# Punitive Damages under Products Liability

## *Why Does a Manufacturer Need to Consider Tort Law?*

We are going to attempt to understand the importance of American tort law from a business point of view. This issue is often reported in the news from the consumer's point of view. We believe that the manufacturer is liable for the defects of their products, but the real issues go much deeper than that. For those different issues, we will devote some detailed discussions during this month's blog.

Why do torts liability exists? The reasons are numerous, and in my opinion, it is reasonable if we consider the most important functions that scholars have identified on tort liability.

a. Compensation for injuries. Perhaps the most important question that it is addressed by tort law is who is responsible for the payment of a wrongdoing. Is the responsible party the victim or the actor? One does not need to understand law in-depth to answer that the victim should not pay. Tort law is the practice that lets us define in which cases and circumstances actors would have to assume the burden of paying for damages.
b. Deterrence or prevention of injurious conduct. Another function of tort law imposes fear of the consequences of negligent actors. The fear of tort law might condition one's behavior to a more appropriate level of care, that the actor otherwise would not use, without the possibility of a tort claim.

When we speak of tort law, the first thought that comes to mind is [negligence liability] caused by accidents, but tort law is much more detailed than that. Even further, we can find several cases of liability in which negligence has nothing to do with the case per se. However, negligence is a direct consequence of problems with the product or the service provided by the company.

For a business person, the most important part of tort law is usually the products liability because this rule will determinate the level of responsibility that he or she will owe to one's customers.

However, the category of [products liability] is considered to be part of the inadvertent physical injury in tort law, along with negligence and strict liability. One of the main differences between products liability and negligence liability is payment. In negligence liability, payment is given because firstly, one looks to reimburse the losses of the victim, and secondly, because of deterrence.

Products liability, on the other hand, looks to generate action of the manufacturer, forcing him or her to review his production process in order to avoid as many mistakes as realistically possible in order to protect the general public.

This means that it does not matter if the manufacturer can prove that he or she was not negligent, and that the defect product was only a minor mistake, or an accident. Such facts are not important to determine responsibility; a harmful result caused by a faulty product is enough proof to claim that the

manufacturer is liable for the harm. Other claims could be important after the fact, as will be discussed in the punitive damage trial post.

### *When Is an Action Negligent?*

To recognize a tort, a potential plaintiff needs to find several elements in order to identify if he or she has a case. First, one needs to prove that the defendant neglected a law/duty. One finds this law in rules and general standards because they are obligations that everyone is forced to observe. Second, it must be proved that the actor breached said duty, or in other words, did not obey the rule. Third, one must show that the breach of the duty was the proximate cause of the tort, meaning that the legal breach was the primary reason why the wrong occurred. And finally, there must be damage, which can be represented by the losses of the victim.

In order to understand products liability, we need to first understand two basic concepts of tort law that reveal some instances where public policy decides to allocate the loss expenses in any tort law case.

The first is negligence, which makes the actor liable only if one was not using proper care when performing the activity that caused the damage. And second, [strict liability] , which establishes that the amount of care an actor used when one's action generated the damage does not matter. This is applicable if one's actions when the damage was incurred are considered by the law as risky.

To understand negligence liability, consider your car. Anyone that has being involved in a car accident that was not one's fault, yet still was liable for the car´s repair expenses, will understand the concept. It is only fair that if a person acts negligently, generating damages to a third party, one is held liable for that action, and, as a result of these actions, must pay for damages.

Every time that we face a negligent action, the basic issue that we need to understand is that the actor did not intend for the action to consequently harm anyone. If this was not the case, one would enter other field of tort law, governed by intentional torts. This blog will not discuss intentional torts because no manufacturer intentionally tries to cause damage to his consumers.

But how can we tell that we are facing a negligent act? There are several principles that help one establish liability in such cases. The most important law used by US courts is the reasonable person standard. This principle means that one will only be held liable if a reasonable person would have used a higher level of care.

When is an actor supposed to exercise any level of care? One has a duty to exercise reasonable care every time that one's conduct might potentially cause physical harm to others. This means that any activity that involves any risk to a third party could potentially generate negligence liability under such rules.

In conclusion, for any tort claim, the question of whether the care exercised by the defendant meets reasonable person standards will always be determined by a jury. A jury's members will be able to

appropriately determine if a common person, under the same circumstances, would have acted as the defendant did.

### *Strict Liability: It is Possible to be Held Liable for a Tort without Negligence?*

As we discovered, the general rule under tort law is [negligence liability] , in which the defendant will be held liable for one's actions if a jury determines that the level of care used by the defendant under the case's circumstances was unreasonable.

