defect existing at the time it left the control of the manufacturer. Product defects, like cloud formations, come in different shapes and sizes. In order to bring some conceptual precision into an otherwise unmanageable constellation of facts, the American Law Institute, in its Third Restatement of the Law of Torts (1998), definitionally trifurcated strict liability product defects into three categories: (a) manufacturing defects; (b) design defects, and (c) warnings defects. Strict liability *pure* attaches to manufacturing defects, while a reasonableness standard is applied to design and warnings cases. Arguably, this tripartite division, in addition to substantially reflecting what courts have been doing in practice,[13] represents an improvement over the wording of Section 402A of the Second Restatement of Torts (1964), which treated the defect concept as a single notion.

It may be asked, however, whether the Third Restatement's definitional formula of defect represents that much of an improvement. The whole purpose of Section 402A, it would seem, was to cut through the Gordian Knot of then existing bothersome defenses (e.g., the manufacturer was not negligent; the manufacturer never contracted with the plaintiff; even if privity of contract exists, the manufacturer never expressly warranted the product) and impose strict liability in tort on those who sell harm-causing defective products. The language of Section 402A was straightforward and bold. It offered a final solution to the problem of empowering the hapless consumer to successfully sue the deep-pocketed manufacturer. But experience was to show that Section 402A contained some pregnant defects of its own.

There is a logical inconsistency in threatening to impose strict liability on the manufacturer only, in the words of the Restatement, if the product was "in a defective condition *unreasonably dangerous* to the user or consumer." This inconsistency was removed from California law by a 1972 decision of the California Supreme Court holding that a plaintiff injured by a defective product need not prove that the defect made the product unreasonably dangerous.[14] The court's decision is interesting for two reasons; (1) it is evidence that the court desired to purge California products liability law of a negligence component in strict liability cases; and (2) it illustrates the subordinate, non-binding character of the Restatements. Concerning the first feature, the court was firmly convinced that adoption of the "unreasonably dangerous" language of Section 402A would place a significantly increased burden on the plaintiff and "represent a step backward" in the judicial development of the state's law pertaining to products liability. The second point, involving the relationship between the Restatements and American positive law,

13 A contrary view is expressed by *Shapo*, In Search of the Law of Products Liability, 48 Vanderbilt Law Review p. 631 (1995).

14 *Cronin v. J.B.E. Olson Corporation*, 501 P.2d 453 (California, 1972).

should be of particular concern to code-oriented European jurists. The Restatements are not law; they are private unofficial codifications of discrete fields of law such as torts, contracts, property, etc.

The people who create these Restatements are highly qualified judges, practicing lawyers and law professors cooperating more or less harmoniously within the framework of the American Law Institute, a private non-profit corporation with an executive office in Philadelphia, Pennsylvania. The drafters of the Restatements strive mightily to concisely summarize the existing law of 50 different states of the United States. Where this law is uncertain or inappropriate, the drafters state what in their opinion the legal rule should be. Restatements often have great persuasive value during litigation but, as the *Crown* case illustrates, they do not constitute a source of binding positive law. It remains to be seen how closely American courts will adhere to the provisions of the Third Restatement of the Law of Torts. California, for its part, should have little trouble with the new Restatement's tripartite division of product defects.[15] The problem areas will surely focus on those provisions of the new Restatement which incorporate "foreseeability", "knowability" and "reasonability", all negligence-like components, into the definitions of design[16] and warnings[17] defects. Experiment and growth will shape the future contours of American products liability law. Dominant will be the issue of whether negligence or strict liability will prevail as the principal theoretical basis for products liability.

## 3. Legal transplants: the reception of American products liability law in Europe

The appearance in Europe of a branch of law properly known as "products liability law" may be attributed to European Community Directive no. 85/374/EEC of 25 July 1985[18] and, in Germany, to the 1989 Product Liability Law,[19] which statutorily implemented the Directive into German law. Prior to this time people referred, not to "products liability law", but rather to whatever legal provisions pertained to liability for defective products. The EC Directive and the 1989

15 *Barker v. Lull Engineering Co.*, 573 P.2d 443 (California, 1978).

16 *Bernal v. Richard Wolf Medical Instruments Corporation*, 221 Cal. App. 3d 1326, 272 Cal. Rptr. 41 (1990), holding that, contrary to the position taken by the Third Torts Restatement (Sec. 2, comment d), the plaintiff does not have the burden of proving that a reasonable alternative design was available.

17 *Anderson v. Owens-Corning Fiberglas Corporation*, 810 P.2d 549 (California, 1991) adopts the "knowability" state-of-the-art defense.

