

## Ch. 6 Tort Law and the Public's Health: Indirect Regulation part 1



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### Goals

- To identify the major bases for legal action and major doctrines under this area of law
- To identify the developments in case law and statute in the area of tort law with regard to issues of regulation of tobacco, of firearms and of high calorie, high fat fast foods, including recent developments in statute and in constitutional law that have put additional burden on plaintiffs pursuing relief in these areas.

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### Torts

- Torts are civil (non-contractual) wrongs recognized by law as grounds for a lawsuit.
- Money damages are sought
- May be intentional tort, negligent tort or strict liability tort

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## Note re Gostin reference to “Restatement of Torts”

- ‘Restatements’ of Law were Publications undertaken by The American Law Institute (whose mission is to clarify law) since the 1920s to address uncertainty in the law
- A restatement of basic legal subjects that would tell judges and lawyers what the law was
- Critics claim at times the effort has been to push the law in a certain direction and not just to restate what judges decide

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## ‘Pros’ - Functions of tort law

1. Assignment of responsibility for unreasonable risk that causes injury
2. Compensation for loss
3. Deterrence of unreasonably unsafe conduct
4. Encouragement of product innovation to reduce risk

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## ‘Cons’ of tort law

- Cost of defending court suits
  - may discourage business from entering market or staying in business
  - May increase consumer prices

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## Intentional torts

- Those wrongs which the defendant knew or should have known would occur through their actions -
- One who performs an intentional tort is liable for all harm proximately caused by his tort, even if the harm is not foreseen or intended

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## Negligent torts

- Negligent torts occur when the defendant's actions were unreasonably unsafe, e.g., causing an accident by failing to obey traffic rules
- Standard is 'reasonable person' (or 'reasonable doctor' in medical malpractice) and includes the foreseeability of damage

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## Elements of Negligence

Prima Facie Case for Negligence

1. Defendant had a **duty of care**
2. Defendant **failed to conform (breached)** his standard of care
3. Defendant's conduct was a **cause-in-fact** of plaintiff's injuries)
4. Defendant's conduct was the **legal (proximate) cause** of plaintiff's injuries which were a foreseeable consequence. It immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause.
5. Plaintiff suffered **actual damages**

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## Contributory/comparative Negligence

- Contributory/comparative negligence is the failure to exercise due care for your own safety.
- A finding of contributory negligence completely bars the plaintiff from recovering.
- Comparative negligence approach is more common today, e.g., Florida statute - does not bar but reduces plaintiff's recovery.

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## FL Statutes Sec. 768.81

### 768.81 Comparative fault.--

- (1) DEFINITION.--As used in this section, "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.
- (2) EFFECT OF CONTRIBUTORY FAULT.--In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

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## Private nuisance

- An intentional tort
- Definition: Unreasonable interference with the possessor's use and enjoyment of land

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## Elements of Private Nuisance

1. defendant intends (i.e. he knows) to interfere with the use and enjoyment of land
2. The interference is substantial and unreasonable

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## Strict liability torts

- Strict liability wrongs do not depend on the degree of carefulness by the defendant, but are established when a particular action or product causes damage
  - (e.g., liability for making and selling defective products - see Products Liability )

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## Elements of strict liability

1. Intention (knowledge)
2. Proximate cause
3. No public duty privilege (defendant's act was not expressly authorized by law)
4. No sovereign immunity (A doctrine precluding the institution of a suit against the sovereign [government] without its consent. Waiver is common, often by law but with monetary limits.)

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## Strict liability

- May be related to defendant's **engaging in "abnormally dangerous activity"** – related to place where the activity takes place
- So, does not refer to automobile driving, (even in our cities)
- But may be important in environmental issues, e.g., hazardous chemicals, nuclear energy

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## Products liability - history

- Definition: Liability of maker of product for injury sustained because of defect in the product
- Historically, a passenger in a defective auto could not sue the manufacturer because the passenger had no contract
- Then, contractual implied warranty of merchantability was developed but counteracted by contract disclaimers.
  - Note: Merchantable (salable) goods generally (1) must conform to the standards of the trade as applicable to the contract for sale, (2) must be fit for the purposes such goods are ordinarily used, (3) must be uniform as to quality and quantity.

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## Products liability (cont.)

