

Product Liability: How It Turned Strict.

There is a commonly held misconception in the food industry—one that we run into quite a lot when attending trade shows and other industry-sponsored conferences to give presentations on the law of product liability. That misconception is that liability for a product-related injury requires proof of negligence. That is, if I as a person injured by a product am going to hold you, its manufacturer, liable, I must be able to present evidence the product was defective because you failed to use reasonable care in making it. And if I cannot come up with such evidence, or if you can prove you acted as carefully as possible, you cannot be sued for damages, at least not successfully. This is, however, wishful thinking, legally-speaking.

In all fifty states there is a form of what is called strict liability. The rule of strict liability was first announced by a court in 1963 in a case that involved a defective power tool. The case was *Greenman v. Yuba Power Products*, and it did away with the legal fiction that a manufacturer's liability for injury was based on the implied promise that the product was safe to use. Writing for the California Supreme Court, Chief Justice Roger Traynor, widely considered a father of product liability law, stated that it was "clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."

Under the new rule of strict liability, to hold a manufacturer liable, a person injured while using a product need only show that: (1) the product was defective; (2) it was used as intended; and (3) the defect caused the injury. The care used in the manufacture of the product is irrelevant to the determination of liability. The only issue in a product liability case is the defectiveness of the product, not the manufacturer's conduct in somehow allowing the defect to arise. As a result, proof of negligence is not required to recover damages.

There are as many kinds of product defects as there are product injury cases. Nonetheless, defects are usually grouped into three categories: (1) manufacturing defects, (2) design defects, and (3) marketing defects, which include insufficient instructions and failure-to-warn cases. For cases involving unsafe food, it is nearly always a manufacturing defect at issue, especially when pathogens such as *E. coli* O157:H7, *Salmonella*, or hepatitis-A are involved. And while it is true that a manufacturer is not liable for a product-related injury unless the product is both defective and unsafe, in food cases this is a distinction without a difference. Food that is unsafe, because it is unfit to eat, is by definition defective—and vice versa.

The meat industry has argued that *E. coli* O157:H7 should not be treated as a defect since it cannot be easily eliminated from products like ground beef. But this argument has not yet been accepted, in part because of policy considerations that have historically favored the consumer. It is thought that, since people must eat, and that there is no way to know if purchased food has in it contaminants that might make someone sick—or worse, kill them—then the manufacturer should on balance be the one held responsible.

The rationales supporting the rule of strict liability are hotly debated, except, for the most part, when it comes to food cases. Manufacturers are assumed to be in the best—and some might say only—position to prevent the defects from occurring. They are also assumed to be in the best

position to pay for the risk by buying insurance, or passing along the cost of the risks in the form of increased prices. And given that the person injured by a contaminated food product is usually viewed as being an innocent victim, there has never been much controversy over holding strictly liable the manufacturer as a means of compensation.

Of course, these rationales hold less true when it is a retailer or distributor we are talking about. And that is why, as strict liability began to apply up and down the chain of distribution, making everyone who touched the product a potential defendant, the move to abolish or reform the rule of strict liability gained significant traction. But even when that reform was through, and most states had significantly revised the rules of product liability, one rule remained unchanged: the manufacturer of a product that is unsafe as a result of a manufacturing defect is liable to the injured person without regard to whether there is evidence of negligence or fault.

NEXT MONTH: Chain of distribution liability.

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