



Compensation for Bystander Injuries In Strict Products Liability: Why It Is Important To Afford Bystanders With More Protection Than Consumers Or Users Of Products

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Abstract

This article will consider issues relating to the responsibility of sellers and others who furnish defective products for injuries to bystanders in the context of strict products liability. The article builds upon prior research in delineating the origin and nature of products liability litigation, the theories of recovery for injuries, and the nature of damages caused by defective products, and the development of strict product liability in tort. Consider this scenario: Walter is peacefully walking his dog Gertie down Tenth Avenue when the popcorn machine on the Belmar Boardwalk explodes sending mounds of hot cooking oil into the air. The oil covers Walter's (and Gertie's) torso and both are whisked away to their respective hospitals for treatment for serious burns. It turns out that a switch in the machine had been manufactured improperly causing a defect in the electrical line. Can Walter recover for his own serious injuries? Can Walter recover for the injuries to Gertie? And, suppose that Walter was not himself physically injured, but had suffered emotional distress in observing several patrons at the Boardwalk refreshment stand who had been burned over significant portions of their bodies?

Keywords: Bystander; Negligence; Warranty; Fraud; Strict Liability in Tort

THEORIES OF LIABILITY (HUNTER, AMOROSO & SHANNON, 2012 A, B, C; HUNTER & AMOROSO, 2012; HUNTER, SHANNON & AMOROSO, 2012)

The area of law termed products liability as it has developed over the Past century is a mixture or a hybrid of both contract law (involving either express or implied promises, found in the law of warranties) and tort law (based upon specific conduct, oftentimes reflected in a negligence standard, or in actions based on fraud or misrepresentation). In general terms, products liability refers to the obligations or duties of manufacturers, wholesalers (and other middlemen), and retailers/sellers (as well as other parties) to consumers, purchasers, users, and even "bystanders" when a product is found to be defective. No matter what the theory of liability, the predicate of a suit in products liability is a defective product. Liability only extends to products that are in a "defective condition," which exists if the product, at the time it is conveyed by the seller to another party: "(1) not contemplated by reasonable persons among

those considered expected users or consumers of the product; and (2) unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption." (Alberts, Thornburg & Buttrick, p. 1133, 2014). The authors note that "both are threshold proof requirements."

Product Defect

A defect can arise from three common sources:

- A manufacturing or production defect—one that occurs from a random and atypical breakdown in the manufacturing process. "Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings." (Ford Motor Co. v. Pool, 1985);
- A design defect—one that is characteristic of a whole product line (such as the Ford Pinto automobile (Grimshaw v. Ford Motor Company, 1981) or the now infamous McDonald's "hot coffee" case (Liebeck v. McDonald's Restaurants, 1995); or
- A marketing defect—one involving inadequate warnings concerning risks or dangers, or inadequate instructions relating to how to properly or safely use a product. (Vukadin, 2014). The adequacy or lack of adequacy of a product warning depends on the method and design of its disclosure, "because the form of communication affects the likelihood that the ordinary consumer will benefit from the information." (Geistfeld, p. 140, 2006). Many cases in the area of a marketing defect involve food, drugs, or more recently, children's toys, cribs (Hunter & Montuori, 2013) or car seats. (Generally, Twerski & Henderson, 2014/2015). Professor Geistfeld (p. 139, 2006) puts it this way:

"The ordinary consumer wants the warning to contain any disclosures that would significantly improve her risk-utility decisions. The ordinary consumer would not find it worthwhile to be warned about information she already has or can readily gain from product use. Such a warning does not improve the ordinary consumer's decision making but still creates an information cost for her—the time and effort to read the information in order to figure out that it is unhelpful."

Professor Geistfeld (p. 141, 2006) continues: "A poorly designed warning increases the likelihood that the ordinary consumer will not read the warning in its entirety, rendering the warning defective."

