

# Negligent Products Liability

by Sophia



## WHAT'S COVERED

In this lesson, you will learn about negligence as a tort theory that can apply in products-liability cases. Specifically, this lesson will cover:

## 1. Typical Negligence Claims

Negligence, or lack of due care, is the second theory raised in the typical products-liability case. It is a tort theory, as compared to breach of warranty, which is a contract theory.

Negligence theory also has a distinct advantage over warranty theory: **Privity of contract** is never relevant. Privity is a direct connection between the consumer and the manufacturer required for a contracts claim.

➞ **EXAMPLE** Say a pedestrian is struck in an intersection by a car whose brakes were defectively manufactured. Under no circumstances would breach of warranty be a useful cause of action for the pedestrian— there is no privity at all.

Negligence theory in products liability is most useful in two types of cases:

- Defective design
- Defective warnings



### TERM TO KNOW

#### Privity of Contract

The relationship that exists between two parties to a contract. The privity requirement prevents a non-party to a contract to sue on the contract in the absence of privity.

### 1a. Design Defects

Manufacturers can be, and often are, held liable for injuries caused by products that have **defective design**. The question is whether the designer used reasonable care in designing a product reasonably safe for its foreseeable use. The concern over reasonableness and standards of care are elements of negligence theory.

Defective design cases can pose severe problems for manufacturing and safety engineers. More safety means more cost. Designs altered to improve safety may impair functionality and make the product less desirable to consumers.

At what point safety comes into reasonable balance with performance, cost, and desirability is impossible to

forecast accurately, though some factors can be taken into account.

➞ **EXAMPLE** If other manufacturers are marketing comparable products whose designs are intrinsically safer, the less-safe products are likely to lose a test of reasonableness in court.



#### TERM TO KNOW

##### Defective Design

In products liability law, a theory of negligence alleging the manufacturer failed to use reasonable care in designing a product for its foreseeable safe use.

### 1b. Warning Defects

**Defective warnings** can occur when the manufacturer failed to warn the user of potential dangers. Whether a warning should have been affixed is often a question of what is reasonably foreseeable, and the failure to affix a warning will be treated as negligence.

➞ **EXAMPLE** The manufacturer of a weed killer with poisonous ingredients is certainly acting negligently when it fails to warn the consumer that the contents are potentially lethal.

The law governing the necessity to warn and the adequacy of warnings is complex. What is reasonable turns on the degree to which a product is likely to be misused and whether the hazard is obvious.



#### TERM TO KNOW

##### Defective Warnings

In products liability law, a theory of negligence alleging the manufacturer failed to use reasonable care in designing a product for its foreseeable safe use.

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## 2. Problems with Negligence Theory

Negligence is an ancient cause of action and, as was discussed in the lessons on torts, it carries with it a number of well-developed defenses.

Two categories may be mentioned:

- Common-law defenses
- Preemption

### 2a. Common Law Defenses Against Negligence

Among the problems confronting a plaintiff with a claim of negligence in products-liability suits are the following:

1. **Proving negligence at all:** Just because a product is defective does not necessarily prove the manufacturer breached a duty of care.
2. **Proximate cause:** Even if there was some negligence, the plaintiff must prove her damages flowed proximately from that negligence.
3. **Contributory and comparative negligence:** The plaintiff's own actions contributed to the damages.
4. **Subsequent alteration of the product:** Generally, the manufacturer will not be liable if the product has been changed.

5. Misuse or abuse of the product: Using a lawn mower to trim a hedge or taking too much of a drug are examples.
6. Assumption of the risk: The plaintiff knowingly used the product in a risky way.



#### TERMS TO KNOW

##### **Proximate Cause**

A cause that plays a substantial part in harm that falls upon a plaintiff; such cause is unbroken by any other intervening cause, and the harm would not have occurred without it.

##### **Contributory Negligence**

A defense to a tort action alleging that the defendant's negligence also caused the harm.

