

## **AN INTRODUCTION TO PRODUCT LIABILITY LAW**

When a person is injured by a defective product that is unreasonably dangerous or unsafe, the injured person may have a claim or cause of action against the company that designed, manufactured, sold, distributed, leased, or furnished the product. In other words, the company may be liable to the person for his injuries and, as a result, may be required to pay for his damages. That, in short, is product liability; and, not surprisingly, the law that governs this kind of liability is referred to as product liability law.

This article is intended to serve as a brief introduction to product liability law, especially as it relates to food. However, before we embark on our introductory tour of this subject, a few words of warning are necessary. First, you should keep in mind that whole books have been written about product liability law and that this article is, by necessity, an oversimplification of a complex subject. Second, for every general rule described below, you should assume that there exists innumerable exceptions. That is the way the law is, and, if it were otherwise, there would be a lot of lawyers out of work. Finally, you should remember that, as a rule, the law is different from state to state, and product liability law is no exception to this rule.

### **A BRIEF HISTORY OF STRICT PRODUCT LIABILITY LAW**

#### ***AN INJURY WITH NO REMEDY AT LAW***

It is exceedingly rare, in the law, when one can point to a general rule that is both well established and uniformly followed. For a very long time, however, there was such a rule, and it was said to have derived from an English case decided in 1842. The case is called *Winterbottom v. Wright*, and its facts are simple.

Mr. Winterbottom was seriously injured when the mail coach he was driving collapsed because of poor construction. The mail coach had been sold to the Postmaster General by its manufacturer, Mr. Wright, and the Postmaster in turn contracted with a company to supply horses to pull the coach, which then hired Mr. Winterbottom to drive the coach. Mr. Winterbottom sued Mr. Wright, only to have his case promptly dismissed based on the “general rule” that a product seller cannot be sued, even for proven negligence, by someone with whom he has not contracted – or, in the words of the law, someone with whom he is not “in privity.”

Seeming almost exasperated that such an obvious rule required any explanation at all, one Lord announcing the decision nonetheless explained:

If we were to hold that [Winterbottom] could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favour of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract.

Another Lord, equally concerned that the court not be bothered again by this kind of case, added:

We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. . . . Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

In other words, with the *Winterbottom* decision, the doors of the courthouse were locked to any one who did not possess the key of privity.

### ***THE ASSAULT ON THE CITADEL***

To paraphrase the universally esteemed expert on product liability law, Professor William Prosser, the history of product liability law is really the history of an assault on the citadel of privity. It is also the history of how injured people, like Mr. Winterbottom, were given back the keys to the courthouse, and allowed a remedy at law for the injuries they suffered as a result of a defective and unsafe products.

The change began, as it always does in the law, with the creation of exceptions to an otherwise well established general rule. 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. Then, in 1916, came the historic decision in *MacPherson v. Buick Motor Co.*, a decision in which Justice Benjamin Cardozo enlarged the “inherent danger” exception so that it swallowed the general rule of privity.

In words that are as famous as perhaps any written in a legal decision (at least with regard to product liability law), 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.

In so holding, Justice Cardozo made it clear that the *MacPherson* decision forever “put aside the notion that the duty to safeguard life and limb . . . grows out of contract and nothing else.” Concluding, he then announced that: “We have put the source of the obligation where it ought to be. We have put its source in the law.”

The effect of *MacPherson* was immediate and sweeping; its reasoning was accepted and followed by courts in every state, and its holding was not long subject to serious challenge. The doctrine of privity had been swept aside, and even the most conservative commentator no longer disputed that a manufacturer should be subject to liability for its negligence, and that this liability should extend to all those who are foreseeably expected to suffer injury as a result of a product's defective or dangerous condition. In short, a person injured by a defective product could sue the manufacturer for negligence even if he had purchased the product from someone else.

### ***THE RISE OF STRICT LIABILITY***

Strict liability is liability without privity and without negligence. While the *MacPherson* decision had held that a product manufacturer could be sued for its own negligence, even in the absence of privity, the notion that a manufacturer could be sued in the absence of privity, *and* in the absence of negligence, was not soon accepted and remained controversial.