Under the common law, there were three theories under which a plaintiff could bring a suit for personal injury or property damage (Treater, 2014) caused by a defective product. (E.g., First National Bank and Trust Corporation v. American Eurocopter Corp., 2004). These theories may be summarized as follows:

Negligence

Negligence requires proof that a product was designed or manufactured in an "unreasonable manner," or that the warnings or directions were inadequate under the circumstances. (Public Citizen v. Heckler, 1986; Adams, Olexa, Owens & Cossey, 2008).

Drawbacks to a suit based on the theory of negligence involved the requirement, in many cases, of expert proof (Faigman & Lesikar, 2015); the existence of the doctrine of privity, which made it difficult, if not impossible, to reach a negligent manufacturer with whom an injured plaintiff had not personally dealt, and which at the same time absolved the retailer from liability because the retailer had normally only "passed on the product"—hence the origin

of the common law doctrine of “caveat emptor,” translated as “let the buyer beware”; the defense of contributory negligence, which at common law was an absolute bar to recovery by a plaintiff shown to have been even slightly negligent on their own part (generally, Owen, 2000); the defense of assumption of risk (Keeton et al., 1984); issues relating to negligence per se (“We think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself.” (Martin v. Herzog, 1920)); and the sometimes tortured concept of a “reasonable man”—more specifically, reaching a consensus on what would be the standard required of a “reasonable manufacturer” or “reasonable designer” or of a “reasonable plaintiff” or “reasonable defendant” under the circumstances of each case.

Misrepresentation and Fraud

An action based on the theory of misrepresentation or fraud focuses on proof of a false representation of a material fact (found in words, actions, concealment, or in some cases even silence, where the common law found a positive “duty to speak” (Bergeron v. Dupont, 1976)), upon which a plaintiff reasonably relied, in entering into a contract or agreement. At common law, falsehood was an essential element of proof of a misrepresentation, and proof of scienter (“the intent to deceive”), arising from either “knowledge of falsity or “reckless disregard of the truth,” was a part of the prima facie proof required in cases of fraud. (Ellis, 2003). Often times, an assertion of “safety” or of a “safe product” formed the basis of an allegation of fraud in product cases.

A major drawback to a suit based on fraud or misrepresentation was the common negative expectation that all sellers would in fact engage in a certain amount of “sales puffing” or exaggeration regarding their products (“favorable comments by sellers with respect to their products are universally accepted and expected in the market-place” (Web Press Servs. Corp. v. New London Motors, Inc., 1987), and the common notion that no matter how careful a manufacturer might be, no one could absolutely guaranty the safety of any product under all circumstances, thus negating the required element of reasonable reliance on the part of a plaintiff as an element of proof.

Warranty Actions

Warranty actions were essentially based on contract promises, either express or implied. Professors Mann and Roberts (p. 218, 2000) note: “In bringing a warranty action, the buyer must prove that (1) a warranty existed, (2) the warranty was breached, (3) the breach of the warranty proximately caused the loss suffered, and (4) notice of the breach was given to the seller.”

Because warranties arose out of the law of contracts, warranties were subject to disclaimers on the part of a seller (generally, Steverson, 2014) and could also be severely limited in their scope. (Parent, 2006). Warranty actions also were subjected to notice requirements (that is, the injured party had to give the party causing the injury notice that damage/injury had occurred within a rather limited period of time) (Reitz, 1988; U.C.C. 2-607(3), 1989); were often subjected to the claim at any statements made were opinions or commendations (Carpenter v. Alberto Culver Co., 1970; Vokes v. Arthur Murray, Inc., 1968; Sellers v. Looper, 1972) or mere “sales puffing” (Downie v. Abex Corp., 1984); and the plaintiff was often required to prove reliance on specific words or promises made by a seller. (Contra, CBS v. Ziff-Davis Publishing Co., 1990).

