

# TORTS

“The American Recipe”

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# PRODUCTS LIABILITY

## TRADITIONAL THEORIES IN SUPPORT OF PRODUCTS LIABILITY

1. NEGLIGENCE
2. STRICT LIABILITY
3. BREACH OF WARRANTY
4. MISREPRESENTATION

## THREE KINDS OF PRODUCT DEFECTS

1. MANUFACTURING (ONE-OFF)
2. DESIGN
3. WARNING (INSTRUCTIONS)

# RESTATEMENT OF TORTS 2<sup>nd</sup> § 402A

A product seller “who sells a product in a defective condition unreasonably dangerous to the user or consumer or his property is strictly liable.”

“Defective Condition” – Manufacturing, (Design or Warning)

“Unreasonably Dangerous” – Whether the article sold is “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.”

# TEST RE DESIGN & WARNINGS

Slightly Different Test Than For Manufacturing Defect:

More Like Negligence But With Focus on Product Instead of D's Conduct

“RISK/UTILITY” TEST: A Product is Defective Only Where the Magnitude of the Hazards Outweigh the Utility of the Product as Sold or the Broader Benefits of the Product.

Factors to Consider In Balancing Risks Against Utility and Cost:

1. Utility of the Product to Public & User
2. Nature of Product, i.e., Likelihood It Will Cause Injury
3. \*\*Availability of Safer Design or Adequate Warning\*\*
4. Whether Safer Design or Warning Would Permit Product to Remain Functional & Affordable
5. Ability of PI to Avoid Injury By Careful Use
6. Obviousness of Danger
7. Seller's Ability to Spread the Cost of Making the Product Safer

# RESTATEMENT (3d) TORTS: PRODUCTS LIABILITY § 2

**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.

**DESIGN DEFECT** - When the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the reasonable alternative design renders the product not reasonably safe.

**WARNING DEFECT** - 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 . . . and the omission of the instructions or warnings renders the product not reasonably safe.

# REASONABLE ALTERNATIVE DESIGN

Comment d to [section] 2 of the Third Restatement defines reasonable alternative product design in terms of the "risk-utility balancing test." The test is "whether a reasonable alternative design would, at a reasonable cost, have reduced the foreseeable risk of harm posed by the product and, if so, whether the omission of the alternative design by the seller ... rendered the product not reasonably safe."

# NOT REASONABLY SAFE

Factors include:

1. Magnitude and probability of the foreseeable risks of harm;
2. Instructions and warnings accompanying the product;
3. Consumer expectations regarding the product and
4. Relative advantages of the alternative design, including:
  - production costs,
  - effect on product longevity,
  - maintenance,
  - repair, and
  - aesthetics; and
  - the range of consumer choice among products.

# IMPLIED WARRANTY OF MERCHANTABILITY - UCC 2-314

Goods to be Merchantable must be at least such as

- (a) pass without objection in the trade under the contract description;
- (b) in the case of fungible goods, are of fair average quality within the description;
- (c) are fit for the ordinary purposes for which such goods are used;
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
- (e) are adequately contained, packaged, and labeled as the agreement may require;
- (f) conform to the promise or affirmations of fact made on the container or label if any.



# IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE – UCC 2-315

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.

# TO WHOM DO WARRANTIES RUN?

THREE ALTERNATIVES OFFERED IN UCC § 2-318

MOST RESTRICTIVE & ENACTED IN 28 STATES:  
ALTERNATIVE A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

# RESTATEMENT OF TORTS 2<sup>nd</sup> § 402B

## MISREPRESENTATION

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

# COMMON LAW DEFAMATION

## ELEMENTS OF TORT:

### 1.DEFAMATORY STATEMENT

Holds PL up to Scorn, Ridicule or Contempt (Immoral or Criminal)

Interpreted by a Substantial Respectable Minority

May Use Extra Facts “Inducement” or Explanation “Innuendo”

### 2.ABOUT THE PLAINTIFF

Intent is Irrelevant

May Use Extra Facts to Connect to PI “Colloquim”

Can be Group Defamation

### 3.PUBLISHED TO THIRD PARTY

Need Intent or Negligence

# SLANDER & LIBEL

SLANDER = ORAL

LIBEL = WRITTEN (OR MORE PERMANENT FORM)

LIBEL = DAMAGES PRESUMED

SLANDER = REQUIRED PROOF OF DAMAGES, UNLESS

## SLANDER PER SE

1. COMPETENCE TO PERFORM TRADE OR PROFESSION
2. CURRENT LOATHSOME DISEASE
3. SERIOUS CRIMINAL BEHAVIOR
4. SERIOUS SEXUAL MISCONDUCT