

KNOW YOUR LIABILITIES:

You could be liable if you sell a defective product that causes injury

By Kenneth Ross, DC, JD

Product liability boils down to several areas—liability based upon 1) intentional torts, 2) negligence 3) strict liability (defective products that cause an injury) and 4) breach of an express or implied warranty. For the purpose of this article, we will concentrate on strict liability and express/implied warranty.

Product liability law focuses on the liability of a supplier of a product that causes physical harm to a person or property by a defect in the product. If a product does not perform as well as expected, causing purely economic loss to the buyer, this is a sales issue and not product liability. However, when a defective product **cause's** injury, the manufacturer of the product, as well as the distributor, wholesaler, and retailer who sold it, may be liable to the person injured based on any of the legal theories in the above paragraph, depending on the circumstances in which the person was injured.

Determining the type of liability involved is important because it affects key issues of the case. Such factors are: scope of the duty owed, defenses assertable (contributory negligence, assumption of risk, etc.) damages, and liability recoverable and liability insurance coverage, which exclude intentional torts.

Strict Liability

In recent years, courts have held manufacturers and suppliers of defective products strictly liable in tort to consumers and users for injuries caused by defective products. Keep in mind that the plaintiff in any suit must prove both a defect in the product that is attributable to the manufacturer or supplier, and that the defect caused the injury. A product may be defective in manufacture, in design, or in the sufficiency of the warning accompanying it.

Kinds of defects:

1) Manufacturer defects: is the unintended condition of the product at the time it left the control of the manufacturer, and the product not conforming to the manufacturer's own production standards. In other words, the product fell below the manufacturer's own standards when it left the manufacturer's control, either to the supplier or the consumer.

2) Design defect: The product was in a condition as to meet the manufacturer's standard, but was designed in such a way that it presented an undue risk of harm in normal use. This type of defect case can lead to negligence, because of the undue unforeseeable risk that should have been discovered and prevented by using due care. The manufacturer cannot be held liable if the product simply wears out with normal use over time. However, a manufacturer can be held liable for failure to design its product so as to minimize foreseeable harm caused by other parties or conditions.

The defendant must be able to show he removed the danger to the consumer. The plaintiff must prove that the product did not perform as safely as an ordinary consumer would have expected. If the consumer knows the product is unsafe and continues to use it, the claim may be barred.

Some courts have held that the plaintiff may recover damages if he is able to show that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or that the design of the product was defective. A manufacturer may become liable for damages on a defective product if those dangers are not eliminated before the manufacturer continues to market the product. If the risks are not eliminated in a product by the manufacturer, and the product is unavoidably unsafe, the manufacturer must provide a suitable warning, or, if the danger outweighs the benefit of the product, it must be discontinued altogether.

3) Inadequate Warning

In addition to the product itself, defects may arise from packaging and inadequate instructions, warnings, or labels. Inadequate warnings may make a product defective when the dangers are not apparent to the consumer or users.

Unexpected dangers are something that a reasonable user would have no reason to expect or anticipate in the product. Example: A manufacturer of an electrical stimulation product has no duty to warn of the danger of using an electrical stimulation machine directly over a pace maker. This danger should be readily apparent to the user. Keep in mind that many medical products are unsafe, but that does not mean they are defective. Use of any medical equipment must follow proper indications and contraindications by the user. If the doctor uses medical equipment, not intended to be used for that purpose, the manufacturer or supplier cannot be held liable, but the doctor may be held liable from a negligence standpoint if he or she injures the patient.

Warning must be given to the person at risk from any danger of a product. Example: Before a doctor can treat a patient, he or she must warn the patient as to the dangers of an adjustment (informed consent). The same holds true of any medical equipment. If there is a risk or danger to your patient in using the equipment, the patient must be advised.

When you purchase used equipment, the seller of the used product may be liable for safety defects attributed to the design or manufacturer if they conflict with the purchaser's reasonable expectations of the product. In these cases, an "as is" disclaimer does not shield the seller from liability. Some courts bar this type of claim because the buyer cannot reasonably expect the product to be free of defects. **The liability question arises when the product / equipment has been altered from the original design of the manufacturer, by a seller not connected to the original manufacturer.** All states have held that any person injured by a defective product can seek a tort liability claim.

