

Elements of Torts in the USA

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Keywords

breach, causation, damages, definition, duty, legal cause, proximate cause, res ipsa loquitur, tort, torts

Table of Contents

Introduction	2
books you may need	2
disclaimer	3
Definition of Torts	3
Overview	5
1. Duty	6
2. Breach of Duty	8
3. Causation	8
4. Damages	10
Res Ipsa Loquitur	10
history	12
Products Liability	13
A. circumstantial proof	15
B. history of products liability	15
Escola v. Coca Cola (Cal. 1944)	15
Greenman v. Yuba Power Products (Cal. 1963)	18
Suvada v. White Motor (Ill. 1965)	20
Dippel v. Sciano (Wisc. 1967)	22
Standler's comment	24
C. Massachusetts uses breach of warranty	24
Warranties in Massachusetts	25

Fraud	29
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Introduction

Torts is a broad area of law in the USA in which the plaintiff sues a defendant for a personal injury or damage to property caused by the negligence or wrongful conduct of the defendant. The historical evolution of torts in England and the USA was by common law: legal rules made by judges in the process of deciding cases. Because torts evolved in an ad hoc fashion, there is no grand design.

This essay is intended to present the basic principles of tort law with citations to the authoritative RESTATEMENT SECOND OF TORTS (in four volumes, published during 1965-1979) and sometimes citations to cases decided by the highest courts in New York, Pennsylvania, Florida, or California. I also cite to the final edition of the venerable torts textbook by William L. Prosser,¹ which I cite in the text as PROSSER AND KEETON.

While reading someone else's outline the night before the final examination *might* enable a student to obtain a passing grade in a law school class, the real value of an outline is in the effort that a student makes to synthesize information from cases, statutes, and reference books (e.g., RESTATEMENTS) — learning to synthesize information is just as important as understanding torts. So I tell law students to make their own outline, instead of copying this document. Furthermore, this document is *not* a survey of *all* torts — this essay is only a sketch of the fundamentals of negligence and products liability, plus a few details that I find interesting.

books you may need

An attorney needs to read and understand a torts textbook — typically more than 1000 pages — *before* attempting to litigate a tort case. Leading textbooks include:

- PROSSER AND KEETON ON TORTS, 5th edition, 1984. (Old, but a classic law textbook that continues to be frequently cited by judges.)
- DOBBS' LAW OF TORTS, 2000.

Both Prosser and Keeton and Dobbs' are also available in a two-volume practitioner's treatise edition that contains more detail than the one-volume hornbook for law students.

Law libraries will have a copy of the six-volume treatise, HARPER, JAMES AND GRAY ON TORTS, formerly known as HARPER & JAMES.

¹ W. Page Keeton, editor, PROSSER AND KEETON ON THE LAW OF TORTS, West Publishing, Fifth Edition (1984).

I have cited few of the landmark cases in torts, because excerpts from those cases are included in case books for law students, such as:

- Prosser, Wade, Schwartz, Kelly, & Partlett, *CASES AND MATERIALS ON TORTS*, 12th edition, 2010.
- Keeton, Sargentich, & Keating, *TORT AND ACCIDENT LAW: CASES AND MATERIALS*, 4th edition, 2004.
- Epstein, *CASES AND MATERIALS ON TORTS*, 9th edition, 2008.
- Franklin, Rabin, & Green, *TORT LAW AND ALTERNATIVES, CASES AND MATERIALS* 9th edition, 2011.

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at <http://www.rbs2.com/advice.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Definition of Torts

The word *torts* is rarely used by nonattorneys and the definitions in dictionaries are not particularly enlightening. The venerable legal treatise by Prosser and Keeton attempts to define tort, largely unsuccessfully:

Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.

PROSSER AND KEETON, § 1, p. 2 of Hornbook edition.

Prosser and Keeton then criticize as “inaccurate” what they just said, by noting that other remedies, such as injunctions, restitution, and self-help are available. In desperation, Prosser and Keeton try again to define tort:

It might be possible to define a tort by enumerating the things that it is not. It is not a crime, it is not breach of contract, it is not necessarily concerned with property rights or problems of government, but is the occupant of a large residuary field remaining if these are taken out of the law.

