CHAPTER 1

The Five Elements of a Products Liability Case

Introduction

Although the common law was imported from England, the law of products liability is entirely home-grown. In fact, much of it has developed in response to perceived shortcomings and loopholes in the traditional common law, and some elements of American products liability law have now been exported back to England and to other overseas jurisdictions.

Nevertheless, since its inception, the development of products liability law has tended to tread the traditional common law path of incremental change, based on both analogies with previous cases and judicial assessments as to what makes good policy.

This means that much of the law in this area is still in flux, with the courts in different jurisdictions reaching different decisions as to whether a particular issue should be

• considered a question of law or of fact;
• determined in accordance with doctrines of contracts or torts;
• determined, if within the law of torts, in accordance with the Second or Third Restatement of Torts; or
• treated as a matter of state or federal law.
It is, therefore, unrealistic to expect a book of this size to offer definitive guidance on how to approach every products liability case or issue, no matter where that case or issue has arisen or might be litigated. Yet—as is often true of other areas of law too—the relative youth and malleability of products liability law mean that particular cases are often determined less by strict legal technicalities, and more by the manner in which a case is plausibly framed.

Relevant Areas of Law

Indeed, one of the most significant features of products liability law is that the same case may often legitimately be pleaded as an action falling within the domain of any or all of the following areas of law:

- Breach of warranty
- Misrepresentation
- Negligence
- Product defect

Since there are actually two forms of breach of warranty, three forms of misrepresentation, and three distinct types of product defect, it can truthfully be said that, with the appropriate evidence, a products liability claim may be framed in one or more of nine different ways.

In fact, if the product in question is considered a danger to public health, then it may also be possible to frame the case as a public nuisance. This is, though, essentially an action that may be brought only by a state or federal attorney general.

Moreover, even if none of these nine approaches turns out to be applicable to a specific case, that does not necessarily mean that there is no legal doctrine that could fit the circumstances. The ordinary laws of torts, property, and contracts continue to be of general application.

Accordingly, while this book certainly outlines the doctrines and approaches that are more-or-less universally accepted and applied throughout the nation, it does not stop there. On the contrary, it goes on not only to identify where there are controversies, but also to suggest appropriate strategies for framing events in a plausible and persuasive manner.

There may be no national law of products liability, but proven techniques of legal reasoning carry weight everywhere.
The Five Elements

The first step toward an understanding of products liability law involves identifying precisely what it is that makes an event into a potential products liability claim.

In fact, virtually every products liability case can be characterized by the presence of all of the following five elements:

1. A product;
2. Which has been sold, or otherwise distributed, by someone in the business of selling or distributing that type of product;
3. But which was defective;
4. In a manner that has caused—or is likely to cause—personal injury or property damage;
5. To a victim who was using or consuming the product, or who was an otherwise reasonably foreseeable third party.

It should be emphasized, however, that while the presence of all of these elements is almost always necessary for the law to recognize the case as one that concerns products liability, such presence is not necessarily sufficient to sustain a verdict for the plaintiff. This is because one or more of these elements may be trumped by an appropriate affirmative defense. Such defenses are discussed in Chapter 10.

Product

By definition, the law of products liability applies only to products. Determining whether something is a product goes to the very heart of products liability law and is, therefore, a systemic matter for the court to determine as a matter of law.

Nevertheless, there is no definitive legal definition of what constitutes a product. It does seem, however, that—with one exception—whatever constitutes “goods” for the purposes of the Uniform Commercial Code (UCC) will qualify as a product.

Section 2–105(1) of the UCC defines as goods “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.” It also expressly includes animals and...
their unborn young, crops not yet ripe for harvest, and items attached to realty but which will be removed upon sale.

The exception is that human blood and tissue is not considered a product, so that compensation for any injury arising from its use must be sought under the appropriate state or federal statute.¹

Even allowing for that exception, § 2–105(1) does not exhaust the list of things that may be considered as “products.” Section 19 of the Third Restatement of Torts (Products Liability), for example, purports to define products as being tangible property that is distributed commercially.

This means that the notion of a “product” is not confined solely to personal property. On the contrary, real property may also be treated as a “product” if the context makes such an interpretation appropriate.

**Products vs. Services**

In some states, however, even this provides too limited a definition. The difficulty lies in making a clear distinction between a product (to which products liability law will apply) and services (to which products liability law will not apply) because, on many occasions, a service might involve the provision of a product.

