

# **Products Liability in New York**

**A Memorandum  
Discussing the Plaintiff's Burden of Proof in  
Products Liability Actions in the State of New York**

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## *New York Practice*

### **INTRODUCTION**

The history of products liability doctrine in New York reveals a trend of expanding liability in which new theories of recovery have become increasingly available to plaintiffs, while older restrictions have been gradually stripped away. Prior to the pivotal decision of *MacPherson v. Buick Motor Co.*<sup>1</sup>, a manufacturer's duties regarding product safety were contractual in nature. With limited exceptions, a manufacturer could be held liable only to those with whom he was in privity of contract, and only pursuant to duties voluntarily assumed in the contract.<sup>2</sup> In dispensing with the privity of contract requirement, the *MacPherson* decision began to shift the basis of products liability from contract to tort, and in so doing, vastly expanded the class of plaintiffs toward whom product manufacturers owe an affirmative duty of care. At the same time, the emergence of the doctrine of strict products liability substantially reduced plaintiff's burden of proof by shifting the focus from the manufacturer's conduct to the risks posed by the product. For example, by dispensing with a negligence standard, the strict liability doctrine exposes distributors and retailers of defective products to liability, despite their lack of meaningful control over the design and manufacturing of the product complained of, merely because they played a role in placing that product in the stream of commerce.

The above formula (more potential plaintiffs, more available defendants, and a lower

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<sup>1</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>2</sup> See *Winterbottom v. Wright*, 10 M & W 109, 11 L.J. Ex 415 (1842); *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865 (8<sup>th</sup> Cir. 1903).

burden of proof) has predictably resulted in voluminous litigation. However, the courts have steadfastly maintained that *strict liability* does not equal *absolute liability*. Even today's broad products liability doctrine recognizes that no product can be made absolutely safe, and that manufacturers and sellers cannot be made the insurers of their products. By understanding the various theories of products liability, the elements thereof and the available defenses thereto, the insurance industry and the defense bar can continue to put plaintiffs to their proof, and dispose of meritless claims.

### **THEORIES OF PRODUCTS LIABILITY**

Broadly speaking, a products liability action may be brought under any of the following three theories. There is substantial overlap among these theories, and in most cases, all three will be alleged in plaintiff's complaint and bill of particulars.

#### **Negligence**

As discussed above, a cause of action based upon strict liability in tort can be established without proof of negligence. However, negligence remains a viable basis of recovery which is almost always asserted in products liability cases. Generally speaking, A[t]he negligence theory requires the jury to find that the defendant failed to act reasonably in designing, testing, manufacturing, selling, inspecting or marketing the product.<sup>3</sup> Unlike strict products liability, the duty of care owed by a defendant for negligence purposes varies substantially based upon defendant's role in the process of designing, manufacturing, and marketing the product. Further, the defendant's duty to warn, for negligence purposes, varies based upon the status of the particular defendant.

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<sup>3</sup> 1A N.Y. P.J.I. 3d 2:120, at 523, citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS ' 96 (5<sup>th</sup> ed. 1984).

A product manufacturer has a duty to exercise reasonable care in the design, manufacture, testing, inspection, and marketing of any product that is reasonably certain to be dangerous if defective.<sup>4</sup> The test of reasonableness in the case of a product manufacturer is quite strict: the manufacturer is held to the same standard as an expert in the particular field.<sup>5</sup> As such, the manufacturer has a duty to keep abreast of developments in the state of the art, and must warn consumers of dangers that come to its attention following the sale of the product.<sup>6</sup>

A mere retailer or distributor, of course, generally has no role in the design or manufacture of an allegedly defective product. As such, the retailer's or distributor's duty of care is generally limited to reasonable testing and inspection, and the duty to warn. The scope of the duty to test and inspect is much narrower in the case of a retailer or distributor. Where the product is received in a sealed package from a reputable manufacturer, there is no duty to inspect.<sup>7</sup> Where the product is not sealed, a retailer or distributor is required to

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<sup>4</sup> See *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576; *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 11 N.E. 1050; *Thomas v. Winchester*, 6 N.Y. 397, *Kross v. Hayes Co.*, 29 A.D.2d 901, 287 N.Y.S.2d 926.

<sup>5</sup> See *Cornbrooks v. Terminal Barber Shops, Inc.*, 282 N.Y. 217, 26 N.E.2d 25.

<sup>6</sup> See *Cover v. Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378, 461 N.E.2d 864; *Andre v. Mect Corp.*, 186 A.D.2d 1, 587 N.Y.S.2d 334.