Perhaps it is not surprising, then, that the rule of strict liability first developed in cases involving defective food. Neither should it surprise anyone that, the doctrine of strict liability came, as Professor Prosser has noted, “as the aftermath of a prolonged and violent national agitation over defective food, and the first decisions followed immediately upon the heels of the political overturn of 1912” that gave birth to our present day food and drug laws. Of course, it is also worth pointing out that *The Jungle*, Upton Sinclair's damning indictment of the meat industry was published in 1906, putting the issue of food safety first and forever on the map.

While the food cases decided in this time period used a number of methods to get around the privity rule, most depended on the notion that the seller of food has a special responsibility to the immediate purchaser of its food products, a responsibility that was referred to as a special implied warranty. Because this implied warranty was historically owed only to the immediate purchaser of the food, and not its ultimate consumer, courts at the turn of the century reinterpreted the rule so that the implied warranty was deemed to follow or “run with” the food item itself – almost as if a written guarantee accompanied each food item promising to pay any damages if the food was in some manner defective or caused an injury.

As a result, it did not matter whether the person injured by the defective food had been the person who purchased it; all that mattered was that the food was defective. Neither was it necessary to prove that the maker of the food had been negligent in its preparation; the fact that the food was defective was conclusive proof of negligence. This is strict liability.

### ***THE CITADEL FALLS***

This doctrine of strict liability – as based on an implied warranty theory – was restricted to food items for some time, but then gradually extended, on a case by case basis, to other products associated with intimate bodily use, like hair dye, clothing, and soap. Finally, in 1960, the New Jersey Supreme Court issued a landmark decision known as *Henningsen v. Bloomfield Motors*. Like the food cases on which it was based, the *Henningsen* decision eliminated the requirement of privity based on an implied warranty of safety, but then it extended the warranty

to all products and to every foreseeable user of the product. Thus, as Professor Prosser has famously noted, with the *Henningsen* decision, the “citadel of privity fell. What followed was unquestionably the most sudden and spectacular overturn of a well-established rule of law in the entire history of the law of torts.”

The final step in the development of strict product liability came, in 1963, in a decision nearly as famous as the *Henningsen* decision, the California Supreme Court issued a decision known as *Greenman v. Yuba Power Products*. In it, Chief Justice Roger Traynor took the final step in the creation of modern product liability law and pointed out what had long been obvious to many commentators: an implied warranty that ran with the product was a legal fiction created to achieve a desired result. So, like Justice Cardozo before him, Justice Traynor made it “clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.” As explained by Justice Traynor:

To establish the manufacturer’s liability it was sufficient that plaintiff proved he was injured while using the [product] in a way it was intended to be used as a result of a defect in the design and manufacture of which the plaintiff was not aware that made the [product] unsafe for its intended use.

In so ruling, the California Supreme Court became the first court in the United States to adopt this rule.<sup>1</sup> It was not, however, the last. The doctrine of strict product liability in tort is, for the most part, now the law in every one of the fifty states.

### **THREE THEORIES OF PRODUCT LIABILITY**

In most jurisdictions a person injured by a product may base his or her recovery of damages on one (or more) of four different legal theories: (1) negligence, (2) breach of warranty, and (3) strict tort liability. This section will provide a brief – hopefully instructive – introduction to each of these legal theories.

#### ***NEGLIGENCE***

Negligence is a relatively simple concept (unless explained by a law professor). In short, negligence is the failure to exercise ordinary care to avoid injuring someone to whom you owe the duty of care. Ordinary care is the care that a reasonable person would take based on the circumstances known to him at the time.

Of course, ignorance is no defense, so there is also the question of what a reasonable person would have been aware of under the circumstances. This is called constructive knowledge – in contrast to actual knowledge – and it is what the law decides a reasonable should

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<sup>1</sup> Prior to its adoption in the *Greenman* case, this rule had been promulgated as a “model rule” by the American Law Institute (ALI), in the Second Restatement of Torts. Because this model rule was published as § 402(A) of the Restatement, strict product liability is sometimes referred to by this section number. The influence of the ALI in the uniform adoption of the strict product liability rule cannot be overestimated, but it is also beyond the scope of the present article.

know under the circumstances. For example, if you know that it snowed all night, you *should* know that your sidewalk needs to be shoveled regardless of whether you look out of the window and actually see how much snow has accumulated. Similarly, in the context of food production, a company may not have known that the apples it was using to make unpasteurized apple juice were contaminated with *E. coli* O157:H7; however, if it knew that it was buying apples picked up from the ground, and that the orchard was in a rural area in which animals might be present, one could certainly argue it *should have* known that the apples might be contaminated.