As a matter of principle, products liability law will then be applicable only when harm is caused by a defect in the product rather than by any lack of care in the service. In practice, however, this may sometimes be a difficult line to draw.

One example, on which the courts have reached different conclusions, is the provision of electricity. Is such provision a service, or is it a service that involves the provision of a product?

The Supreme Court of Ohio has taken the former view,² while the states of Wisconsin and Connecticut have held that it is a service up until the point when it passes through the consumer’s meter, at which point it becomes a product.³ In the latter two states, therefore, it would be important to know the precise location of any harm caused by an overloaded or erratic electricity supply.

**Books, Maps, and Computer Software**

Distinguishing between a product and a service has proved particularly problematic in cases involving books and maps.

While it is clear that a traditional hard-copy book is a product, it is also clear that the ideas it contains or promotes are intangibles that
cannot constitute a product.\textsuperscript{4} Any harm caused by attempting to follow those ideas will not, therefore, fall within the purview of products liability law.

However, the reverse is true of maps and seamen’s charts. While ideas can have a wholly intangible existence, the plotting of boundaries, topography, and ocean depths is impossible without some physical space where the diagrams can be set out. In \textit{Saloomey v. Jeppesen & Co.}, for example, injuries caused by the victim’s following a map’s inaccu- racies were held to fall within the ambit of products liability law.\textsuperscript{5}

A question on which the courts have yet to take a definitive view is whether computer software constitutes a product or a service. However, it seems appropriate to extrapolate from \textit{Saloomey} that satellite navigation devices should be treated as products, even if any harm that results in following their directions results from faulty software or programming rather than inherently defective hardware.

On that basis, \textit{all} computer software may legitimately be regarded as a product, especially as such code cannot exist apart from a tangible means of storage or conveyance such as a hard disk or thumb drive.\textsuperscript{6} The fact that the UCC considers software to be “goods” provides further support for this proposition.

\textbf{Components}

Many products are used as components in larger products. Such integration into a larger whole does not immunize the component manufacturer or supplier from liability if the component proves faulty and causes harm.

In \textit{Jones v. Aero-Chem Corp.},\textsuperscript{7} for example, the manufacturer of a canister of teargas that suddenly discharged, injuring the customs officer carrying it, was permitted to maintain an action for indemnification against the manufacturer of the canister’s allegedly faulty valve assembly.

Moreover, even if the component was not originally defective, if the process of integrating it into a larger product made the latter defective, and this then went on to cause harm, those responsible for the component will be among those potentially liable for the harm if they “participate[d] in the integration of the component into the design of the product.”\textsuperscript{8}

Note that this refers to integration into the \textit{design}: the component manufacturer need not have participated in the physical integration of its component into the larger product in order to be at risk of liability.
Economic Loss or Property Damage?

One complication that should be noted here is that, if a component that has been integrated into a larger product causes damage to the rest of the product, this will not normally be considered a form of property damage.

Instead, it will be treated as a form of purely economic loss, which is not usually recoverable in products liability cases according to what is known as the “economic loss rule” or “economic loss doctrine” (discussed further in a later section).

It is a question of fact whether a component has been integrated into a larger product, or whether it remains distinct from other parts with which it operates. If the component is held to remain distinct, then any damage it causes to other parts will be treated as property damage and will thus be recoverable in a products liability claim.

In Jimenez v. Superior Court,9 for example, the Supreme Court of California held that faulty windows, which caused damage to the mass-produced houses in which they were installed, had caused property damage for which the plaintiffs were entitled to be compensated.

Commercial Sale or Distribution

Seller

It is important to appreciate that liability for defective products (or for inaccurate claims made about such products) is not limited to product manufacturers. In fact, § 20 of the Third Restatement of Torts (Products Liability) makes it clear that liability also extends to anyone engaged in the business of selling or otherwise distributing products.

Product sellers are deemed to include not just manufacturers, but also retailers and wholesalers. Those who use or provide a product as part of the performance of a commercial transaction or service (e.g., a rental car company) are deemed to be distributors of the product concerned. But auctioneers are not commercial distributors, because they do not distribute products so much as facilitate their distribution.10

It is thus clear that private sellers cannot normally be held liable in a products liability action, unless they sell or distribute products on such a frequent basis as to transform such conduct into the operation of a small business.