<sup>7</sup> See *Foley v. Liggett & Myers Tobacco Co.*, 136 Misc. 468, 241 N.Y.S. 233, *aff'd* 232 A.D. 822, 249 N.Y.S. 924; *Rosenbusch v. Ambrosia Milk Corp.*, 181 A.D. 97, 168 N.Y.S. 505; *Sparling v. Podzielinski*, 32 Misc.2d 227, 223 N.Y.S.2d 10; *Outwater v. Miller*, 3 A.D.2d 670, 158 N.Y.S.2d 562.

perform only ordinary physical testing and inspection. There is no duty to dismantle a product, subject it to chemical testing, etc. For duty to warn purposes, the retailer or distributor is held only to the standard of care of other sellers in the industry, and not to an expert standard as in the case of manufacturers.

Regarding the duty to warn generally, plaintiff's burden of proving causation takes on special significance. Consider the following hypothetical: a retailer of a product is aware of a danger associated with the product's foreseeable use, but fails to warn its customers. Plaintiff sues the retailer, alleging negligent failure to warn. If the retailer can prove that the plaintiff knew of the danger despite the absence of warnings, there would be no causal relationship between the retailer's negligence and plaintiff's injuries, and therefore, no liability.<sup>8</sup>

Compare this with a situation in which plaintiff sues a manufacturer, under a negligent design theory, and the manufacturer proves plaintiff was aware of the design defect prior to using the product. Plaintiff's conduct under these facts would constitute assumption of risk, bringing comparative fault principles into play, but would not break the chain of causation between defendant's negligence and plaintiff's injuries.

In evaluating a products liability claim based on negligence, initial investigation should focus on: the role of the insured in designing, manufacturing, and marketing the product; the condition of the product when it was received by the insured (i.e., whether it was received in a sealed package); and the instruction manuals and warning stickers which accompanied the product when it left the insured's hands. Early efforts should also be made to ascertain whether plaintiff was misusing the product at the time of the accident, and whether the danger was one of which plaintiff would have likely been aware, as where the danger was commonly known in the community or in plaintiff's profession.

### **Breach of Warranty**

The name of this theory is instantly misleading. It suggests both a contractual relationship between the parties and the voluntary assumption by defendant of liability for the breach of contractual warranties. However, the Court of Appeals has made clear that warranty liability does not depend upon privity of contract.<sup>9</sup> Thus, a remote user of a

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<sup>8</sup> See *Banks v. Makita, U.S.A., Inc.*, 226 A.D.2d 659, 641 N.Y.S.2d 875.

<sup>9</sup> See *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973);

product, or even a bystander may recover under a warranty theory. Furthermore, while a manufacturer can expressly disclaim the implied warranties of merchantability and fitness for a particular purpose as against other parties to a contract, such disclaimers are ineffective as against strangers to the contract such as a remote user or bystander.<sup>10</sup> Likewise, courts have suggested that a buyer's duty to promptly notify a seller of a breach of warranty do not apply to personal injury actions.<sup>11</sup> Thus, the now obsolete privity of contract requirement has been perversely turned on its head; strangers to a contract under some circumstances may have a greater right of recovery against product manufacturers than would parties to the contract!

Breach of warranty actions may be based upon express warranties (such as representations contained in advertising or labeling), the implied warranty of merchantability, and the implied warranty of fitness for a particular purpose. Breach of implied warranty overlaps considerably with strict liability, but the Court of Appeals has held that the two doctrines are not co-extensive, and that in some cases there can be liability for breach of warranty even though a strict liability claim has not been established.

In *Denny v. Ford Motor Co.*<sup>12</sup>, plaintiff sued the manufacturer of a sport utility vehicle that had rolled over when she swerved to avoid a deer. Plaintiff sued under both warranty and strict liability, and alleged that the vehicle was defective in that its high center of gravity and narrow track width resulted in a heightened risk of roll-over accidents. The federal

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*Heller v. Suzuki Motor Corp.*, 64 N.Y.2d 407, 477 N.E.2d 434, 488 N.Y.S.2d 132 ().

<sup>10</sup> See *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

<sup>11</sup> See *Silverstein v. R.H. Macy & Co.*, 266 A.D. 5, 40 N.Y.S.2d 916 (); *Sylvester v. R.H. Macy & Co.*, 291 N.Y. 552, 50 N.E.2d 656 ().

<sup>12</sup> 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995).

court jury returned a verdict finding that the vehicle was not defective for strict liability purposes, but that the defendant had breached its implied warranty of merchantability. Defendant moved for a new trial, arguing that the two findings were irreconcilable. The federal court certified to the Court of Appeals the question of the interrelationship between the two doctrines.

The Court of Appeals held that the two theories were not coextensive.