18 O.J. No. L 210 of 7.8.1985, p. 29.

19 Produkthaftungsgesetz, BGBl. I S. 2198.

German Product Liability Law both adopted the strict liability principle embodied in Section 402A of the Second Torts Restatement.[20] This, of course, does not mean that the American products liability legal transplant was put into European soil without trimming and pruning its branches. Products liability may be more or less strict depending on a variety of collateral factors:

a) The number of products excepted from the rule

Are pharmaceuticals, services, agricultural products included?

b) The definition of defect

Neither the Directive nor the German statute articulates a very helpful definition of defect. No mention is made of the tripartite (manufacturing; design; warnings) classification of defect. An expectation standard is expressed, without saying whose expectation (the consumer's; the producer's; perhaps both of them) is to be used in establishing defectiveness.

c) Joint and several liability

If several defendants are being sued, is each liable for all of the plaintiff's damage, or only that part severally attributable?

d) State of the art defense

This is relevant in both design and warnings cases. Should a subjective or an objective test be used to determine knowability?

e) Statute of repose defense

Both the Directive (Section 11) and the 1989 German statute (Section 13) provide that suit may not be filed if 10 years have passed since the product was put into circulation. U.S. state statutes typically fix such liability cut-off time periods at 6, 8 or 10 years after the product was first sold for consumption.

f) Scope of damages

Is there a limit to the amount of damages payable by a producer for harm caused by the same product defect? The Directive (Section 16) permits a member State to limit such damages to 70 million ECU; the 1989 German statute sets the limit at 160 million DM, $80 million. American law imposes no limitations on the producer's liability for compensatory economic damage (lost wages; cost of medical care), but some states have statutorily capped non-economic damages (pain and suffering; emotional distress; lost enjoyment of

[20] The Directive provides that "the producer shall be liable for damage caused by a defect in his product." Article 1 of the 1989 German statute states: "If as a result of a defect of a product a human being is killed, is injured or is affected in his health, the producer is obliged to compensate him for the ensuing damage." Since neither the Directive nor the statute mention negligence, the liability of the producer is impliedly strict liability.

life) in products liability cases at various pecuniary levels: Michigan at $280,000; Kansas at $250,000. Punitive damages, which generally do not exist in Continental European countries, have also been subjected to various types of statutory limitation by some, but by no means all, of the states of the United States.

All of the above factors condition the relative austerity of strict liability regimes on both sides of the Atlantic Ocean. An additional and perhaps more revealing factor consists of the institutional framework in which the rules of law operate. Systemic differences are often overlooked by positive law comparativists, but a knowledge of them and of the men who work in them to shape a country's legal culture is indispensable to assess the extent and intensity of civil delictual liability.[21] It is beyond the scope of this paper to treat this subject extensively, but a few brief observations will suffice to show how a study of social structures can help in explaining differences in tort liability regimes.

The recent explosion of tort and products liability litigation in the United States is better understood when one takes into consideration the following:

a) The jury

Guaranteed in federal court civil trials by the 7th Amendment of the U.S. Constitution and in state courts by comparable provisions in state law,[22] trial by jury is a hallmark of the American legal system. The jury, normally sympathetic to a product-injured fellow citizen, finds facts, determines liability, and fixes damages, both general and special.

b) Punitive damages

Where the conduct of the defendant is outrageous or especially reprehensible, the jury is empowered to award the plaintiff punitive damages. Intended as both punishment and deterrence, punitive damages sometimes far exceed the measure of compensatory damages, posing a Constitutional issue of fairness and proportionality.[23]

21 *Rheinstein*, Einführung in die Rechtsvergleichung, 1974, pp. 170-173; *Rheinstein* used *Max Weber's* untranslatable "Rechtshonoratioren" to draw attention to the importance of these "legal notables" (sic). See also *Rheinstein's* review of The Oracles of the Law by *Dawson*, 18 American Journal of Comparative Law p. 442 (1970).

22 Article 1, 16 of the California Constitution: "Trial by jury is an inviolable right and shall be secured to all ...".

23 *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996): a punitive damage award which is "grossly excessive" of the state's interest in punishing and deterring defendant's misconduct violates the Due Process Clause of the 14th Amendment.

c) The practicing bar, especially those attorneys specializing in representing plaintiffs in personal injury cases

The American Trial Lawyers Association, a wealthy and influential special interest group, vigorously resists all efforts to reform a tort system that continues to so generously enrich its members.

d) The contingent fee agreement

Generally regarded as unethical or even illegal outside the United States, the contingent fee is widely used in personal injury tort cases: if the plaintiff loses his case, the attorney is paid nothing; if the plaintiff wins, the attorney is paid a percentage (typically $1/3^{rd}$) of the award. This arrangement, clearly speculative, encourages plaintiffs to litigate even the more frivolous claims.[24]

e) The rule that the losing party in litigation does not have to pay the attorney's fees of the winner