Sometimes, in exceptional cases and always based on public policy reasons, the law applies a higher standard of liability. This means that the level of care used by the actor in the incident that resulted in damages is inapplicable. This rule focuses on the level of risk that the activity itself creates for others.

When the law applies a standard that any wrong outcome will result in liability for the actor, regardless of one's care level, one is faced with a strict liability rule.

In all these cases, the law permits a plaintiff to recover damages from a defendant without proving that the defendant acted unreasonably. One only needs to prove that the defendant was engaged in the activity, and that the damages are a result of the actions of the defendant; or, in other words, that the action of the defendant directly resulted in the wrongdoing.

For example, in many states, if you drive over the permissible speed limit, you are liable under strict liability standards for any damages you cause to others during an accident. This is because one chose to violate the rules established for driving.

There are two main arguments that justify this kind of liability. Some argue that such liability is a kind of corrective justice because the person that creates the dangerous situation is the one that pays for its consequences. The second argument suggests that by imposing strict liability, people will use an appropriate level of care, which develops one's civic conduct. In most strict liability cases, the actor is the only individual in a position to exercise control over a certain activity. For example, if a company wants to build nuclear reactor facilities to preserve and create energy, it will be liable for any accident concerning the reactor.

One of the traditional cases of strict liability it is a fire, where an individual intentionally starts a fire on one's own land. Imagine a case where the owner of a lot wants to burn excess brush, and the fire spreads onto neighboring land. The individual will be held liable under a strict liability rule because he or she created the risk, which resulted in wrongdoing and damages.

On a modern approach, strict liability rules are based on the creation of abnormally dangerous activities, which are exceptional activities that most individuals would not engage in. This theory is based on the argument that because the risk is unreasonable, we can recognize it since the risk has the potential to greatly harm others. In addition, there is no alternative for diminishing the harm by exercising greater care, etc.

## *Can an Employer be Held Liability for the Actions of an Employee?*

One of the most important ways in which tort law is applicable on a day to day basis for any business is through its employees. From the moment a business makes the decision to hire an individual, that person is connected to the company, in more ways than simply providing services for the organization. For this reason, a good personnel selection can avoid several legal problems for any employer.

The question of whether or not a company should be liable for damages incurred by its employees is the kind of speculation that provokes very different answers, depending on one's personal view and one's answer. For a consumer, the response is clear; of course, a company should be held liable for the actions of any employee. For the management of the organization, on the other hand, this situation depends on the circumstances. The company will try to reduce, to the extent possible, the number of situations in which the company pays for any damages resulting from the consequences of its employees' actions.

The general rule would be that a person cannot be held liable for the actions of another. But in this case, tort law provides a solution based on public welfare, creating an exception to this general rule.

We need to consider that in some exceptional cases, it is possible to hold one person liable for the actions of another, if one is in a situation applicable to [strict liability] to a third party, which is called "vicarious liability." Under this law, the main point of interest and that requires examination is not the actor that generated the wrongful act. The responsibility is not based on a simple fault.

According to the vicarious liability doctrine, an employer is responsible for the actions of an employee because the company is the responsible party of the employee that committed the wrongful act.

Does vicarious liability mean that an employer is liable for any tort action of an employee? Of course not! An employer will only be liable for an employee's actions that were carried out by the employee based on the scope of their employment.

For example, say you own a pizzeria. For that reason, you need to hire a driver to deliver your pizzas. If the driver hits a pedestrian while delivering a pizza, the company can be held liable under vicarious liability. But, if the delivery person hits a pedestrian after one's shift at the pizzeria is over, the driver is the only responsible party for the wrongdoing.

What elements help us determinate if the employer is potentially liable for the tort? This involves a case by case review. One aspect that can always help to answer this problem relates to the actions that the employee is directly responsible for.

Was the tort committed under the scope of employment? If the actor was carrying out the assignment that one was hired to perform, the employer could be held liable for the damages suffered by the pedestrian in the pizzeria case.

## *When Does a Defective Product Create a Cause of Action for Products Liability?*

Products liability it is a specific area of tort law, which covers contract law previsions, and this matter is important to the general public. The creation of this field of law originated during the Industrial Revolution based on the breach of warranty of products. In essence, this is a breach of contract, but courts soon realized that this approach limited the liability of the manufacturer, negatively impacting consumers with less power in the contractual agreement.

This approach of tort law is based on simple principles, namely that products are bought by consumers to satisfy a certain need. The basic expectation of a consumer is the ability of the purchased product to meet one's needs.