Strict liability applies only where the injuries or damages have resulted from a defective product. Strict liability does not extend to services provided by a doctor. However, if the doctor is negligent in performing those services, such as adjusting the patient or placing a

person on a piece of equipment, the doctor may still be held liable from a negligence standpoint and not a product defect issue that causes injury to a patient. In other words, strict liability does not apply to a physician's diagnosis or treatment, unless such treatment is negligent or causes an injury or the patient perceives an injury and sues the doctor for negligence.

Imposing strict liability depends on two separate issues:

- 1) Type of defect (manufacturer, design, and lack of warning)
- 2) Standard used to determine the defect (unforeseeable or unreasonable danger, misuse, or carelessness of the product by the user.

Note: The manufacturer has the duty to warn the user of any risks, no matter how small. The doctor has a duty to use the product properly and warn the patient of any potential dangers of use of the product.

The burden is on the plaintiff to prove that the product was defective when it left the manufacturer or seller's control and a casual relationship exists to the plaintiff's injury and the use of the equipment.

Kinds of recovery:

1. Personal injury (or death)

Pain and suffering caused by a defective device are recoverable together with general damages such as medical expenses, loss of income, etc.

2. Economic losses

Most courts do not allow recovery in tort for purely economic losses. (if the product does not perform well and the buyer is deprived of profits from the use of the equipment). This is a sales issue and not a tort issue and may be pursued by contract action against the person who sold the equipment to you.

Defenses in Strict Liability:

If you are sued by a patient, it is almost always going to be a negligence case (malpractice). If a patient is injured on a piece of equipment that was not defective, the suit will be a negligence issue. If the patient was injured and the equipment was defective, you will probably still get sued. However you have a strict liability case against the manufacturer or supplier for the defective equipment that caused the patient's injury.

1. Contributory Negligence:

Failure to discover or guard against danger or failing to exercise reasonable care to discover the danger or guard against it traditionally is not a valid defense to a strict liability claim in most states. However you may have a contributory negligence claim against the manufacturer or seller of the product if you are sued for injuring a patient if that injury was caused by a defective piece of equipment.

2. Unreasonable Use:

You can be sued in a contributory negligence case along with the manufacturer and or supplier in the sense of unreasonable misuse of a defective product in a manner for which no reasonable person would use it and the patient is injured.

3. Comparative Fault:

If the injury was caused by the plaintiff's for careless of use of the product. Most states limit recovery by the plaintiff. Example: If you place electrodes in one location on the patient and the patient moves the electrodes to another location other than what you instructed the therapist to do. If injury occurs, the plaintiff contributed to their own injury.

Note: One who knows of the danger or risk involved, and unreasonably continues to use the product, may be held to have assumed the risk. This is a valid defense to strict liability.

Liability Based Upon Breach of Warranty

Rather than relay of negligence or strict liability as a basis for liability, courts may also impose liability for breach of warranty in a contract action.

Express Warranty:

Any advertising the seller represents to the purchaser about the product involved may be an express warranty and is considered part of a contract. If the warranty is breached (the product is not as represented as advertised), and causes damage or injury to the purchaser who has relied of the representation, the purchaser may have an action against the manufacturer or seller.

Implied Warranty:

Most actions are based upon implied warranties, an assurance from the seller to the buyer that the product will do no harm in normal use. If you buy a product (equipment) for a particular purpose, and rely on the seller's skill or judgment in supplying the product, there is an implied warranty that the goods sold are in fact for that purpose. If the doctor chooses to use the product for something else, there is no implied warranty.

Goods vs. services: Warranties do not apply in contract services from the doctor. Thus, the doctor does not have any implied warranty for any services performed. Therefore, any injuries that occur as a result of services rendered are based in tort law (negligence). Keep in mind that this covers services only. Any products you sell are subject to implied warranty liability. This type of liability is a form of strict liability. If you sell a product in your office and that product is defective or causes injury, both the manufacturer and doctor can be liable.

Damages for breach of warranty are substantially the same as in a strict liability action. All damages proximately caused by the breach, including pain and suffering and personal injury, are recoverable

Defenses to Warranty Actions:

1. Contributory negligence: This is usually not a defense in itself for the doctor in a negligence case. However, if the product was defective in some way, than the doctor has an action against the manufacturer or supplier or both.

2. Assumption of Risk: This is a defense in warranty action
Keep in mind you can still be sued from a negligence standpoint under strict liability or in breach of warranty cases if the patient is injured. However you may have an action against the manufacturer of supplier or both under strict liability or warranty law.

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