Ibid. But Prosser and Keeton call this definition “illusory”.

Part of the problem in making a precise definition of *torts* is that this area of law has expanded in an ad hoc fashion by judges (i.e., common law) and legislatures. Torts is a large subject area in litigation, in which a victim (e.g., plaintiff) seeks a remedy from some defendant (e.g., person, corporation, government) who harmed the victim. The easiest way to get a sense of *torts* is to list the major areas of tort litigation:

- personal injury (e.g., automobile accident, slip and fall, dog bite)
- medical malpractice
- products liability (e.g., defect in either manufacturing or design of product, failure to warn)
- wrongful death: survivor recovers economic value of remainder of decedent's life
- wrongs involving real property: nuisance against nearby landowner, trespass on land
- negligent misrepresentation, fraudulent misrepresentation
- wrongs involving tangible property: conversion, "trespass to chattels" (N.B., same occurrence could also result in criminal prosecution for theft)
- infringement of intellectual property (e.g., patent, copyright, trademark, trade secret)²
- defamation (i.e., libel or slander)
- intentional wrongs against a person: assault, battery, false imprisonment, intentional infliction of emotional distress. (N.B., assault and battery can also be crimes. The government prosecutes crimes, while victims prosecute torts.)

² **Copyright:** *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972) ("Copyright infringement is in the nature of a tort,"); *Taylor v. Meirick*, 712 F.2d 1112, 1117 (7th Cir. 1983) (Posner, J.) ("A tortfeasor has a duty to assist his victim. This principle applies to a statutory tort such as copyright infringement."); *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997) (willful infringement of copyrights is an intentional tort); *Bucklew v. Hawkins, Ash, Baptie & Co., LLP.*, 329 F.3d 923, 931 (7th Cir. 2003) ("Copyright infringement unlike patent infringement is an intentional tort,").

Patent: *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1365 (Fed. Cir. 2008) ("Patent infringement is a tort. *Schillinger v. United States*, 155 U.S. 163, 169, 15 S.Ct. 85, [87, ...] (1894).").

Trademark²: *International Order of Job's Daughters v. Lindeburg and Co.*, 633 F.2d 912, 915 (9th Cir. 1980) (In general, the common law has been understood as protecting against the broad business tort of 'unfair competition.' Trademark infringement is a species of this generic concept. See *New West Corp. v. NYM Co. of California*, 595 F.2d 1194, 1201 (9th Cir. 1979)."); *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1388 (8th Cir. 1991) ("Infringement of a trademark is a tort, *Union National Bank v. Union National Bank*, 909 F.2d 839, 843 n. 10 (5th Cir. 1990); *Keds Corp. v. Renee Int'l Trading Corp.*, 888 F.2d 215, 218 (1st Cir. 1989),").

- wrongs against a business, such as “unfair competition” or trademark infringement
- dignitary harms against a person, such as
 - invasion of privacy: intrusion on seclusion, unreasonable publicity given to private life, publicity placing person in false light
 - civil rights violations, e.g., 42 U.S.C. § 1983

Overview

There are four elements to a tort, and plaintiff must prove each of these four elements:

1. duty,
2. breach of duty (i.e., fault),
3. causation, and
4. injury.

RESTATEMENT SECOND OF TORTS §§ 281, 328A; PROSSER AND KEETON, § 30.

Each of these four elements is considered in the following four sections of this essay. A *tortfeasor* is a person who commits a tort. A tortfeasor is generally the defendant in tort litigation, but there are exceptions (e.g., an employer or insurance company might be the defendant, if the tortfeasor dies then his/her executor might be the defendant, etc.).

Notice that someone can be negligent, but if they owe no *duty* to the plaintiff, then there is no tort. Someone can be negligent, but if their negligence does not *cause* the injury to the plaintiff, they are not liable in tort. And someone can be negligent — even reckless — but if there is no *injury* to the plaintiff, then there is no tort. A plaintiff needs to satisfy *all four* elements before winning a tort case.