Two arguments are used by this doctrine to establish when a manufacturer has breached his or her responsibilities, triggering a products liability cause:

1. [Implied warranty of merchantability]: According to the rules of the [Uniform Commercial Code] 2-314, the base to determine a product's viability is based on how the product is ordinarily used. In order to be acceptable, the product needs to be made of an appropriate, average quality. This means that the product fulfills consumer expectations, and does not cause any damage to consumers.
2. [Negligence]: On the other hand, the manufacturer has to take all possible precautions in order to prevent and to avoid physical harm resulting from the use of one's products.

How can we determine if the courts will believe that a certain product, which allegedly harmed a consumer, was not the fault of the manufacturer? A manufacturer could use "the risk-utility test" to clarify one's argument. If the costs of redesigning the product are ignored or if the manufacturer does not properly warn the consumer of a product's possible risks, then the manufacturer will be held liable for any damages based on product negligence.

However, we can point out that if the product does not fulfill the expectations that a consumer would reasonably expect, the manufacturer should be responsible for the inefficiency of the product. Again, we need to address reasonableness as a potential factor in determining a claim. If a consumer buys a car, it can be reasonably assumed that one would use the car for transportation. In this case, if the car does not work, one would use the implied merchant warranty approach to recover damages. On the other hand, if a consumer goes to a restaurant and suffers food poisoning, and the food was poorly prepared, then the customer can expect to recover damages based on the negligence of the establishment.

There are three potential causes of wrongdoing that can be used as arguments in a products liability claim, and these can be avoided by improving the policies and practices of a production process. The next three blogs discuss these causes of action in detail, which are: [manufacturing defects] , [design error] and [failure to warn the consumer] .

***When May a Fabricant be Accused of Manufacturing Defects?***

The first principle that we need to establish involves understanding when we are encountering a manufacturing defect. This is an important point because if this category is too broad, it might result in a customer fabricating a false manufacturing defect claim.

According to the second restatement of torts, a product contains a manufacturing defect “when it departs from its intended design even thought all possible care was exercised in the preparation and marketing of the product.”

The basic principle of manufacturing defects is that, upon comparison, the defective product in a given product line will differ from appropriate products because firstly, design specifications where not followed. As a consequence of that defect, the product physically harmed the consumer.

If we closely examine the definition, we can easily deduce that this is not a negligence standard because it disregards the level of care that a manufacturer invests into the production process. Instead, it focuses on the result of that process: the product departs from the intended design. As a consequence of that departure, the produce physically harms the consumer.

Who bears this liability? This question depends on the common law in the state where you are developing your ideas, or where your business is headquartered. However, in California, for example, this liability could fall under the manufacturer, distributor, or retailer that sold the product.

The reason for such an approach is based on the inferior position that the consumer holds when compared to the manufacturer in order to facilitate filing claims under liability laws. Very often, the manufacturers are located far from consumers. However, the distributor, and certainly the retailer, is easier for the consumer to locate. Of course, it is cheaper for a consumer to sue a company in the consumer’s own jurisdiction.

Is there any defense for the manufacturer in this kind of liability? Yes, there are at least two reasonable defenses that can be presented by a manufacturer under this kind of claim.

First, a manufacturer can claim that the consumer did not use the product in a reasonable and appropriate way. To establish this defense, the manufacturer should prove that the consumer mistakenly used the product in a way that a reasonable person would not. For example, if an adult gets hurt because one fell from a swing manufactured for children, the adult would not have a claim because such products can clearly only withstand a given, maximum weight.

Second, a manufacturer can argue that the product was not the main factor which harmed the plaintiff. For example, if a consumer falls on a public street because there is a hole in the road, one cannot sue the shoe manufacturer for the injury because the damages and the product are not related.

Finally, the manufacturer warned the consumer about the potential harm that one could suffer. Often, we regularly see warnings concerning weight gain on candy and fast food wrappers. These claims are appropriately used in lawsuit defense because obesity is a proven result of abusing such foods, like eating too many candies or fast food cheeseburgers.

### *When Are You Facing a Design Defect?*

We know that the misuse of any product can potentially harm a consumer, as using a product improperly could yield very dangerous results. However, under design defects, the reliability and make of the product is more profound because an injury itself it is not enough to constitute a proper claim. To construct a claim on the basis of design defect, one needs to prove that the product was already problematic when it left the control of the manufacturer. This challenges the way in which the product was made and its intended use from the onset. Such claims argue that from the moment of its conception, the product itself resulted in the harmful effects suffered by the consumer. This is different from a manufacturing mistake, where a product is made that is dangerous for public use.