It is not enough, however, to show that a company acted in a negligent manner, or that it failed to take an action that a reasonable person would take in like circumstances. An injured person must also demonstrate the existence of a duty, and that the duty was owed to him. While many people assume the law requires everyone to act in the same reasonable way towards everyone – which might be a good idea – in fact, we do not owe everyone the same duty of care. For example, if a person trespasses on my land, and he falls in my uncovered and unfilled pool and breaks his neck, it is his own tough luck that I did not replace the light bulb that might have alerted him to this unknown danger. On the other hand, if you are my guest, and you fall in my pool, I better hope that I have good insurance.

The failure to exercise ordinary care – which is usually referred to as a *breach* of the duty of care – must also have been the proximate cause of the injury. In other words, the injured person must be able to demonstrate that the injury would not have occurred but for the breach. This is often referred to as *but for* causation, and it is most often an issue in failure-to-warn cases where the manufacturer might argue that an injury might have occurred even if there had been a warning, or that it was the injured person's own negligence that caused the injury.

As a general principle, the duty to exercise ordinary care, and to supply a safe and non-defective product, applies to everyone in the chain of distribution, including a manufacturer who carelessly makes a defective product, the company that uses the product to assemble something without discovering the defect, and the retailer who should exercise greater care in offering such products for sale. Therefore, under the law, these individuals each owe a duty of care to anyone who is likely to be injured by the defective product, including the initial buyer, a family member, a bystander, or someone who leases the item or hold it for the purchaser.

Finally, the duty to exercise care involves every phase of getting the product to the public. For example, the product must be designed in a way that it is safe when used as intended. The product must be inspected and tested at appropriate stages in the manufacturing, distribution, and selling process. The product must be made from appropriate (*i.e.*, safe and non-defective) materials, and assembled with appropriate care to avoid against its negligent manufacture. The product's container or packaging must be adequate (and not itself dangerous or defective), and contain appropriate warnings and directions for use. An otherwise non-defective product can be made unsafe by the failure to provide adequate instructions for its safe use. Of course, in most cases, there is no duty to warn of obvious dangers; but, what constitutes an obvious danger is, in many cases, far from obvious itself.

## ***BREACH OF WARRANTY***

As you probably learned from the preceding section on the history of product liability law, warranty claims are governed by contract law. In simple terms, a warranty is a promise, claim, or representation made about the quality, type, number, or performance of a product.<sup>2</sup> In general, the law assumes that a seller always provides some kind of warranty concerning the product he sells and that he should be required to meet the obligation created by the warranty.

For the most part, the law that governs the sale of goods, in general, and warranties, in particular, is uniform from state to state. This makes sense, because if the law was not uniform, the interstate sale of goods would be made unimaginably complicated – more so than it already is. In any case, the law that governs the sale of goods is Article 2 of the Uniform Commercial Code – or, as it is typically referred to, the UCC. The UCC has been adopted in every state.

Under the UCC, there are two kinds of warranties: *express* and *implied*.

**Express Warranty:** An express warranty can be created in one of three ways: through an *affirmation of fact* made by the seller to the buyer. This affirmation must relate to the goods, it must become part of the *basis of the bargain*, and it must not be mere *puffery*. An express warranty can be created by spoken words during negotiations or written into a sales contract. Interestingly, an express warranty can also be created by silence in situations where not saying something has the effect of creating a mistaken impression about the quality of the goods sold.

Express warranties can also be created by samples shown to the buyer, by design specifications, by an earlier purchase of the same kind of product (where the buyer reasonably assumed that a second shipment would be of the same quality as the first), or by advertising or marketing claims. Finally, an express warranty can be about the quality of the goods at the time of the sale, but it can also be about the quality of performance of the goods in the future. This is important because, under the UCC, the time limit in which to file a lawsuit alleging a breach of warranty begins to run when delivery occurs – even if the defect is not discovered until later. If, however, the warranty concerns future performance – *e.g.*, the Acme widget-maker will be free of defects for five years – the clock does not start to run until the warranty expires.