Warranties under the Uniform Commercial Code (UCC) were originally thought to be applicable only in cases involving the sale of goods, and not in the myriad of other types of transactions that resulted in goods or other items of personal property reaching the hands of a consumer—most notably leases or bailments. Under the common law, privity of contract between a manufacturer and the consumer/buyer (termed vertical privity) was likewise problematic, although the requirement of vertical privity was later severely limited in the case of *MacPherson v. Buick Motors* (1916), a case which enjoys its 100th anniversary this year! As Justice Cardozo would write: “If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger...”

Under the common law, there was also a rule that limited a manufacturer’s potential liability to the actual purchaser of a product, and not to any other parties. This aspect of privity was greatly modified with the decision in *Henningsen v. Bloomfield Motors* (1960), which saw the expansion of liability (horizontal privity) under the warranty of merchantability to persons other than the consumer/buyer, depending on the option a state may make.

This expansion may be seen in UCC Section 2-318, which significantly added to the range of potential plaintiffs in a warranty action. (Sullivan & Thrash, 2012). As noted by Professors Phillips, Terry, Vandall & Werthheimer (p. 511, 2002): “A hallmark of modern products liability is the elimination of the privity requirement. Today, any foreseeable plaintiff can sue, at least in tort if not in warranty, where physical injury to person or property is involved.”

The Development of Strict Liability in Tort

The drawbacks inherent in the three common law forms of action and the fact that none were specifically designed in product cases led to the development of the modern and now preferred theory in products liability cases—the creation of strict (or absolute) liability in tort. The theory of strict liability focuses exclusively on the existence of a product defect and not on the conduct of the defendant (negligence), or on specific words or promises (warranty/misrepresentation/ fraud). In the seminal case of *Greenman v. Yuba Products, Inc.*, (p. 901, 1963) the California Supreme Court held that strict liability will lie where there is “a defect in design and manufacture of which plaintiff was not aware that made [the product] unsafe for its intended use.”

Schwartz (p. 335, 2015) notes:

*“As stated in section 402A, comment a of the Restatement (Second) of Torts... ‘the rule [of design defect] is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product.’ As implemented in section 402A of the Restatement (Second), following Judge Traynor’s opinions in the Supreme Court of California cases *Escola v. Coca Cola Bottling Co. of Fresno* (1944) and *Greenman v. Yuba Power Products* (1963), strict liability is concerned with the status of the product itself - that is, whether the product sold is ‘defective.’” [See Appendix.]*

In *Bobka v. Cook County Hospital* (1981), the court described the elements of strict products liability as follows:

1. That the injury resulted from a defective condition of the product;
2. That the defective condition made the product unreasonable dangerous, and;
3. That the defective condition existed at the time the manufactured product left the manufacturer’s control. (*Bobka*, 1981, citing *Suvada v. White Motor Co.*, 1965).

Strict liability permits an injured party, very broadly defined, to sue a manufacturer directly, even in the absence of privity; will permit no disclaimers of the manufacturer's duty (Tunkl v. Regents of Univ. of Cal., 1963); and has obviated the strict requirements of notice under warranty actions (often as short as three months), preferring instead to abide by more generous statute of limitation provisions.

WHO CAN SUE? AND WHAT CAN THEY SUE FOR?

Traditionally, courts have focused almost exclusively on the consumer—the purchaser or foreseeable user of a product—in determining issues relating to damages. (Hunter and Amoroso, 2012; Geistfeld, p. 198, 2006). In general, compensatory damages are “designed to place [the plaintiff] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.” (Restatement (Second) Section 903 cmt. A, 1965). Depending on the nature of the claim and the individual jurisdiction, the plaintiff may be entitled to recover damages for any personal injury, property damage, and economic loss. Compensatory damages might include medical expenses, lost wages or lost earnings, and damage to tangible property (i.e. Gertie) for which there is a recognized market value. It is also possible to collect nonmonetary damages sometimes called “pain and suffering” for such things as “pain, fear, anxiety, disfigurement, and the loss of life's pleasures.” (Seffert v. Los Angeles Transit Lines, 1961; Geistfeld, p. 198, 2006). In certain circumstances, and with consideration of the Due Process Clause of the 14th Amendment (BMW of North America v. Gore, 1996), the plaintiff may also be able to recover punitive damages for egregious conduct, or where the defendant acted with fraud, malice or in wanton disregard of the rights of a plaintiff. These damages are clearly “aimed at deterrence and retribution.” (State Farm Mut. Auto Ins. Co. v. Campbell, p. 416, 2003).