Under this argument, the plaintiffs construct their theory, alleging that the product itself contained harmful risks, and that these harms could be avoided if its design was modified by the manufacturer. Such design changes would be reasonable with customary design change practices, where a manufacturer simply opts for a safer alternative design.

In this case, the claim it is not against the existence of the product, but the negligence of the manufacturer. This negligence occurred when the manufacturer failed to opt for an alternative design that could have made the product reasonably safer for the consumer.

It is possible to challenge the product's specifications, construction, or even the choice of materials carried out by the manufacturer.

This claim it is based on the principle that the consumer has reasonable expectations that the products would function as safely as possible, depending on the product's characteristics. However, this product exceeded normal risks, turning into a hazard for its consumer. For example, we would not expect a manufacturer to use hazardous materials, such as lead, on a toy meant for toddlers, who will probably bite the toy, resulting in possible contamination. In this case, we would expect that the toy factory opts for an alternative design that only uses materials appropriate for children of the toy's target age group.

This example shows that the risk of poisoning is a feasible result, so it is clear that the manufacturer could be held liable for such a design error. Here, the benefits of the design cannot compare with the risks of the design, and the disadvantages and likelihood of harm are apparent.

However, these sorts of claims are very difficult to prove because they are unlike manufacturing defects, where a series of well constructed products are available for comparison with the defective one that caused harm. In this case, you are challenging the way in which the perfectly manufactured product behaves, and to do so successfully, the Supreme Court requires that you propose an alternative design that could have substituted the one selected by the manufacturer. In any case, this does not mean that one needs to become a designer in order to create a novel product. One simply needs to point out how any differences in the design would have negated the harmful outcome in the particular case.

## *When Does a Manufacturer Risk Facing Punitive Damages?*

Every time that a claim is filed against a manufacturer, the plaintiff is usually requesting monetary compensation, which may be an extensive amount. As commonly known, there are three kinds of damages that could be awarded in a tort claim: economic damages, non-economic damages, and punitive damages.

1. Economic damages: or compensatory damages, attempt to reimburse the victim, awarding in his or her favor all the natural losses and direct consequences of the defendant's wrongdoing. This category may include loss of wages, medical bills, damage of property, etc.
2. Non-economic damages: this kind of damage attempts to compensate the victim for any resulting pain, such as suffering, loss of companionship, love of a spouse, guidance of a parent, etc.
3. Punitive damages: are awarded as a punishment against the defendant, in this case a company, in order to dissuade the company from continuing such conduct in the future. The types of punitive damages awarded in the US aim to stop wrongdoers from repeating the illegal action that causes the plaintiff harm. These damages also serve as a warning to other potential defendants.

There are scholars who challenge the very existence of punitive damages, claiming that the practice is intrinsically unfair. Why should one plaintiff receive compensation when hundreds of individuals that suffered the same harms were not compensated?

Several explanations have been provided to remedy this problem when such cases enter the courtroom. First, in the cases of products liability, there is a low probability that wrongful conduct will ever be tried because the expenses of litigation are too high when compared to the low possibilities of wining such a case.

Second, because every consumer bears some of the harm, and it is difficult to identify how many individuals are suffering the consequence of the wrongdoing, the harm is often underestimated. This underestimation is based on the lack of information on the real harm experienced by the consumers.

Finally, as has been stated before, because the harm is divided among countless individuals, the damages are spread among this population. This results in relatively little individual incidences and cases. As a consequence of this, discussed in detail above, if punitive damages did not exist, the incentives to seek compensation would not exist either. This would protect corporations from the effects of harm suffered by their consumers as a result of faulty products.

Based on the particular characteristics of the wrongful acts behind a products liability case, the plaintiff's attorney would try to get punitive damages against the manufacturer for several reasons. First, these awards are substantially bigger than those offered by economic and non-economic damages. Second, courts usually compensate a consumer for the damages that he or she suffered and also award damages to a number of consumers that also suffered the same harm. For example, in the case of Phillip Morris USA v. Williams, one smoker was awarded punitive damages over $79.5 million. Finally, the attorneys

would prefer this strategy because the plaintiff's lawyer charges their clients over the results of the procedures instead of a fix fee.

## *Conclusion*

Through the information in the proceeding articles, we reviewed some opinions on the level of care that manufacturers, retailers and service providers should execute in their business to avoid any tort liability against them.