While the strict products concept of a product that is not reasonably safe requires a weighing of the product's dangers against its over-all advantages, the UCC's concept of a defective product requires an inquiry only into whether the product in question was fit for the ordinary purposes for which such goods are used.<sup>13</sup>

Although noting that, for practical purposes the distinction between the above defective concepts would usually have little or no effect, the court held that the jury could have simultaneously concluded that the utility vehicle was not defective, but that it was also not fit for its ordinary purposes.

### **Strict Products Liability**

A claim for strict liability in tort is established merely by proof that a product was in a defective condition when it left the defendant's hands, and that the defect was a substantial factor in causing plaintiff's injury, provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.<sup>14</sup>

The *Codling* test, while frequently cited, should not be taken at face value. Although the rule as stated suggests complete defenses based on misuse of product and contributory negligence, courts have applied comparative fault principles to strict liability claims, such that comparative negligence or foreseeable product misuse merely reduces plaintiff's

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<sup>13</sup> *Denny*, 87 N.Y. at 258, 662 N.E.2d at 736, 639 N.Y.S.2d at 256.

<sup>14</sup> *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

recovery.<sup>15</sup> Based upon these authorities, a more accurate statement of current New York law would read: A defendant is strictly liable in tort where:

1. The product was in a defective condition when it left defendant-s hands;
2. That defect was a substantial factor in causing plaintiff-s injuries; and
3. At the time of the occurrence, the product is being used (whether by the person injured or damaged or by a third person) for a purpose and in a manner reasonably foreseeable to the defendant; but
4. Plaintiff-s recovery shall be reduced pursuant to comparative fault principles to the extent that plaintiff is guilty of culpable conduct in misusing the product or in failing to discover the defect, perceive the danger, or otherwise avert his injuries or damage in the exercise of reasonable care.

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<sup>15</sup> It should be noted that comparative fault presents conceptual difficulties in the context of strict liability. Since the defendant-s negligence is not in issue, courts essentially must allocate fault between the *conduct* of the plaintiff and the *condition* of the product

Although softened by comparative fault principles, the *Codling* rule still protects defendants to a greater extent than the majority of other states, which adopt RESTATEMENT (SECOND) OF TORTS ' 402A. In the case of *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*<sup>16</sup>, the Court of Appeals expressly declined to adopt the general Restatement approach (although portions of ' 402A are frequently cited in support of specific case holdings). Unfortunately, *Micallef* offered absolutely no discussion of the distinctions between the two approaches, or the policy reasons that support choosing one over the other. However, the most significant distinction is that, under the Restatement approach, the comparative negligence of the plaintiff in failing to discover the defect is no defense. As discussed above, the *Codling/Micallef* formulation serves to reduce plaintiff's recovery to the extent that his own negligence was a substantial factor in his own injuries.

A strict liability action is generally based upon:

1. A manufacturing defect, i.e., where the particular product materially differs from its design or performance standards;
2. A design defect, i.e., where the product in question is manufactured as intended, but which should not be marketed because it is unreasonably dangerous;
3. Failure to warn.

It should be noted that in the case of a manufacturer, the application of strict liability principles will not differ substantially from the application of negligence principles. A plaintiff who can prove the existence of a manufacturing defect will have little difficulty proving negligent manufacture. Likewise, a design defect implies negligent design, and warnings so inadequate as to render a product defective imply negligent failure to warn. The real difference becomes apparent when strict liability is applied to defendants farther down the chain of distribution.

To illustrate, consider the hypothetical case of a retailer of a sealed product containing a latent manufacturing defect. Suppose the retailer has 100 such products on its shelf, and 99 of them are perfectly safe. Suppose further that the retailer could only detect the defect in the single unsafe unit by opening each of the 100 packages and subjecting the merchandise to exhaustive and destructive testing, which of course, he does not do. The plaintiff purchases the defective product from the retailer, and is injured as a proximate result of the

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<sup>16</sup> 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

latent manufacturing defect.

Under a negligence theory, the retailer would be free from liability. As discussed above, a retailer is not liable in negligence for latent defects not discoverable through ordinary inspection. Under a strict liability theory, however, the retailer is fully liable merely based upon his participation in placing the defective product in the stream of commerce. The absence of negligence is no defense. As discussed below, the retailer's best line of defense is to pass his liability through to the manufacturer.

### **COMMON LAW INDEMNIFICATION AND CONTRIBUTION**

An often-overlooked line of defense in products cases is the availability of common law indemnification and contribution. Although the doctrine of strict products liability is commonly perceived as dispensing with the element of fault, the doctrine exists primarily to provide a solvent defendant to an injured plaintiff. As such, liability among defendants in the chain of distribution of a defective product is joint and several. However, once plaintiff is compensated, no public policy prevents a defendant who is fairly low in the chain of distribution from passing liability through to those more directly responsible for the defect.

