Problems with Strict Products Liability

by Sophia

WHAT'S COVERED

In this lesson, you will learn about some limitations to strict liability. Specifically, this lesson will cover:

1. Disclaimers

Because strict liability is liability without proof of negligence and without privity, it may seem like the “holy grail” of products-liability lawyers. It is certainly true that 402A abolishes the contractual problems of warranty, but there are other issues that can arise.

Consider Comment *m* in Section 402A of the Restatement.

> *"The rule stated in this Section is not governed by the provisions of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to 'buyer' and 'seller' in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as provided by the Uniform Act. The consumer’s cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer’s hands. In short, “warranty” must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort."*

Comment *m* specifically says the cause of action under Restatement, Section 402A, is not affected by a **disclaimer**. In non-consumer cases, courts have allowed clear and specific disclaimers, yet courts differ in allowing disclaimers of strict liability in tort between parties to commercial contract.

IN CONTEXT

In 1974, the Third Circuit, in *Keystone Aeronautics Corp v. RJ Engstrom Corp*, 499 F.2d 146 (3rd Circuit, 1974), applying Pennsylvania law, held that a disclaimer of strict liability may be effective if it is negotiated between parties of relatively equal bargaining power and is clearly expressed in the contract, reasoning that a social policy aimed at protecting the average consumer need not apply to business dealings.

Meanwhile, also in 1974, the Tenth Circuit, applying Oklahoma law, held in *Sterner Aero AB v. Page*, 499 F.2d 709 (10th Circuit, 1974) that a party could not disclaim strict liability in a commercial transaction because contract defenses that would normally apply in warranty cases did not apply to tort actions.

TERM TO KNOW

Disclaimer

A clause in a contract that relieves a party from liability it might otherwise incur but for the contract provision that denies or renounces the ability to bring such a claim.

2. Plaintiff's Conduct

Conduct by the plaintiff herself may defeat recovery in two circumstances:

- Assumption of risk
- Misuse or abuse of the product

2a. Assumption of Risk

Courts have allowed the defense of assumption of risk in strict products-liability cases.

A plaintiff assumes the risk of injury, thus establishing defense to claim of strict products liability, when she is aware the product is defective, knows the defect makes the product unreasonably dangerous, has reasonable opportunity to elect whether to expose herself to the danger, and nevertheless proceeds to make use of the product.

2b. Misuse or Abuse of the Product

Where the plaintiff does not know a use of the product is dangerous but nevertheless uses it for an incorrect purpose, a defense arises, but only if such misuse was not foreseeable. If it was, the manufacturer should warn against that misuse.

CASE STUDY: *Eastman v. Stanley Works*

A carpenter used a framing hammer to drive masonry nails, and the claw of the hammer broke off, striking him in the eye. He sued. The court held that while a defense does exist *"where the product is used in a capacity which is unforeseeable by the manufacturer and completely incompatible with the product's design... misuse of a product suggests a use which was unanticipated or unexpected by the product manufacturer, or unforeseeable and unanticipated [but] it was not the case that reasonable minds could only conclude that appellee misused the [hammer]. Though the plaintiff's use of the hammer might have been unreasonable, unreasonable use is not a defense to a strict product-liability action or to a negligence action."*

Eastman v. Stanley Works, 907 N.E.2d 768 (Ohio App. 2009).

3. Limited Remedy

The Restatement says recovery under strict liability is limited to "physical harm thereby caused to the ultimate user or consumer, or to his property," but not other losses, and not economic losses.

CASE STUDY: ***Atlas Air v. General Electric***

A New York court held that the **economic loss rule** (no recovery for economic losses) barred strict products-liability and negligence claims by the purchaser of a used airplane against the airplane engine manufacturer for damage to the plane caused by an emergency landing necessitated by engine failure, where the purchaser merely alleged economic losses with respect to the plane itself, and not damages for personal injury (recovery for damage to the engine was allowed).

Atlas Air v. General Electric, 16 A.D.3d 444 (N.Y.A.D. 2005).

But, there are exceptions.

CASE STUDY: ***Duffin v. Idaho Crop Imp. Ass'n***

In this case, the court recognized that a party generally owes no duty to exercise due care to avoid purely economic loss, but if there is a "special relationship" between the parties such that it would be equitable to impose such a duty, the duty will be imposed:

"In other words, there is an extremely limited group of cases where the law of negligence extends its protections to a party's economic interest."

Here, the special relationship involved payment of a higher price for a "certified" product.

Duffin v. Idaho Crop Imp. Ass'n, 895 P.2d 1195 (Idaho 1995).

TERM TO KNOW

Economic Loss Rule

A doctrine in tort law that disallows any recovery in tort where the loss is purely economic and does not involve personal injury.

4. The Third Restatement

The law develops over time. What seemed fitting in 1964 when the Restatement (Second) announced the state of the common-law rules for strict liability in Section 402A seemed, by 1997, not to be tracking common law entirely closely.

The American Law Institute came out with the Restatement (Third) in that year. The Restatement changes

some things. Most notably, it abolishes the “unreasonably dangerous” test and substitutes a **risk-utility test**. That is, a product is not defective unless its riskiness outweighs its utility.

More importantly, the Restatement (Third), Section 2, now requires the plaintiff to provide a reasonable alternative design to the product in question. In advancing a reasonable alternative design, the plaintiff is not required to offer a prototype product. The plaintiff must only show that the proposed alternative design exists and is superior to the product in question.

The Restatement (Third) also makes it more difficult for plaintiffs to sue drug companies successfully. One legal scholar commented as follows on the Restatement (Third):

> *"The provisions of the Third Restatement, if implemented by the courts, will establish a degree of fairness in the products liability arena. If courts adopt the Third Restatement's elimination of the "consumer expectations test," this change alone will strip juries of the ability to render decisions based on potentially subjective, capricious and unscientific opinions that a particular product design is unduly dangerous based on its performance in a single incident. More important, plaintiffs will be required to propose a reasonable alternative design to the product in question. Such a requirement will force plaintiffs to prove that a better product design exists other than in the unproven and untested domain of their experts' imaginations."*
>
> **Quinlivan Wexler LLP, "The 3rd Restatement of Torts—Shaping the Future of Products Liability Law," June 1, 1999.**

Of course, some people put more faith in juries than is evident here. The new Restatement has been adopted by a few jurisdictions, while others have rejected it as courts appear reluctant to abandon familiar precedent.

TERM TO KNOW

Risk-Utility Test

A newer test under Section 402A of the Restatement of Torts (Third) for determining strict products liability by a manufacturer or supplier that substituted the “unreasonably dangerous” test with a determination of whether the risk of danger outweighs the benefits of the product’s design. This test has not been widely accepted.

SUMMARY

In this lesson, you learned that there remain obstacles to recovery even under strict products liability. **Disclaimers** of liability have not completely been dismissed, and the **plaintiff’s conduct** may impact recovery if defenses of **assumption of risk** or **use or misuse of the product** are found credible by the court. With some exceptions, **remedy is limited** to personal injury and damage to the goods themselves; economic loss is not recoverable. Sixty some years of experience with the Second Restatement’s section on strict liability has seen changes in the law, and **the Third Restatement** introduces those; however, it has not been widely accepted yet.

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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