We understand that tort law is applicable to business people in several cases, making this body of law one that requires consideration from the onset of product design and its manufacture, which creates [strict liability] against manufacturers and service providers.

Moreover, such laws are essential to management since policy drafting can create severe liability for a business. One factor that usually is not considered by entrepreneurs is [deterrence]. From lay perspective, liability can only exist if there is [negligence] in one's actions. However, as discussed, the negligence could have been committed by one's [employees] , creating equal levels of responsibility for the corporation because the company itself is also responsible for the wrongdoing.

We reviewed that there are three mayor issues that can lead to products liability resulting from problems with the product itself creating a [cause of action based on the defective product] due to the [implied warranty of merchantability] that comes with any product:

a. [Manufacturing error] : The product did not perform as reasonably expected by the consumer, or even worse, harmed the consumer while using it.
b. [Design Defect] : The product could have being designed in a safer way if the manufacturer opted for an alternate and safer design, which would not have harmed the consumer.
c. [Failure to warn] : the manufacturer should include a warning or instructions on the product every time when a competent person could be harmed without that provision.

Despite these options, there are some standards that minimize the types of defenses that can be presented by a corporation in such cases. However, this does not relieve the [consumer from one's own negligence] when using the product.

We also discussed some cases in which [service providers] might have to implement higher standards of liability based on the control the provider has over the consumer's safety.

All these factors contribute to some simple ways a company might avoid a major liability:

1. Adjust your management policies to keep the area of the store as safe as possible for your customers.
2. If one of your employees committed an inappropriate action within the scope of his employment, you are liable for his actions.
3. If a product fails, harming any customers, and you believe this is the company's responsibility, try to reach a settlement as soon as the customer files a claim. This avoids

any ruling awarding [punitive damages] . However, you should consider that any time you meet the [requirements for punitive damages], you need to modify either the product or the company's policies in order to avoid liability, as described on the blog [Milk, Coffee and Punitive Damages] .

4. Every time that the product or service could become dangerous to the consumer, aside from a warning, you should incorporate an [exculpatory agreement] on the contract, even if it is not enforced. During a potential trial, it might be useful, proving that the company warned the consumer.

### *What Level of Care Should a Service Provider have towards its Consumers to Avoid Liability under Tort Law?*

As we will see in this article, there are several cases in which tort law puts a service provider in a position where it will be held liable for any damages suffered by the consumer, within the sphere of the company's control. This is applicable even if the service provider does not act negligently.

Several reasons exist for these occurrences. However, they are all based on the principle that the consumer entrusts the service provider with his or her safety. Under this reasoning, a company has control over the consequences of one's actions over the costumer, and for that reason, the company is held to stricter standards of liability than mere negligence. However, this does not mean that the company will be held responsible according to strict liability standards because the company might have some reasonable defenses that act in the company's interests.

What cases can justify this special regulation? There are several cases that are commonly considered as situations in which the service provider has control over the harm that can occur to a consumer, and for that reason, the provider needs a more stringent level of care. Even so, the rules can change within jurisdictions. The following are some example that a company may find useful to consider:

a. Common carrier to passenger: This is one of the clearest cases since the passenger relies on the care that will be provided by the carrier, and totally depends on him or her for one's safety.
b. Landlord to tenant: There have been some Supreme Court cases in which a tenant has been held liable for neglecting safety concerns, resulting in physical harm for a tenant. For example, the omission of installing a proper lighting system might result in a rape or other violent crime.
c. Landowner to business visitor: Strangely, under this case, the landowner has a high care obligation to the business visitors that come into the household because the business person cannot choose to refuse the venue. Considering other guests, these obligations do not exist because guests assume the risks of the places where they choose to stay.

Other cases where the same principle is applicable are: the prison to inmate, the university to a student on campus, or the hotel to a guest.

Is there a limit to the duty applicable to service providers to prevent consumers from exercising this liability? Yes, and one may refer to the Strauss v. Belle Realy case as an example. For instance, a tenant cannot sue an electric company for any damages suffered during a power outage since he or she is not the direct customer of the service. The liability of the corporation it is limited to the legal consequences of their errors, disregarding any claims filed by a person that does not have a contractual relationship with the service providers.

According to the court, the idea of having an unlimited liability for indirect claims (meaning claims filed by someone other than the beneficiary of the contract) would result in abuse of this statute, excessively expanding the responsibilities of service providers.

### *Consumer's Negligence and with Manufacturing Defects?*

It is well known that in several cases, consumers do not honor the minimum standards of care that tort law requires, and this fact might intensify the consequences of an accident. Negligence may generate more harm than expected due to the consumer's own negligent behavior.