Historically, a person could not sue for a breach of an express warranty unless he was in privity with the person who made the warranty. However, this requirement is no longer strictly enforced, and most courts recognize that, with express warranties, it is enough that the warranty was made, and that the person alleging breach of warranty reasonably relied on it.

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<sup>2</sup> For reasons that we do not need to go into here, a product is typically referred to as a “good” when discussed in the context of contract law. You should also keep in mind that a good is not a service, and that goods and services define two distinct categories in contract law. In simplest terms, a product or a good is any thing or tangible item that has value – *any* value. As mentioned, it is therefore contrasted with a service. As you no doubt recognize, people and companies also make promises and claims about the services they have agreed to provide and, as a result, the law of warranties also applies to services. However, the rules that apply to services are quite different than those that apply to products. You should therefore keep in mind that the discussion that follows applies only to product warranties.

One exception is where the buyer and seller are both merchants, *i.e.*, people who are sophisticated and experienced in dealing with the goods in question. In such a case, courts tend to hold the both the buyer and the seller to a much higher standard, and to more strictly enforce the rules of the UCC. As a result, there is sometimes a distinction made – not always justified – between how the rules are applied to merchants and consumers.

**Implied Warranty:** While an express warranty is created by an affirmative act, an implied warranty is presumed to exist unless the buyer clearly and unambiguously *disclaims* it in writing as a part of the sales agreement. There are two kinds of implied warranties in the UCC.

The *implied warranty of merchantability* is a kind of minimum requirements warranty. Because the UCC is mostly concerned with commerce as conducted between merchants, in contrast to commerce between merchants and consumers, the definition of this implied warranty speaks in terms of goods that will “pass without objection in the trade” and that “are fit for the ordinary purposes for which such goods are used.” Typically, the implied warranty also includes a warranty of reasonable safety.

The *implied warranty of fitness for a particular purpose* imposes a similar requirement in cases where the seller knows or has reason to know of a particular purpose for which the goods are required. In such a case, where the buyer relies on the seller to select or furnish goods that are suitable for a particular purpose, and the seller in fact has such expertise, an implied warranty of fitness for a particular purpose is created by law.

For example, assume that the buyer tells the seller that he needs a widget-maker that can make 500 widgets per hour to fulfill a contract the buyer has with a major widget retailer. If the seller is known in the trade as someone expert in the manufacture of widget-makers, and he recommends a particular model as being able to fulfill the requirements of the buyer, then the seller is making an implied warranty of fitness for a particular purpose. If the widget-maker proves to be inadequate, and only makes 300 widgets per hour, the buyer may file a lawsuit.

**One Final Word on Warranty Claims:** The careful reader might reasonably ask at this point why an injured person would assert a breach of warranty claim when she could assert a claim for strict product liability in tort. The short answer to this question is: Because you can. Is it necessary? Of course not. You only need one theory on which to recover damages, and courts will usually restrict a person to one or two theories at trial to avoid confusing the jury.

The long answer is that, by asserting more than one theory, a plaintiff is allowed to obtain more kinds of information about the defendant during the discovery phase of the litigation, information that the defendant may not want the plaintiff to discover about its operation. For example, by alleging the breach of an express warranty a plaintiff may be entitled to obtain information about how the product is marketed – information to which the plaintiff might not otherwise be entitled if he had alleged only a strict liability claim. Similarly, by alleging negligence, a plaintiff may be able to discover a lot about how the product was manufactured, information that would not be relevant if the only issue was whether the product was defective.

In short, pleading all three claims usually serves a strategic purpose, but it is usually not necessary to the plaintiff's recovery of damages.

### ***STRICT LIABILITY***

Strict product liability is liability without fault for an injury proximately caused by a product that is defective and not reasonably safe. Therefore, in establishing strict liability, the injured plaintiff need only prove that: (1) the product was defective, and (2) the product defect was the cause of the injury. In other words, the focus at trial is on the product, not the conduct of the manufacturer, because it does not matter whether the manufacturer took every possible precaution. If the product was defective and caused an injury, the manufacturer is liable.