In most torts, the defendant’s actions were an accident (e.g., defendant was negligent), but torts also cover wrongs where the defendant intended to harm the victim. Sometimes one sees the statement that the central idea in [most] torts is the concept of *fault*. Fault is the departure of defendant’s conduct from a minimum acceptable standard of conduct. In other words, fault is the breach of the *duty* mentioned above. At the beginning of this paragraph, I say “most torts”, because there are a few, but important, torts in which liability is imposed without finding fault with the defendant’s conduct. These so-called *strict liability* torts include:

1. products liability (see page 13, below)
2. keeping of wild or ferocious animals. RESTATEMENT SECOND OF TORTS § 506, et seq..
3. abnormally dangerous activities (e.g., storing, transporting, or using explosives in a populated area). RESTATEMENT SECOND OF TORTS § 519, et seq.

1. Duty

Statement of duty:

A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

PROSSER AND KEETON, § 30. See also RESTATEMENT SECOND OF TORTS §§ 4, 328A(a).

As a general rule, the duty of conduct is what a “reasonable man [of ordinary prudence]” would do in the same factual circumstances. RESTATEMENT SECOND OF TORTS § 283; PROSSER AND KEETON, § 32. Fortunately, there are further rules of law that make the duty more predictable.

A legal duty can be established by:

- A. a statute or government regulation that is intended to prevent the injury that occurred in the case. RESTATEMENT SECOND OF TORTS § 285(a), 286, 288, 288A. An *unexcused* violation of a statute or regulation is negligence per se.³ RESTATEMENT SECOND OF TORTS § 288B. Further, “compliance with a ... [statute or regulation] does not prevent a finding of negligence where a reasonable man would take additional precautions.” RESTATEMENT SECOND OF TORTS § 288C.
- B. common law. RESTATEMENT SECOND OF TORTS § 285(c).
- C. engineering standards, or custom in the profession or trade. RESTATEMENT SECOND OF TORTS § 295A. *Texas & Pacific Railway v. Behymer*, 189 U.S. 468, 470 (1903) (Oliver Wendell Holmes, J.) (“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”).
- D. decision of the judge in the tort case. RESTATEMENT SECOND OF TORTS §§ 285(d), 328B(b) and (c).
- E. A person who undertakes to provide services in the practice of a profession (e.g., physician, attorney, engineer) or trade (e.g., automobile mechanic) “is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing” RESTATEMENT SECOND OF TORTS § 299A.

A defendant who has “superior attention, perception, memory, knowledge, intelligence, and judgment” is held to a higher standard than an ordinary person. RESTATEMENT SECOND OF TORTS § 289, comment *m*. If a professional has greater skill than the average in that profession, then that professional is held to a higher standard. RESTATEMENT SECOND OF TORTS § 299, comment *e* and

³ Negligence per se means that the negligence is conclusively determined. PROSSER AND KEETON, § 36, p. 230 of Hornbook edition.

§ 299A. On the other hand, if the defendant was ill or physically disabled at the time of the alleged tort, the defendant must conform his/her conduct to “that of a reasonable man under like disability.” RESTATEMENT SECOND OF TORTS § 283C. The concept of reasonable man expands and contracts, according to the particular defendant’s condition.

There is a complicated balancing of risk of harm and benefit to society. RESTATEMENT SECOND OF TORTS § 291-298. Some acts are unreasonably dangerous even if done carefully, while other acts “are dangerous only because of the improper manner in which they are done.” RESTATEMENT SECOND OF TORTS § 297, comment *a*. “The greater the danger, the greater the care which must be exercised.” RESTATEMENT SECOND OF TORTS § 298, comment *b*, and § 293(c). The RESTATEMENT specifically mentions “firearms, explosives, poisonous drugs” and high-voltage electricity as requiring a high degree of care. *Ibid*. For example, consider a major surgical operation that carries a risk of death, but also is the best hope of curing some disease — the fact that the patient dies does *not* prove negligence and does not prove that the operation was *unreasonably* dangerous.

A duty generally occurs when anyone acts, or fails to act, in a situation in which harm can result to another person. Such acts are known in tort law as an *undertaking* — when D undertakes to provide a service, a duty is imposed on D to use due care to avoid harm.

But, as a general rule, there is *no* duty to rescue someone from peril. RESTATEMENT SECOND OF TORTS § 314. Once a person has begun a gratuitous rescue, the person can abandon the rescue at any time, unless “he has put the [victim] in a worse position than the [victim] was in before the [rescuer] attempted to aid him.” RESTATEMENT SECOND OF TORTS § 323, comment *c*, and § 324(b).