One of the most clear-cut situations where one might observe such negligence is car accidents. It is possible that a car crash may be the result of a [manufacturing error] or [design error] of the product, as we have already discussed in other articles in this piece.

In this case, we find that two situations might arise. First, the product failed without any negligence based on the consumer's actions. And second, the consumer was acting negligently and the product failed.

Under the first case, the consumer used the product according to the instructions of the manufacturer, taking into consideration all the warnings provided when purchasing the product. In this situation, according to the Supreme Court rulings, the fabricant will be held liable for the damages. One needs to remember that, as discussed in previous blogs, if the product is a car, not only the manufacturer will be responsible, but also the distributor and the retailer.

If, on the other hand, the consumer acted with negligence, disregarding the warnings given by the manufacturer, but the product contained a defect that also played a role in the accident, one needs to establish if the accident would have happened without the failure. If the answer is yes, both parties are jointly liable for any harm. If the answer is no, the manufacturer can raise this defense in court.

Other situations might arise, which are even more complicated than a product mistake that results in an accident. These situations involve products that are meant to protect the consumer in case of an accident. Following the car crash example, such devices include seatbelts and air bags.

Usually, the negligence of the consumer is an acceptable defense for the manufacturer since the warnings and instructions prevent certain harms that might occur if the consumer neglects to follow such instructions. In the case of a car, usually the manufacturers prevent the drivers to follow out all the transit previsions of the competent authority. In this case, a driver might collide with another car while

speeding or under the influence of alcohol and suffer damages because the seat belt did not work properly. One might understand that the manufacturer could argue that the warnings and instructions on the product aim to prevent the consumer from engaging in those dangerous activities.

Why, in this case, the manufacturer cannot use the negligence of the consumer as a defense: In this case, the product is designed to perform its expected functions under the same situations where it did not perform properly. In this example, the seat belt is supposed to protect the consumer form harm in case of a car accident, regardless of the reason behind the accident itself.

### *Exculpatory Agreements: How to Avoid Some Causes of Liability*

Of course, a manufacturer or retailer can find ways to avoid liability, and contractual law is the perfect tool for such instances. One can include an exculpatory agreement clause on the service providing contract, or in the sales contract.

The aim of exculpatory agreements is to set concrete limits regarding the liability of a service provider, in turn shifting the burden of possible risks to the customer. By signing the contract, the client accepts all the risks that the activity may result in.

This practice was being overruled by courts since legal institutions understand that the clients are greatly disadvantaged when compared to the service providers. Under exculpatory agreements, the manufacturer or retailer controls which party assumes which risks. For this purpose, the courts have constructed some guidelines to determinate when such a clause might be considered unacceptable. These factors are called Tunkl factors. If they are present, the courts would not enforce the agreement. For instance, see the following examples:

- When one is in dealings with a business that is subject to special regulations, usually applicable in very technical situations, which would make it complicated for a regular individual to prove a claim.
- Service is of great importance to the public or is a matter of public necessity. The rationale behind this factor incorporates the idea that certain categories are too essential for the community, and for that reason, a service provider cannot delegate the risks to the consumer.
- The service provider has superior bargaining power or the agreement is a contract of adhesion; the victim had no opportunity to bargain for protection from the risk. Under this kind of contract, the consumer can only choose to sign the contract or not have access to the service since all the clauses are dictated by the service provider.

Because the consumer cannot have any bargaining power to modify the conditions, it is advisable to omit exculpatory agreements whenever possible. Such contracts are inequitable and otherwise unfair to the consumer.

Is there any defense for manufacturers when the court refuses to enforce an exculpatory agreement? Yes, a company can argue that the client assumed the risk at the moment the contract was signed and made effective.

There are times when individuals knowingly engage in reasonably dangerous activities offered by a third party. If a consumer is harmed, he or she has to endure that injury as a result of the activity that he or she took part in. This is the case for most sports. For instance, we cannot imagine a football player filing a lawsuit against the opposing team for a knee injury. The same is true regarding other injuries suffered by the consumer that are an inherent risk to the activity, and that were not provoked by a special, negligent action performed by the service provider. For example, if a customer of a skiing establishment gets hurt while skiing, one cannot sue the resort unless the reason for the accident was the lack of a proper sign, warning that the trail is ending.