**Another Caveat:** While in many states strict liability still applies to everyone in the chain of distribution, many states now protect retailers from strict liability and require an injured person to prove negligence to recover damages from the retailer. For the most part, this change occurred as a result of so-called tort reform movement based on the perception that "innocent" retailers were being treated as "deep-pockets" and sued simply because it was more convenient than suing the manufacturer, which was often located out-of-state. As a result, legislatures modified the common law (or judicially-created) principles of strict product liability to protect retailers from liability except in situation where it could be proved that the retailer was negligent in some manner, and this negligence contributed to the person's injuries.

Accordingly, the discussion that follows will discuss strict liability only as it applies to a product manufacturer. Keep in mind, however, that in many states this discussion applies equally to each person in the chain of distribution, regardless of fault.

**Defective And Unsafe Products:** As a general principle, manufacturer is not liable for a product-related injury unless the product is both defective and unsafe. In most states, however, this is a distinction without a difference, because an unsafe product is presumed to be defective. Therefore, we will here focus solely on the question of what makes a product defective.

***Manufacturing Defects:*** A product is considered to have manufacturing defect any time that it does not conform to design specifications or performance standards, or it deviated in some material way from otherwise identical units of the same product line. Manufacturing defects like these can result from improper assembly, missing parts, loose parts, warped parts, or the use of substandard or otherwise defective materials.

In the case of food products, a manufacturing defect can result, for example, when a potentially hazardous food is not cooked to the proper temperature, or when contaminated ingredients are used when the food is prepared. In some states, however, a distinction is made between "foreign" and "natural" contamination.

Under this approach, a food manufacturer is strictly liable only if "foreign" matter

is found in the food, *e.g.*, a piece of metal inside a candy bar. In contrast, there is no strict liability for the manufacturer's failure to remove a naturally-occurring substance from the food, *e.g.*, a piece of bone in chicken used to make a burrito, or pits in cherries. The rationale for this distinction is that the consumer has a duty to be on guard for the presence of natural objects, even if it can be shown that the object could have been removed with existing technology. Of course, even in the absence of strict liability, the person injured by a so-called natural substance could still recover damages if she can prove that the manufacturer was negligent.

Where the foreign-natural test really starts to break down is when faced with questions like whether *E. coli* O157:H7 is "natural" or "foreign" to something like hamburger. Notably, a few courts have concluded that the salmonella bacteria is "natural" to raw chicken, mainly because it is so prevalent, but there is no published decision yet on the *E. coli* question. For the most part, however, it would appear that the foreign-natural test is becoming disfavored, and the analysis is strictly one of consumer expectation – a far more logical and reasonable approach.

***Design Defects:*** A product has a design defect when its design or configuration is what makes it unreasonably dangerous. In contrast, a product with a manufacturing defect would have been safe had it been manufactured as designed to be.

In general, a safe product design must take into account the intended use of the product, as well as its reasonably foreseeable uses and misuses. Another factor to be considered is whether there existed, at the time of manufacturer, a safer alternative design. In some states, an injured person is required present evidence that the manufacturer could have used another design that would have prevented or reduced the risk of injury, damage, or death without impairing the product's utility and that the alternative design was economically and technology feasible. Safer alternative design rules are highly variable from state to state.

***Failure to Warn:*** Failure to warn claims allege that the product was made unsafe or dangerous by the manufacturer's failure to provide sufficient warnings, instructions, or labels with the product. As many courts and commentators have noted, and done so with much justification, a strict liability claim based on the failure to warn carries with it a heavy dose of negligence.

Unlike other kinds of strict liability claims, a failure to warn claim focuses, to a large degree, on the conduct of the manufacturer at the time of marketing. This kind of claim also focuses on the extent to which the manufacturer knew, or should have known, of a given risk or danger – which is, of course, also a negligence-based issue. However, like all other product liability claims, where failure to warn is alleged the manufacturer is assumed to possess the knowledge possessed by every other manufacturer and, as a result, knowledge by one is considered knowledge of all. Therefore, a duty to warn exists if the danger of an unreasonable risk or danger is known *or* reasonably knowable.