There is a duty to rescue someone from peril in two different situations:

1. when a person has a “special relationship” to the victim (e.g., passenger on a common carrier, guest of a hotel/motel, child in custody of school, etc.). RESTATEMENT SECOND OF TORTS § 314A.
2. A person who does a dangerous act (i.e., who creates a peril) “is under a duty to exercise reasonable care to prevent the risk” RESTATEMENT SECOND OF TORTS § 321. A tortfeasor who “has caused such bodily harm ... [that made the victim] helpless and in danger of further harm, ... has a duty to exercise reasonable care to prevent further harm.” RESTATEMENT SECOND OF TORTS § 322.

The question of the existence of a duty is a matter of law, for the trial judge to decide. *Espinal v. Melville Snow Contractors, Inc.*, 773 N.E.2d 485, 487 (N.Y. 2002) (“As we have often said, the existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations”); *Mindala v. American Motors Corp.*, 543 A.2d 520,

524 (Pa. 1988) (“Whether a duty exists is in the first instance a question of law.”); RESTATEMENT SECOND OF TORTS § 328B(b) and (c).

2. Breach of Duty

There are several ways to breach a duty of care:

- A. **negligence** “either an act, or an omission to act where there is a duty” to act. RESTATEMENT SECOND OF TORTS § 282, comment *a*, see also § 284 The concept of negligence includes what nonlawyers call an “accident” — a bad result that occurred without deliberate planning and without intent to produce the bad result.
- B. gross negligence, or **reckless disregard**, or wanton conduct, is a more egregious breach of a duty than negligence. A tortfeasor is reckless if he/she knew that he/she was creating a high degree of risk, but he/she is indifferent to that high risk. RESTATEMENT SECOND OF TORTS § 500; PROSSER AND KEETON, § 34.
- C. **intentional tort**, willful or deliberate misconduct, with intent to cause harm.

Gross negligence — and intentional torts — are generally punished more severely than mere negligence. Sometimes tariffs or contracts will exculpate someone from ordinary negligence, but *not* from gross negligence or willful misconduct.

3. Causation

Law professors and judges continue to disagree about some details in tort law, especially proximate causation. This means that there is not one, unique correct answer to some questions about proximate causation.

Sometimes, an easy test to apply is: if P’s injuries would not have occurred “but for” the negligence of defendant, then defendant is the proximate cause of those injuries. This test is valid even if some of the injuries were caused by a subsequent actor in a causal chain. *McCahill v. New York Transp. Co.*, 94 N.E. 616, 618 (N.Y. 1911); *Miller v. Board of Education, Union Free School Dist. No. 1 of Town of Albion*, 50 N.E.2d 529, 531 (N.Y. 1943); *Whitner v. Von Hintz*, 263 A.2d 889, 894 (Pa. 1970) (“The Pennsylvania but for formulation, on the other hand, says that there is liability if the harmful result would not have come about but for the negligent conduct. That is, if the conduct were the *Causa sine qua non* of the result, there is responsibility,”); *Ford v. Jeffries*, 379 A.2d 111, 114 (Pa. 1977) (“The determination of the issue [proximate cause or legal cause] simply involves the making of a judgment as to whether the defendant’s conduct although a cause in the ‘but for’ sense is so insignificant that no ordinary mind would think of it as a cause for which a defendant should be held responsible.”). Note that the “but for” test is equivalent to the Latin phrase “*sine qua non*”. PROSSER AND KEETON, § 41.

The RESTATEMENT SECOND OF TORTS §§ 431-432 in the year 1965 offered a different view of proximate causation, which the RESTATEMENT calls “legal cause”.