Callan, Regenstreich Koster & Brady recently represented a retailer of auto parts in an asbestos case. The plaintiff garage owner claimed to have been exposed to asbestos while working with various auto parts of which the client was a principal supplier. Some of the manufacturers of these auto parts had gone out of business years before the lawsuit was commenced, but most were still in existence and were made parties to the case. At a settlement conference before a mediator, we argued that our client's liability was negligible, given the presence of solvent defendants further up the stream of commerce from the insured. Despite the fact that the insured was theoretically liable for each and every asbestos-containing auto part it had sold to the plaintiff, we were able to settle plaintiff's claims against the insured for only a small fraction of the total settlement demand. The most surprising aspect of these proceedings was the mediator's comment that, despite having presided over numerous asbestos cases involving retailer defendants, she had never heard an indemnification theory advanced before!

The public policies that favor holding a party liable for product defects over which he has no meaningful control take into account the availability of contribution and

indemnification. In *Mead v. Warner Pruyn Division*<sup>17</sup>, the Third Department addressed at length the issue of whether or not a retailer of goods which he does not manufacture and over which he has no control as to hidden or latent defects can be subjected to the remedy of strict products liability simply as a retailer of such goods . . . .<sup>18</sup> Relying upon the RESTATEMENT (SECOND) OF TORTS ' 402A, as well as case law from other jurisdictions, the Court adopted the doctrine of retailer liability. Chief among the supporting policy considerations noted by the court were: the retailer's integral role in the overall producing and marketing enterprise; the possibility that the retailer may be the only member of that enterprise available to the injured plaintiff; and the retailer's ability to exert pressure on manufacturers to produce safer products.<sup>19</sup> The court relied heavily on the reasoning of the California Supreme Court to the effect that A[s]trict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.<sup>20</sup> The court further noted that:

[t]he retailer may seek contribution from the manufacturer as a joint tortfeasor or provide for contractual indemnity or finally, ***seek indemnity from the manufacturer based upon strict products liability.***<sup>21</sup>

In *Nutting v. Ford Motor Co.*<sup>22</sup>, the Third Department discussed the policy considerations favoring the imposition of strict products liability upon certain sellers.

These policy considerations include the ability of the seller, because of its continuing relationship with the manufacturer, to exert pressure for the improved safety of products and [to] recover increased costs within their commercial dealings, ***or***

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<sup>17</sup> 57 A.D.2d 340, 394 N.Y.S.2d 483 (3<sup>rd</sup> Dept. 1977)

<sup>18</sup> *Id.* at 340-41, 394 N.Y.S.2d at 483

<sup>19</sup> *Id.* at 341-42, 394 N.Y.S.2d at 484.

<sup>20</sup> *Id.* (citations omitted).

<sup>21</sup> *Id.* at 344, 394 N.Y.S.2d at 485-86 (citations omitted). *See also Kirby v. Rouselle Corp.*, 108 Misc.2d 291, 294, 437 N.Y.S.2d 512, 514 (Monroe Cty. 1981).

<sup>22</sup> 180 A.D.2d 122, 584 N.Y.S.2d 653 (3<sup>rd</sup> Dept. 1992).

***through contribution or indemnification in litigation;*** additionally, by marketing the products as a regular part of their business such sellers may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods.<sup>23</sup>

In *Sukljian v. Charles Ross & Son Co., Inc.*<sup>24</sup>, the Court of Appeals apparently accepted the above principles, although ultimately holding that they did not apply in the circumstances of that case:

Policy considerations have also been advanced for the imposition of strict liability on certain sellers, such as retailers and distributors of allegedly defective products. Where products are sold in the ordinary course of business, sellers, by reason of their continuing relationships with manufacturers, are most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, ***or through contribution or indemnification*** in litigation; additionally, by marketing the products as a regular part of their business such sellers may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods.<sup>25</sup>

## CONCLUSION

The courts often apply the theories of products liability interchangeably. However, a more fastidious approach to defining the boundaries between the theories, the elements plaintiff must prove, and the available defenses will pay dividends. Additionally, some familiarity with the public policies on which products liability is based is essential in order to properly allocate liability among the various defendants.

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<sup>23</sup> *Id.* at 128-29, 584 N.Y.S.2d at 657 (emphasis added) (citations omitted).

<sup>24</sup> 69 N.Y.2d 89, 503 N.E.2d 1358, 511 N.Y.S.2d 821 (1986).

<sup>25</sup> *Id.* at 95, 503 N.E.2d 1360, 511 N.Y.S.2d 823 (emphasis added).