- The first exception was in cases where the seller knew that a product was dangerous but then failed to disclose the danger to the unknowing buyer.
- The second exception involved products that were deemed inherently, or imminently, dangerous, such as guns, explosives, food and drink, and drugs.
- 1916, *MacPherson v. Buick Motor Co.*, enlarged the inherent danger exception so that it swallowed the general rule of privity of contract.
- Justice Cardozo wrote as follows:

We hold, then, that the principle of [inherent danger] is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. 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. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

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## Products liability

- Products liability claims can be based on
  - negligence,
  - strict liability, or
  - breach of warranty of fitnessIt depends on the jurisdiction within which the claim is based.
- Many states have enacted comprehensive products liability statutes. There is no federal products liability law.

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## Defect

- In any jurisdiction one must prove that the product is defective. There are three types of product defects that incur liability in manufacturers and suppliers:
  - design defects,
  - manufacturing defects, and
  - defects in marketing

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## Is there a 'defect'?

### Alternative tests

1. Did the product perform as safely as an ordinary consumer would expect who used it in a foreseeable manner?
  - used to determine whether the product is negligently manufactured or marketed (whether a warning on the product is defective)
2. Risk-utility balancing test: Is the cost of making the product safer greater than the danger from the product in its present condition?
  - Applied to design defect cases

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## Types of defects

- Manufacturing defect – defect occurs in construction process, not in design - Manufacturer fails to properly assemble, or test a product or to adequately check the quality of a product
- Design defect: Design defects are inherent; they exist before the product is manufactured. While the item might serve its purpose well, it can be unreasonably dangerous to use due to a design flaw. Could the foreseeable risk of harm by the unreasonably unsafe product be avoided by alternative design?
- Defects in marketing deal with improper instructions and failures to warn consumers of latent dangers in the product.

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## Design defect

- The law applies a risk-utility analysis and considers
  - the gravity of the danger posed,
  - likelihood that injury will occur,
  - availability and cost of producing a safer alternative design,
  - social utility of the product
- There are three affirmative statutory defenses to certain design defect claims
  - 1) there was not a practical and technically feasible alternative design,
  - 2) the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product
  - 3) the harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction.

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## Defect in Packaging Design

- Occurs when a product has been placed in packaging that is insufficiently tamperproof
- *Elsroth v. Johnson and Johnson* – Ms. Elsroth took tablets manufactured by the defendant and later died. Tests indicated that the product had been tampered with and contained cyanide.
- Judgment for the defendant - The question is whether the product as designed was not reasonably safe. The defendant after previous instances of tampering had redesigned its packaging to make it extremely difficult to tamper with the product in such a way as to conceal to the average person that tampering had occurred. It is still possible to tamper with the product by very sophisticated means. It is not reasonable to expect the producer to do more.

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## Product Liability Based on Fault

- Negligence based lawsuits
  - E.g., Dow breast implants, Ford Pinto case
  - In 1977, report of dangers of the fuel tank design, and internal Ford Motor Company documents proved that Ford knew but that a cost/benefit study was done which suggested that it would be "cheaper" for Ford to pay liability for burn deaths and injuries rather than modify the fuel tank to prevent the fires in the first place. Ford owned a patent on a better designed gas tank at that time, but there were cost and styling considerations.
  - A Plaintiff was awarded injuries he sustained while a passenger in a 1971 Pinto which was struck by another car at an impact speed of 28MPH and burst into flames. Although the award was eventually reduced to \$3.5 million by the trial judge, the jury's reason for its figure of \$125 million was that Ford Motor Company had marketed the Pinto with full knowledge that injuries such as plaintiff's were inevitable in the Pinto and therefore the punitive damages should be more than Ford had made in profit on the Pinto since its introduction, which was \$124 million. (Grimshaw v. Ford Motor Co. [1981 CA])

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## "Failure to warn"

- *Benedi v. McNeil-P.P.C., Inc.*
- **Plaintiff** consumed three or more glasses of wine a day. He also took Extra-Strength Tylenol. He was admitted to the hospital with liver and kidney failure. This was caused by a combination of Tylenol and too much alcohol. His Tylenol bottle did not contain a warning of the danger of the combination of Tylenol and excessive alcohol consumption. Benedi sued McNeil-P.P.C., the manufacture of Tylenol, for negligent failure to warn, citing previous cases of liver injury associated with combining Tylenol with alcohol.
- Jury's verdict in favor of Plaintiff affirmed on appeal. Tylenol now contains a warning that persons who regularly consume three or more alcoholic drinks a day should consult a physician before taking Tylenol. Benedi won \$7,850,000 in compensatory damages

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## Strict liability

- Products Liability is often alleged based on strict liability offense. Strict liability wrongs do not depend on the degree of carefulness by the defendant. A defendant is liable when it is shown that the product is defective. It is irrelevant whether the manufacturer or supplier exercised great care; if there is a defect in the product that causes harm, he or she will be liable for it.