The actor’s negligent conduct is a legal cause of harm to [a victim] if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability

RESTATEMENT § 431. If the harm would have occurred “even if the actor had not been negligent”, then there is no legal cause. RESTATEMENT § 432(1). The Pennsylvania Supreme Court explicitly preferred the RESTATEMENT to the older “but for” test. *Whitner v. Von Hintz*, 263 A.2d 889, 894 (Pa. 1970)

An interesting torts problem occurs when the initial tortfeasor starts a chain of adverse events that harm plaintiff. The general rule is that the initial tortfeasor is the proximate cause of *all* of the subsequent adverse events, provided that each subsequent adverse event results from “normal efforts” of a third party, even if the third party was negligent. RESTATEMENT SECOND OF TORTS §§ 443, 447, 457. Law professors enjoy creating elaborate hypotheticals for law school exams in which there is a long chain of injuries. Suppose automobile driver, A, hits a pedestrian, P. A Good Samaritan, B, stops to help P, but B unfortunately exacerbates P’s injuries. On the way to the hospital, the ambulance carrying P and driven by C swerves to avoid a driver who failed to yield the right-of-way to the ambulance, the ambulance hits a tree, and P is further injured. In the hospital, surgeon D negligently treats P. D’s negligence causes P to have a longer and more painful recovery. After discharge from the hospital, P slips and falls on the ice on the hospital’s sidewalk, breaking his leg again. The law in the USA is that the initial tortfeasor, A, is legally responsible for the injuries inflicted by A, B, C, D, and the hospital’s icy sidewalk.

In the example in the preceding paragraph, suppose that an earthquake caused the ambulance to hit the tree. The earthquake is arguably extraordinary — earthquakes are rare events — and the earthquake breaks the causal chain, at least relieving A of any liability for the ambulance hitting a tree.

Prosser and Keeton offer the rule: “... intervening conduct or misconduct of a kind that is rare and unusual, and in that sense not reasonably foreseeable, will sever the chain of causation.” PROSSER AND KEETON, § 102. Risks must be foreseeable before they can be part of a causal chain, *unforeseeable* risks break the causal chain. PROSSER AND KEETON, §§ 42, 44.

The RESTATEMENT SECOND OF TORTS §§ 440-461 contains a long list of rules on superseding causes and intervening forces that interrupt the causal chain. I think it is clearer if one searches the case law in the relevant jurisdiction, instead of relying on these sections of the RESTATEMENT.

A difficult proximate causation determination arises when there is an electrical outage caused by the negligence or willful act of an electric utility. Suppose the outage causes a streetlamp or traffic signal to go dark. As a result, a pedestrian is hit by a car at night or two automobiles collide

at the intersection with the nonfunctioning traffic signal. There are arguably two tortfeasors in these cases: (1) the electric utility and (2) the negligent driver who driving too fast at night or who failed to stop at the intersection. The electric utility, of course, argues that the negligence of the driver was a superseding event that is the proximate cause of the accident. For a list of cases on this issue, see my essay at <http://www.rbs2.com/outage.pdf> in the sections on Florida traffic signal cases and *Florida Power & Light v. Goldberg*.

The question of proximate causation is a matter of fact, for the fact-finder to decide. *Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105, 1116-1118 (Fla. 2005); *Bush v. St. Clare's Hosp.*, 621 N.E.2d 691 (N.Y. 1993) (memorandum decision); RESTATEMENT SECOND OF TORTS § 328C(c).

4. Damages

In most cases, there must be either a physical injury to the victim or damage to the victim's property, but sometimes emotional distress, embarrassment, or dignitary harms are adequate for recovery.

The amount of damages is a question to be decided by the fact-finder. RESTATEMENT SECOND OF TORTS § 328C(d).

Res Ipsa Loquitur

In civil litigation, including torts, the defendant has a legal obligation to supply documents in their possession that are relevant to the litigation, and the defendant and their employees have an obligation to testify in depositions and/or at trial. Sometimes, plaintiffs lawyers encounter defendant(s) who are uncooperative: the defendants refuse to provide information that they know. In such a conspiracy of silence, a legal rule called "res ipsa loquitur" can sometimes assist the plaintiff in obtaining Justice. Res ipsa loquitur is a rule of evidence, to be applied in a case where something unusual (and harmful) happened during an event controlled exclusively by defendant, and the inference is that defendant was responsible for that unusual event. Despite being a rule of evidence, res ipsa loquitur is discussed in torts textbooks, because this rule is only used in torts.