Once the duty to warn is established (as just discussed, by showing that a proper warning was required for the product's safe use, and that the danger or risk of harm was known or knowable), the sole issue then becomes whether the product and the warnings labels were provided with the product. Another issue is whether the warning that was given was, in fact, adequate. As a result, if the jury believes that the warning was not adequate, the product is deemed unreasonably dangerous, and liability is imposed.

## **VARIOUS DEFENSES TO PRODUCT LIABILITY**

Having set forth the legal theories on which a person may base a recovery for a product-related injury, I would be seriously deficient if I said nothing about defenses that are available to a manufacturer in a typical product liability lawsuit. Keep in mind, however, that the law that governs these legal defenses is more varied and inconsistent than the law just discussed above. As a result, the discussion that follows will be presented in the most general of terms.

### ***STATUTE OF LIMITATIONS***

In general, there are two kinds of legal defenses: those that avoid liability, and those that decrease the extent of liability. The statute of limitations is a defense that avoids liability by requiring an injured person to file her lawsuit within a specified period of times. If the lawsuit is not filed within the specified period of time it is dismissed, even if the claim is otherwise valid.

There are some exceptions, however. If the injured person is a minor, the clock does not start to run on the limitations period until she turns eighteen years old. Similarly, if the injury is such that a person may not know of the injury right away – like exposure to asbestos, for example – the clock does not start to run until the person discovers the facts necessary to realize she may have a claim. This latter exception is typically called the discovery rule, and there is much variation as to how much a person needs to know before the clock starts to run.

### ***STATUTES OF REPOSE***

Statutes of repose are similar to statutes of limitations but, instead of running from a date of injury, the time limitation usually begins to run from the date on which the product was made or sold. While there is little uniformity among the states on how long the time period is, it is usually at least ten years long. Additionally, in most states, statutes of repose are narrowly interpreted and strictly enforced. As a result, once the time period expires, there is usually no getting around the defense.

### ***FEDERAL PREEMPTION***

There are several circumstances in which federal law preempts state tort law. Federal preemption is a general doctrine of law that applies to many situations, not just product liability. The theory behind federal preemption is that, where a federal statute or regulation occupies an entire field of law, and subjects it to extensive regulation, there is no room left for state law to

operate within that field. The law of federal preemption is exceedingly complex and cannot be discussed at any length here. The simplest example of federal preemption is when the U.S. Congress expressly preempts a given field, such as with the pesticides or the maritime industry. Another example of federal preemption involves cigarettes where the Supreme Court held that legislation requiring warnings on cigarette packages insulated manufacturers against lawsuits based on state product liability law.

### ***UNAVOIDABLE DANGER***

Although manufacturers and sellers have a duty to take precautions and provide adequate warnings and instructions, the public can still obtain products that are unavoidably unsafe. A seller is not held strictly liable for providing the public with a product that is needed and wanted in spite of the potential risk of danger. Prescription drugs illustrate this principle, because all of them have the potential to cause serious harm if used unreasonably – although manufacturers of pharmaceuticals often face failure to warn cases.

### ***CONTRIBUTORY NEGLIGENCE***

There are many kinds of contributory negligence. As a general principle, contributory negligence is a situation in which more than one factor contributed to, or caused, the injury that forms the basis of the lawsuit. In some states, if the injured person himself contributed to the injury, and a jury determines he was more than 50% at fault for causing the injury, no recovery is allowed. However, in a majority of states, the injured person's recovery is simply reduced by his percentage of fault. This is typically referred to as *comparative fault*. Other kinds of contributory negligence (or comparative fault) include:

**Assumption of Risk**: This is the voluntary and knowing decision to place oneself in a dangerous situation, or to use a product with full knowledge and appreciation of the danger. In some states, assumption of risk is a complete defense that allows a manufacturer to avoid all liability. However, in most states, it is another form of comparative fault.