This focus on the consumer or buyer may emanate most directly from an analysis based on the Restatement (Second) relating to strict liability in tort in which a party who offers a product for sale impliedly warrants or promises that the product can safely perform its intended and perhaps foreseeable functions. As Professor Mark Geistfeld (p. 252, 2006) has noted: “The implied warranty accordingly protects the consumer's reasonable expectation that the seller has provided a nondefective product, and the frustration of this safety expectation justifies holding the seller strictly liable for the defect.” It is true that under a negligence standard, it might be possible to include a party other than the buyer or user as a potential plaintiff—but only as long as the third party is “foreseeable.” (Palsgraf v. Long Island R.R., 1928).

Likewise, if a state has adopted Alternative B of Section 2-318, a third party might be covered under the following language: “A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to 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.”

However, the transactional context does not go as far as creating any implied representation of safety for a bystander under the strict liability in tort analysis. In fact, the Restatement in Section 402A, comment 1 “expresses no opinion” whether strict product liability would apply “to persons other than users or consumers.”

Who is a Bystander?

A bystander (plaintiff) is someone who is not directly involved in the purchase or use of the product. (Black's Law Dictionary, 2009). Bystanders are affected by the product essentially

because they are near the person who purchased or used it and are injured by the product. In *Sills v. Massey-Ferguson* (1969), the U.S. District Court for the Northern District of Indiana, in applying Indiana law, held that bystanders may recover under strict liability. In fact, Madden and Owen (p. 269, 2000) noted that after the adoption of the Restatement, decisions in many jurisdictions have now “almost unanimously allowed foreseeable bystanders, including rescuers (*Guarino v. Mine Safety Appliance Co.*, 1969), to recover for their injuries caused by defective products.”

Smith (pp. 634-635, 2013) noted that the Sills court had offered many reasons for extending recovery to a bystander which may be extrapolated to other states:

“First, Indiana does not require privity in recovery for breach of implied warranty, so there was no policy reason to require privity for tort recovery. Second, the court stated that ‘[t]he public policy which protects the user and consumer should also protect the innocent bystander.’ The court cited a Michigan Supreme Court case holding that ‘it would be unjust and totally unrealistic to distinguish between the user and a bystander by saying that one could recover but the other could not.’ Finally, the court looked to the standard for establishing a manufacturer’s duty: whether it was foreseeable that the plaintiff would be affected by the product’s defect. The court reasoned that this standard did not preclude bystander recovery because harm to a bystander could be foreseeable. However, the court specifically refrained from deciding whether the fact that a bystander would be harmed must have been foreseeable, a requirement that would bring the proof required in strict liability actions closer to what is required in negligence suits.”

SHOULD THERE BE A DIFFERENT STANDARD FOR BYSTANDERS?

As we have noted, under the common law, the implied warranty of merchantability was subject to the limitation of the doctrines of both horizontal and vertical privity. Today, this is no longer the case, as uniformly the warranty of merchantability has become one that protects both buyers and users of products in the absence of privity. But, should this protection be extended to the area of strict liability in tort? As the court noted in *Giberson v. Ford Motor Co.* (p. 12, 1974), “the same precautions required to protect the buyer or user would generally do the same for the bystander.” The reason for a possible extension to strict liability was the “feeling that there is no essential difference between the injured user or consumer and the injured bystander.” (*Giberson*, p. 11, 1974).