A famous case involving res ipsa loquitur is *Ybarra v. Spangard*, 154 P.2d 687 (Calif. 1944) (en banc). In that case, the plaintiff Ybarra had surgery in a hospital for appendicitis. After awakening from general anesthesia after the surgery, Ybarra had pain in his previously good shoulder. After discharge from the hospital, the injury to Ybarra's shoulder developed into paralysis and atrophy of shoulder muscles. The physicians and nurses who were present during

the surgery all denied knowledge of why Ybarra had an injured shoulder.⁴ What is obvious — but *not* legally in evidence at the trial — is that Ybarra fell off the table when he was unconscious and landed on his shoulder, or some other traumatic injury occurred to Ybarra’s previously good shoulder. The California Supreme Court directed the trial court to apply the rule of *res ipsa loquitur*. The California Supreme Court remarked:

Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for [defendants] to insist that he identify any one of them as the person who did the alleged negligent act.

Ybarra, 154 P.2d at 690. The trial judge found all of the defendants were negligent and the decision was upheld on appeal. *Ybarra v. Spangard*, 208 P.2d 445 (Cal.App. 1949). Incidentally, it took ten years from the time of his injury for Ybarra to obtain Justice, even back in the days when court dockets were not as crowded as today.

The formal statement of the rule of *res ipsa loquitur* is:

The doctrine of *res ipsa loquitur* has three conditions: “(1) the accident must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.”

Ybarra v. Spangard, 154 P.2d 687, 689 (Calif. 1944) (quoting an early edition of Prosser’s textbook on torts). The final edition of Prosser’s textbook has the same words, except that “accident” has been changed to “event”. PROSSER AND KEETON, § 39. The RESTATEMENT has a different formulation:

- (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
 - (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
 - (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
 - (c) the indicated negligence is within the scope of the defendant’s duty to the plaintiff.

RESTATEMENT SECOND OF TORTS § 328D (1965).

⁴ At trial each of the defendants who were present during the operation “testified that while he was present he saw nothing occur which could have caused the injury”. *Ybarra v. Spangard*, 208 P.2d 445, 446 (Cal.App. 1949).

history

PROSSER AND KEETON, § 39, cite a case in England (*Byrne v. Boadle*) in the year 1863 as the first appearance of *res ipsa loquitur*. My quick search of all state and all federal cases in Westlaw shows that there are at least three cases in the USA during the 1850s that apply this rule, but without using the phrase “*res ipsa loquitur*”.⁵ In the USA, the rule first arose in cases involving injuries to passengers by a common carrier, for which decisions about operations were solely in the control of defendant. By the time the first edition of WIGMORE ON EVIDENCE appeared in the year 1905, there were already 465 reported cases in the USA that mentioned this phrase, although not all of these cases involved the rule of evidence now known as *res ipsa loquitur*. The rule was apparently motivated in the USA by injuries from machinery and electricity.⁶ In October 1926, the Kansas Supreme Court quoted Prof. Wigmore:

With the vast increase, in modern times, of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed ‘accident,’ by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. ‘*Res ipsa loquitur*’ is the phrase appealed to as symbolizing the argument for such a presumption. * * * What the final accepted shape of the rule will be can hardly be predicted. But the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user. (2) Both inspection and user must have been at the time of the injury in the control of the party charged. (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him, but inaccessible to the injured person.

⁵ *Fuller v. Naugatuck R. Co.*, 21 Conn. 557, 1852 WL 652 (Conn. 1852) (The West headnote mentions “*res ipsa loquitur*”.); *Farish & Co. v. Reigle*, 11 Gratt. 697, 1854 WL 3144 at *3, *8 (Va. 1854) (jury instruction: “... if the jury believe from the evidence that the plaintiff was injured by the overturning of the coach, the prima facie presumption is, that it occurred by the negligence of the coachman, and the burden of proof is on the proprietors of the coach to establish that there was no negligence whatsoever; ...” Cites STORY ON BAILMENT, § 601a. The West headnote calls this rule “*res ipsa loquitur*”.); *Fairchild v. California Stage Co.*, 13 Cal. 599, 604 (Cal. 1859) (cites Justice Story, BAILMENT § 601 for the rule that “when injury or damage happens to the passengers [of a stage coach], ... , the presumption prima facie is, that it occurred by the negligence of the coachman; and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatsoever, ...” The West headnote calls this “*res ipsa loquitur*”.); *Mullen v. St. John*, 12 Sickels 567, 1874 WL 11221 at *2 (N.Y. 1874) (First reported case in USA to cite *Byrne v. Boadle* and use phrase “*res ipsa loquitur*”).