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## Strict liability (contd.)

- Strict liability is imposed irrespective of fault
- All parties in the chain of distribution of a defective **PRODUCT** are strictly liable for injuries caused by that product



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## Strict liability (contd.)

- There is no strict liability for unavoidably unsafe products (Consider, e.g. some drugs, vaccinations)

*k. Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs.... The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Rest. (2d) Torts § 402A (1965) comment *k*.



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## Strict liability (contd.)

- Strict liability is not applied in cases of inherently dangerous products that are in common use and have no manufacturing defect. (Consider, e.g. tobacco, firearms)



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*Hamilton v. Beretta U.S.A. Corp.,*  
New York Court of Appeals (April 26, 2001)

- Gun manufacturers have no special duty to protect because of the foreseeability of harm caused by their particularly hazardous products.
- Plaintiffs failed to show how the risk of injury was exacerbated by negligent marketing and distribution.
- The analogies offered by plaintiffs dealt with defective products or failure to warn or failure to include a safety feature
- Defendants' products here were admittedly not defective, and plaintiffs had not demonstrated that defendants could have taken reasonable steps to prevent plaintiffs' injuries.
- This last point is suggests the possibility that gun makers could be liable if they fail to utilize reasonable warnings or injury prevention measures. However, the court also recognized that courts should in general be cautious about imposing liability in an area so heavily regulated by federal statutory requirements

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Products liability defenses

- Disclaimers (manufacturers' warnings)
- Supervening or intervening event
  - Alteration of product by a party in the chain of distribution that absolves prior sellers from strict liability
  - Airplane crashes, parts manufacturers
- Generally known dangers
  - Inherent danger known to general population
  - The Anheuser Busch case, tobacco liability
- Correction of defect
  - Reasonable notice
- Assumption of risk
  - Plaintiff knowingly and voluntarily assumed risk
- Misuse of the product
  - Abnormal and *unforeseeable misuse*

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“Generally known danger”

- Honda Motor Co., Ltd. (Honda) is not strictly liable to Plaintiff for the injuries suffered in the motorcycle accident. The court held that certain products are inherently dangerous and are known to the general population to be so. Sellers are not strictly liable for failing to warn buyers of these generally known dangers.. The court held that the harm or danger was fully apparent and commonly known to persons of ordinary perceptions and sensibilities. Therefore, Honda did not owe a duty to warn Plaintiff of the dangers of riding a motorcycle. *Camacho v. Honda Motor Co., Ltd.*, 701 P.2d 628 (Colo.App. 1985)

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## Services or products

- Services are not products so not within products liability (Which element is dominant determines category)
- E.g., Pharmacist was held not strictly liable for selling defective prescription drugs. The court held that although a pharmacist is engaged in a "hybrid enterprise" combining the performance of services and the sale of prescription drugs, the dominant element is the provision of a service and not the sale of product.
- The court reasoned that a pharmacist is considered a professional, and must be licensed by the state as such. Further, the court reasoned that a pharmacist is involved in providing a "health service." The court drew the analogy that since hospitals are not strictly liable for providing blood products, then pharmacists should not be strictly liable for selling prescription drugs.

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## Vaccine liability

- Manufacturer of polio vaccine is not strictly liable for the injuries plaintiff suffered when she took the polio vaccine. **Vaccine liability** provides that manufacturers of unavoidably dangerous products which serve an important social function are not liable for injuries or side effects caused by such product if such dangers are reasonably warned against. A product is unavoidably unsafe if, at the time of its distribution, there existed no alternative design that would have as effectively accomplished the same purpose or result with less risk. This rule is based on the public policy that society is benefited by the production and distribution of many unavoidably dangerous products, such as the oral polio vaccine in this case. To hold the manufacturer of this vaccine strictly liable would place an onerous burden on the manufacturers that may cause them not to introduce the product. (*Kearl v. Lederle Laboratories - a 1985 California case*)
- The court held that Manufacturer provided a proper and extensive warning of the possible side effects of taking the otherwise unavoidably dangerous oral polio vaccine. The court held that a manufacturer of an unavoidably dangerous product can only be found liable under the doctrine of negligence.

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## Damages

- Damages
  - lost wages
  - medical expenses
  - pain and suffering (P&S)
  - punitive damages in extraordinary cases(1 and 2 are 'economic damages', 3 and 4 are 'noneconomic damages')

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