Giberson had not been decided in a policy vacuum. In addition to the Sills decision in 1969, the California Supreme Court had decided one of the first cases involving neither the buyer nor user of a product—in this case a plaintiff driving an oncoming vehicle involved in a crash when a drive shaft in a defective automobile buckled, causing its driver to lose control of the car on a highway. Clearly, the driver/owner/buyer would be protected under a theory of strict liability. But what about the plaintiff who was driving the “other car,” who was neither a purchaser nor a user of that car, and who might thus be legally classified as a bystander?

In *Elmore v. American Motors Corp.* (1969), fully five years before the Missouri court’s decision in *Giberson*, the California Supreme Court ruled that the bystander plaintiff could recover against the manufacture under a theory of strict products liability:

“An automobile with a defectively connected drive shaft constitutes a substantial hazard on the highway not only to the driver and passenger of the car but also to

pedestrians and other drivers. The public policy which protects the driver and passenger of the car should also protect the bystander.” (Elmore v. American Motors Corp., p. 89, 1969).

Professor Geistfeld (2006) offers an expansive policy argument for the extension of strict products liability to bystanders. From a practical standpoint, there is a major distinction between a consumer and a bystander: unlike a consumer or buyer of a product, the bystander is not in a position to make a product choice. It is clear that American consumers have benefitted greatly from the imposition of a general duty on the part of a manufacturer to warn, which will assure that the ordinary consumer will be provided with the material information required to make an informed decision about purchasing a product. Therefore, the fact that consumers have choices may even encompass limitation of liability provisions in certain cases where there is an availability of the relevant safety options, coupled with knowledge of the attendant risks in using a product. However, noted Professor Geistfeld, these choices “should not necessarily limit the liability of product sellers with respect to third-party harms.” (Geistfeld, p. 253, 2006). Geistfeld cites an interesting example.

In *Passwaters v. General Motors* (1972), the buyer purchased an “ornamental hubcap” for an automobile which contained “protruding spinning blades” that severely injured a rider of a motorcycle. The flippers or blades only “serve[d] the purpose of aesthetic design.” Because the buyer-consumer understood the nature of the product and the dangers inherent in such use, it could be argued that the hubcap did not frustrate the buyer-consumer’s expectations of safety. However, did it create an unreasonable risk of harm for the plaintiff motorcycle rider – classified as a bystander – who had been severely injured by the hubcap? Indeed, the plaintiff’s expert witness (a Ph.D. in agricultural engineering and theoretical applied mechanics) had testified that the “protruding blades moving at high speeds in an unshielded area constituted an unsafe design to persons who might come within their vicinity.” (*Passwaters*, p. 1272, 1972).

A second example merits attention because it reflects a confusion that frequently arises in trying to distinguish between a consumer and a bystander. Several wrongful death actions were filed against the manufacturer of Black Talon bullets. The bullets were designed in such a fashion that upon impact, the bullets will expose razor-sharp edges at a 90-degree angle to the bullet. This design significantly increased the wounding power of the bullet. (Nation, 2008). A case arose when a mentally deranged assailant, Colin Ferguson, went on a shooting rampage on the Long Island Railroad. A number of third parties brought suit against the manufacturer, Olin Corporation. (One of the plaintiffs, Carolyn McCarthy, later ran for and won a seat in the U.S. Congress, propelled to seek office in order to prosecute the gun control issue and the availability of assault-style weapons issue with legislative action.) (Blackman & Baird, 2014).

The plaintiffs claimed a design defect, and as part of their burden of proof in design cases, they offered an alternative design as one of an “ordinary” bullet. However, in *McCarthy v. Olin Corp.* (1997), the appellate court applied New York law and dismissed plaintiffs’ claims. The Second Circuit concluded that “there is no reason to search for an alternative safer design where the product’s sole utility is to kill and maim.” The bullets themselves were simply not defective. In fact, they were very effective for their intended purpose! (McCarthy, p. 155, 1997). (Judge Guido Calabresi filed a dissent arguing that the design should be considered defective because the product itself had a low utility that was clearly outweighed by the great danger posed by the bullets.) (McCarthy, p. 162, 1997).