### *Why the Implied Warranty of Merchantability is a Tort and not a Breach of Contract*

Any product purchased by a consumer (meaning that the product is bought for final use or consumption, excluding resellers who buy a product in order to sell it again to the public) contains the idea of an implied warranty of merchantability. However, it may seem obvious that the seller needs to compensate a consumer when the product does not fulfill his or her expectations.

In practice, this concept has incorporated different forms of contract law, especially Article 2 of the Uniform Commercial Code that relates to the sales rules. Implied warranty has become one of the main parts of tort law, along with negligence claims.

The idea of filing a claim under tort law instead of contract law is based on the ability for one to easily prove the breach since in this case, the consumer will only need to attest that the product did not function in a reasonably expected way. This method eliminates proving that the buyer breached his or her contractual obligations. This method is not a matter of fault, but a factual approach. Because the product did not perform as expected, the manufacturer is liable under products liability.

Also, the actions under contract law only allow the consumer to recover the amount paid for the product, plus the expenses of litigation. Under tort law, however, as already discussed in pervious entries, the court can award economic, non-economic and punitive damages, which by far exceed possible awards under contract law hearings.

What kinds of acts are considered implied warranty by merchantability?

In this article, it is considered that there is an express warranty every time that the manufacturer makes a public statement commenting on the qualities of a product. The contents of that communication bind the manufacturer, and the manufacturer is required to fulfill the obligations discussed in publicity statements because it is understood as a promise made by the seller.

Also, any description of the goods will be considered as a part of the contract itself since these characteristics are the primary reason that interested the buyer in the contract.

The defense that the seller will try to raise is that the statements were only supposed to address one's own opinion and not provide the buyer with accurate information describing the goods. The main discussion under this type of litigation revolves around the statements of the seller, and the buyer will attempt to label them as factual statements, which describe the characteristics of the product. The seller, on the other hand, will attempt to narrow the consequences of such statements by proving that he or she was simply providing one's opinion to the buyer.

We cannot provide a full-proof, undisputed conclusion on exculpatory agreements because the courts have not reached a uniform decision. Additionally, no tests exist that offers one more clarity about these kinds of statements because their decision will depend on the facts of the particular case.

### *Requirements for Punitive Damages*

Since punitive damages are meant to be used as punishment and to create deterrence among manufacturers, this is one matter that should be decided by every state based on its common-law practices. The reasoning behind this is simple: punitive damages under products liability are part of public choices that differs among states. These differences depend on the values and principles of the particular area to determine the importance of the damage generated by improper conduct and the value placed on the injustice. One can observe some case resolutions in the article [Milk, Coffee and Punitive Damages].

Consider California, for example. In order to award punitive damages, a jury needs to value three alternatives: malice, oppression or fraud. Without one of these elements present in the case, no punitive damages can be awarded.

What can we understand about the concept of malice? The subject that acts with malice has the intent to cause the injury, and in this action, he or she acts willful and knowingly disregards the rights and safety of another. Moreover, the actor understands the risks, yet knowingly disregards them. This is not a case of negligence, in which the actor did not intend to harm another. In malice, the wrongful party knew that there was a negative possibility and did not take appropriate measures to prevent that risk, avoiding the foreseeable consequences of one's action. For example, a pharmaceutical company is aware that the use of a certain flu medication it is likely to cause pregnant women to miscarry, and the company fails to warn the public of this possibility.

What is oppression? The principle behind this concept is even more serious since a person or company acts oppressively when the conduct is proved to be highly inappropriate and considered wrong by reasonable people. Here, one acts in a cruel and unjust manner, causing hardship and knowingly disregarding the rights of others. For example, a pharmaceutical company does not test a new drug in order to review the secondary side effects that it may have on pregnant women, even though a layperson believes that this should be a normal procedure for drug testing.

What constitutes fraud for this analysis? The concept of fraud is concealing the fact behind a product and intentionally trying to cause harm to others. It is very rare that one can apply this standard to products liability because one needs to prove that the manufacturer wanted to harm its consumers or intentionally lied in order to disguise the truth about the dangers of continuously using a product, like medicine.

Under a malice case, the manufacturer is aware of the harmful consequences of the use of the product and actively tried to conceal this fact.

For example, a pharmaceutical company developed a medicine that is likely to cause women to miscarry. However, the company could spend 50 cents more, changing one of the main ingredients of the medication and negating the serious side effect. The side effect can be avoided, but the manufacturer decides not to assume the extra costs of this modification.

In the case of Grimshaw v. Ford, the company was forced to pay punitive damages based on the fact that it did not modify the design of its Pinto model, putting the gas tank behind the axle in order to save the costs of a shield. According to the court, the cost of this shield was negligible compared with the potential harms that the absence of it could cause.