**Misuse**: Like the assumption of risk, the misuse of a product is, in a few states, a complete defense. In most states, however, it is another kind of comparative fault. In other words, a fact-finder is asked to determine to what percentage degree the injury was caused by misuse of the product in comparison with the percentage attributable to the product defect. But keep in mind that, as a general rule, a product manufacturer has a duty to anticipate the ways in which a person might foreseeably misuse the product. Therefore, as strange as it may sound, a manufacturer is not necessarily protected from liability because a person is injured by failing to follow directions if the failure was reasonably foreseeable and could have been guarded against through a better design or an adequate warning.

**Alteration**: Alteration, like misuse, is closely related to contributory negligence. Indeed, in many jurisdictions, the term alteration is no longer used. This defense is available where the manufacturer can demonstrate that a person was injured because the product was altered. For example, a person using a power saw may have been injured because he removed a protective

shield from the saw blade. In such a case, the manufacturer would argue that it was this alteration that caused the injury, while the injured person would argue that the saw was designed in a way that made the alteration too easy, and that the saw did not perform well with the shield in place. As with the other defenses discussed here, it will likely be up to the jury to decide whether this defense will be successful.

### ***INTERVENING OR SUPERCEDING NEGLIGENCE***

Like the statute of limitations defense, the defenses of intervening or superceding negligence provide a complete defense and cut off all liability. (For the most part, there is no difference between intervening and superceding negligence – although there once was.) Like contributory negligence, the defenses are based on an allegation that someone else's negligence caused the injury upon which the lawsuit is based. To be successful, the intervening negligence must have been unforeseeable. One common scenario involves the criminal act of a third-party.

For example, in one recent case, a person sued a car manufacturer because the trunk in which he had been placed by a car thief had no emergency-release mechanism. On the other hand, in a different case, the court held that it was for the jury to decide whether a person killed by a hit-and-run vehicle could sue the manufacturer of a car that had been in a roll-over accident. The person killed had pulled his own car to the side of the road to assist in the rescue of the person injured in the roll-over accident and was killed as he returned to his car. As this case should therefore make clear, the success of this kind of defense is highly dependent on the facts.

### ***FAILURE TO MITIGATE***

This defense is another form of contributory negligence. Because the law assumes that a person has a duty to take reasonable steps to prevent an injury from becoming worse, the failure to mitigate is another way of saying that a person contributed to his own injuries by failing to act in a reasonable manner. To the extent that the defendant can demonstrate that a percentage of an injury is attributable to the failure to mitigate, a jury award would be reduced by that percentage. In other words, the failure to mitigate is not a defense to liability but is an attempt by the defendant to lessen the amount of damages that the defendant would otherwise have to pay.

### **A FINAL WORD ON DAMAGES**

There are two kinds of damages for which an injured person may recover: compensatory damages and punitive damages. As the labels suggest, compensatory damages are intended to compensate, and punitive damages are intended to punish. The term compensatory damages is further divided into two subcategories: special (or economic) damages, and general (or non-economic) damages.

In simplest terms, special damages are those for which money has been, or will be, paid, and for which money has been, or will be, lost, *e.g.*, medical bills (both past and future), lost wages (both past and future), lost earning capacity, and property damages. At least with respect to past special damages, these are damages about which there is generally no dispute.

In contrast, there is always a dispute about general damages because, unlike special damage, these resist accurate quantification. These damages include such things as: (1) pain and suffering; (2) mental anguish and emotional distress; (3) loss of enjoyment of life; and (4) the reasonable fear of future illness. General damages also can include loss of consortium claims, *i.e.*, a claim asserted by the spouse or child of the injured person alleging injury to their relationship and the loss of love and affection.

Finally, with regard to punitive damages, suffice it to say that such damages are hugely controversial, but also relatively rare. Of course, every time a jury awards several million dollars in punitive damages it makes the headlines and leads to the erroneous assumption that this kind of award is commonplace – and it is not. In states that allow juries to award punitive damages, the award is usually based on a finding that a manufacturer acted with malice, gross negligence, or with a conscious disregard of a known safety risk. Some states also require that these facts be demonstrated with clear and convincing evidence, which is a difficult standard to meet. Still, in those cases where the facts support such an award –in the parlance of a plaintiff’s attorney – a jury can be expected to award a lot of money “to send a message” to corporate America.

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