It is instructive to note that while Judge Calabresi raised a plausible argument that the bullets were in fact defective, he never properly identified that the issue was not one involving injured consumers and their consumer-choices. Rather, the cases clearly were about third party-harms. Thus, it would be improper to view liability from the viewpoint of the consumer or buyer on the basis of a consumer-choice doctrine that would essentially ignore responsibility to a bystander.

CONCLUSIONS AND COMMENTARY

The California Supreme Court effectively summarized its extension of liability to bystanders in *Elmore v. American Motors Corp.* (p. 89, 1969):

"If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made ... to extend greater liability in favor of the bystanders."

The *Elmore* court recognized that it was fundamentally unfair to limit the liability of manufacturers to bystanders on the basis of the consumer-choice doctrine when the bystander is not invested in any way in this choice. It is certainly true that strict products liability theory is substantially based on a subtle confluence of both implied warranty and negligence theories, rejecting those aspects of both theories that were detrimental to the core rights of consumers and users of products. Professor Geistfeld (p. 258, 2006) notes: "The ordinary consumer reasonably expects that amount of product safety that maximizes consumer welfare, and that amount of safety is required by the risk-utility test." This same expectation is simply not present for those who are "strangers" to the transaction and thus, it is necessary to protect the interests of bystanders by creating a general rule of tort law which explicitly recognizes their right to be protected in cases of damage from defective products.

Of course, this will not end the debate. Having decided that bystanders as a class should be protected under strict liability in tort, it is still important to determine which particular bystanders will be permitted to sue in strict tort liability. Many courts will no doubt follow the rule enunciated in *Winnett v. Winnett* (1974) and will fall back on the traditional concept of foreseeability—holding that the liability of a manufacturer will only extend to those individuals "to whom injury from a defective product may reasonably be foreseeable, and only in those situations where the product is being used for the purposes for which it was intended or for which it is reasonably foreseeable that it may be used." (*Winnett*, p. 4, 1974). The *Winnett* court went further:

"A foreseeability test, however, is not intended to bring within the scope of the defendant's liability every injury that might possibly occur. 'In a sense, in retrospect almost nothing is entirely unforeseeable.' Foreseeability means that which it is objectively reasonable to expect, not merely which might conceivably occur." (Winnett, p. 4-5, 1974).

And, in addition, a debate will not doubt continue whether and under what conditions will courts permit recovery for mental distress unaccompanied by physical harm. Professors Phillips and Powers (p. 395, 1988) note that “most courts apply hard and fast rules to limit liability where third parties suffer mental distress resulting from concern about another person injured by a defective product.” Some courts continue to deny recovery in all cases. Other courts permit recovery, but impose restrictions under what has been termed the “zone of danger” theory (*Rickey v. Chicago Transit Authority*, 1993), or in applying factors such as requiring that (1) the parties be closely related; (2) the plaintiff be sufficiently near the scene of the accident, and (3) the plaintiff contemporaneously observe the accident. (*Dillon v. Legg*, 1968; *Shepard v. Superior Court*, 1977; *Walker v. Clark Equipment*, 1982).

One thing is certain: Future statutory enactments and expanded case law will be required to resolve many of these questions. But for now, it appears that Walter may be able to recover for his physical injuries, as well as those to Gertie. At least, that is what their lawyer is hoping for!

APPENDIX

Section 402A provides: Special Liability of Seller of Product for Physical Harm to User or Consumer

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - a. the seller is engaged in the business of selling such a product, and
 - b. it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
2. The rule stated in Subsection (1) applies although
 - a. the seller has exercised all possible care in the preparation and sale of his product, and
 - b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Merchant

A merchant is defined in U.C.C. Section 2-104(1) as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.”

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