### *What Kind of Warnings should be Contained on the Product?*

We have already discussed that it is possible for a consumer to use a product other than for its intended purpose, exposing one to dangers outside the initial considerations of the manufacturer.

Having said this, the easiest way for the manufacturer to limit the company's liability for misuses of the product is to provide instructions regarding the proper use of the product. As well, it is advisable to warn to the consumer about any potential harm that the manufacturer has already identified as common risks, which any consumer might be exposed to.

The Restatement of Torts considers a product defective if the producer fails to warn consumers of a foreseeable harm, which one may be exposed to by using the product. The rational of this provision is to transform a non-evident risk into a visible danger for the consumer, reducing the probability that the product will harm the everyday user.

How do you know when you need to place a warning on your product? Every time that an instruction or warning can prevent or reduce harm to the consumer, one should place readable instructions on the product. This is most advisable if the failure to include such an instruction or warning would result in an unreasonably unsafe product.

When is a manufacturer potentially liable for omitting instructions and warnings? Every time that an ordinary consumer harms oneself using a product in a reasonable or ordinary way, and such harm is a direct consequence of insufficient instructions or warnings, the manufacturer will possibly be held liable for this omission.

What is an ordinary consumer? According to the §402A of the Restatements of Products Liability, an ordinary consumer is the person who is most likely to buy the product, who has only common knowledge and has characteristics that are shared by one's community.

This law may seem complicated, but in layperson's terms, the act emphasizes that an ordinary consumer is not sophisticated or a specialist on the consumption of the product. One has average knowledge that any person may have on the subject, and the manufacturer should consider this assumption when choosing which warnings to include on a product. For instance, consider a drill. The instructions should not expect a construction expert as a consumer because such a worker will qualify as a sophisticated consumer, not as an ordinary consumer.

Who has the responsibility to implement warnings? The manufacturer of the product itself has the responsibility to warn consumers of potential harm, but other players do as well. For instance, the manufacturer of parts of the product must comply with this obligation, giving notice of any known dangers that are in the components they produce.

Finally, the sellers have to warn consumers every time that such an occurrence is reasonable or necessary. This obligation is based on the fact that the sellers, although proportionally low on the totem pole, have the opportunity to inspect the product just before they hand it over the consumer.

### *Milk, Coffee and Punitive Damages*

According to the principles that were discussed on the article related to punitive damages, these damages will be granted if the defendant acted with malice, oppression or fraud. In all of these possibilities, the plaintiff will have had knowledge of the potential risks that the victim could suffer, and show a manifest disregard for the consumer's safety.

A corporation, in order to be subjugated to such punishment, does not need to have its will looking after the harm. In addition to other factors, it is a legal entity, not an individual. But the organization's policies are an element that could be considered by the court in order to award these kinds of damages.

Is it possible that management policies contribute to this kind of award?

Of course, management policies are one factor that has the ability to reveal any dangers to consumers, whether buyers are shopping at a store or as using the product according to its instructions and intended use.

One needs to remember that the key factor that can generate liability for a manufacturer, or, to be more precise, a retailer in this case, is the control that only the retailer has over the area where the services are rendered or over the characteristics of the product itself. The two cases that are discussed in this article serve as clear examples of liability mistakes based on management policy making.

The consequences of spilt milk on Kmart´s floor:

In the year 2001, the case Ortega v. Kmart was decided in favor of the plaintiff and against the company based on a major mistake on the store's cleaning procedures. According to the court, the store owner is liable for any harm suffered by a consumer if the store owner fails to keep the perimeter of the store safe, even from the actions of a third party.

In the case in question, Kmart failed to generate a clear policy on checking the state of and cleaning the floors, leaving a milk spill on the floor for more than 30 minutes. This overlook exposed a customer to the risk of falling and injuring oneself, which unfortunately actually happened.

McDonald's and punitive damages caused by a cup of coffee:

One of the most broadcasted cases of punitive damages, which brought mainstream attention to this issue, was known as the McDonald's case. Stella Liebeck suffered third degree burns while she was trying to add sugar to her coffee at a McDonald´s drive through. The burns were the result of management's bad judgment, which allowed the coffee to be sold to the public at a temperature of 190° F, between 30 and 50 degrees over the standard used by other coffee shops.

The store refused to pay a compensation to cover the victim's medical expenses. The result was an award for punitive damages of $500,000 by the court since the company should have anticipated that the temperature of the coffee sold posed a risk to the public.