The so-called "American rule" is justified on grounds that otherwise "the poor might be unjustly discouraged from instituting actions to vindicate their rights."[25]

Collectively, these and other factors (liberal pre-trial discovery proceedings) contribute to create the impression that the United States is a litigation paradise for personal injury plaintiff attorneys. Consumer protection advocates welcome the expansion of manufacturers' liability for defective products. But the theory of enterprise liability[26] (the manufacturer pays) fails to disclose the fact that manufacturers pass along to the consumer the costs of product liability suits and associated insurance premiums. As presently constituted, the American tort system more closely resembles a haphazard wealth redistribution lottery than a comprehensive and efficient harm prevention and victim compensation regime. The absence in the United States of a universal system of health and accident insurance adds to the difficulty of comparing American with European products liability law.

24 In *Daniell v. Ford Motor Company, Inc.*, 581 F. Supp. 728 (U.S. District Court, New Mexico), plaintiff, attempting to commit suicide, crawled into the trunk of a car and closed the trunk door. She allegedly spent nine days inside before regaining her freedom. The court rejected her contention that the car was defectively designed because the trunk did not have an internal release or opening mechanism. Perhaps the most famous case involving an ostensibly trivial claim was brought by a woman who was scalded when she tried to pry the lid off a cup of McDonald's coffee. See "Judge cuts award in scalding-coffee suit to $640,000", Los Angeles Times, 15 September 1994, p. D2.

25 *Fleischman Corporation v. Maier Brewing Company*, 87 S. Ct. p. 1404, at 1407 (1967). Accord: *Burnaby v. Standard Fire Insurance Company*, 40 Cal. App. $4^{th}$ p. 787, at 796 (1995).

26 *Priest*, The Invention of Enterprise Liability, 14 Journal of Legal Studies 461 (1985).

## 4. Prospects for the future

The essence of wisdom counsels against attempting to lift the veil that covers the Future's face. Nevertheless, it might not be remiss to hesitantly engage in a prophecy or two concerning the shape of tomorrow's products liability landscape in the United States.

a) Strict liability in tort will not be replaced by defect-free absolute liability

An enterprise liability theory that effectively makes the manufacturer an insurer against any harm caused by his products will not receive the support of American courts and scholars. Such a rule would be economically and socially counterproductive, tend to inflate prices, discourage innovation and even drive some producers out of business.

b) Genuine strict liability will be confined to manufacturing defects

Here the consumer expectation test makes sense. The consumer has a justified expectation that the manufacturing process will not depart from intended design. When it does so depart and a defective product results (*Ausreißer*), the producer's liability should be truly strict.

c) Courts will continue to use concepts of reasonability, foreseeability and knowability in cases involving design and warnings defects

A risk-utility test will be applied wherein the courts balance cost, utility, aesthetics and safety against the magnitude of the harm and the risk of it occurring. This, of course, looks very much like a negligence analysis. Conceptual purists will be mortified, but pragmatists see this as just another example of legal language construed to serve the ends of social justice. After all, products liability law has always been *sui generis*, a composite of contract (warranty) and tort (negligence) and fully congruent with neither.

d) No significant tort-reform legislation will be enacted by the 107th Congress

Two bills are currently pending in Congress, the Small Business Liability Reform Act[27] (it would cap punitive damages at $250,000 and eliminate joint and several liability for non-economic damages like pain and suffering for all businesses with fewer than 25 employees) and the Workplace Goods Job Growth and Competitiveness Act[28] (it would establish an 18 year statute of repose for durable goods used in a trade or business). With the defection of Senator *James Jeffords* from the Republican Party on 24 May 2001 control of Congress dramatically shifted to the Democratic Party. Special interest groups (labor unions, consumer protection advocates and the personal injury prac-

27 See page 163.

28 See page 176.

ticing bar) will surely convince the Democrats in Congress to vote against any such legislation. A similar fate awaits any legislation, federal or state, designed to introduce a no-fault limited compensation alternative to the presently existing products liability regime. Too many powerful people have a vested interest in preserving the *status quo*.

Generally speaking, products liability law in the United States will develop along the lines of the propositions summarized above. The reasonableness standard will add a negligence flavor to strict liability law. Consistent with moral theory, the fault principle may be experiencing a rejuvenation. Come what may in this regard victims of harm caused by defective products will continue to enjoy far greater legal protection than was provided by past applications of the doctrine of *caveat emptor*.