Contributory negligence, depending upon state law, may reduce or even negate plaintiff's claim for damages.

##### **Comparative Negligence**

A defense to a tort action involving the defendant's negligence that measures negligence in terms of percentage and reduces any award proportionately.

##### **Subsequent Alteration**

A defense to a tort action that alleges a product was altered after it left the manufacturer's control, and therefore should diminish or negate the manufacturer's liability for any defect.

## **2b. Preemption**

**Preemption** is illustrated by the following problem.

Suppose there is a federal standard concerning the product, and the defendant manufacturer meets it, but the standard is not really very protective. Is it enough for the manufacturer to point to its satisfaction of the standard so that such satisfaction preempts (takes over) any common-law negligence claim?

Preemption is typically raised as a defense in suits about:

- Cigarettes
- FDA-approved medical devices
- Motor-boat propellers
- Pesticides
- Motor vehicles

This is a complex area of law. Questions inevitably arise as to whether there was federal preemption, express or implied. Sometimes courts find preemption and the consumer loses; sometimes the courts don't find preemption and the case goes forward.

Increasingly, the usual defendants (manufacturers) have pushed Congress and the regulatory agencies to state explicitly in the law that the federal standards preempt and defeat state law.



#### TERMS TO KNOW

##### **Preemption**

A defense to a defective warning products liability lawsuit that claims the warning should be deemed sufficient because it complies with warnings required by a governmental agency or body.



## SUMMARY

In this lesson, you learned that negligence is a second possible cause of action for products-liability claimants. **Typical negligence claims** have the advantage that issues of privity are irrelevant.

Negligence theory in products liability is most useful in two types of cases: **design defects** (claims that the designer failed to use care in designing a product reasonably safe for its foreseeable use) and **warning defects** (claims that the designer failed to warn users about potential dangers associated with the product). There are a number of robust **common-law defenses against negligence**, including issues of proof and causation. Federal **preemption** is also a recurring concern for plaintiffs' lawyers.

Best of luck in your learning!

Source: THIS TUTORIAL HAS BEEN ADAPTED FROM (1) "BUSINESS LAW AND THE LEGAL ENVIRONMENT" VERSION 1.0 BY DON MAYER, DANIEL WARNER, GEORGE SIEDEL, AND JETHRO K. LIEBERMAN. COPYRIGHT 2011. ISBN 978-1-4533-3050-0. (2) "THE LEGAL AND ETHICAL ENVIRONMENT OF BUSINESS" VERSION 1.0 BY TERENCE LAU AND LISA JOHNSON. COPYRIGHT 2012. ISBN 978-1-4533-2750-0 (LICENSEE PRODUCT: BUSINESS LAW), BOTH SOURCES REPRINTED WITH PERMISSION FROM FLATWORLD.



## TERMS TO KNOW

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### Contributory Negligence

A defense to a tort action alleging that the defendant's negligence also caused the harm. Contributory negligence, depending upon state law, may reduce or even negate plaintiff's claim for damages.

### Defective Design

In products liability law, a theory of negligence alleging the manufacturer failed to use reasonable care in designing a product for its foreseeable safe use.

### Defective Warnings

In products liability law, a theory of negligence alleging the manufacturer failed to provide adequate warning labels to advise the consumer of potential harm that could result from the product's use.

### Preemption

A defense to a defective warning products liability lawsuit that claims the warning should be deemed sufficient because it complies with warnings required by a governmental agency or body.

### Privity of Contract

The relationship that exists between two parties to a contract. The privity requirement prevents a non-party to a contract to sue on the contract in the absence of privity.

**Proximate Cause**

A cause that plays a substantial part in harm that falls upon a plaintiff; such cause is unbroken by any other intervening cause, and the harm would not have occurred without it.

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A defense to a tort action that alleges a product was altered after it left the manufacturer's control, and therefore should diminish or negate the manufacturer's liability for any defect.