⁶ *Pointer v. Mountain Ry. Const. Co.*, 189 S.W. 805, 816 (Mo. 1916) (Bond, J., dissenting) (“This rule has been applied to injuries caused by railroads, elevators, electric wires, and divers other appliances involving the use of powerful forces or machinery. WIGMORE ON EVIDENCE, vol. 4, § 2509, ...”).

Mayes v. Kansas City Power & Light Co., 249 P. 599, 602 (Kan. 1926) (quoting WIGMORE ON EVIDENCE, § 2509). I like Prosser's formulation of *res ipsa loquitur* better than Wigmore's formulation.

Products Liability

Products liability began to rapidly evolve in the 1960s. Writing in the year 1965, the RESTATEMENT tersely says:

Special Liability of Seller of Product for Physical Harm to User or Consumer —

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT SECOND OF TORTS, § 402A (1965).

Notice that, under § 402A, the manufacturer or seller is liable if five elements are proved:

1. product was defective when it left the possession or control of the defendant
2. defect in product, or lack of warning, that made the product “unreasonably dangerous”
3. defect was a cause of plaintiff's injuries
4. defendant placed product in stream of commerce (neither an isolated nor an infrequent transaction), but *not* necessarily sale to victim
5. defendant expected the product to be used “without substantial change”

Dippel v. Sciano, 155 N.W.2d 55, 63 (Wis. 1967); *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523, 564, 2005 WI 129 at ¶162 (Wis. 2005). Products liability is strict liability, because plaintiff does *not* need to prove negligence by the defendant. Once liability is proven, the plaintiff will also need to prove damages.

One must distinguish a *manufacturing* defect (i.e., a flaw that affected only a few products, such as a defective part, loose screw, or missing part) and a *design* defect (i.e., a flaw that affected every product of that model, such as a car manufacturer's decision not to install seat belts in some model of automobile).

Prof. Wade has listed seven specific criteria to determine if a product is “unreasonably dangerous”, by means of a risk-benefit analysis:

- (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
- (2) The safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury.
- (3) The availability of the substitute product which would meet the same need and not be as unsafe.
- (4) The manufacturer's ability to eliminate the unsafe character of the product without [A] impairing its usefulness or [B] making it too expensive to maintain its utility.
- (5) The user's ability to avoid danger by the exercise of care in the use of the product.
- (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss.L.J.* 825, 837-38 (1973).

Quoted in *Ortho Pharmaceutical Corp. v. Heath*, 722 P.2d 410, 414 (Colo. 1986), overruled in *Armentrout v. FMC Corp.*, 842 P.2d 175, 184 (Colo. 1992) (“Depending on the circumstances of each case, flexibility is necessary to decide which factors are to be applied, and the list of factors mentioned in *Ortho* and *Camacho* may be expanded or contracted as needed.”); *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 260-261 (Ill. 2007).

In 1998, the RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY appeared and offered a more detailed view of products liability law, including three different ways that a product can be defective:

1. manufacturing defect: a flaw departs from the design specifications
2. design defect: the product is “not reasonably safe” and “foreseeable risks ... could have been reduced or avoided by ... a reasonable alternative design” at the time of manufacture
3. failure to warn of a hazard, inadequate instructions

RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY § 2 (1998).

A. circumstantial proof

In many cases, there is difficulty in proving the one *specific* defect in either the design or manufacturing of the product that caused the injury. If the product allegedly caused a fire, the ensuing fire may have consumed the evidence. If a bottle of carbonated beverage explodes, it is impossible after the explosion to determine the pressure in the bottle, to answer the question “Was there too much CO₂ in the bottle?” As Prosser said:

When a bottle of beer explodes and puts out the eye of the man about to drink it, surely nothing should be less material than whether the explosion is due to a flaw in the glass of the bottle or to overcharged contents.

PROSSER AND KEETON, § 99, p. 694-95 of Hornbook.

The Third Restatement gives a new rule of circumstantial evidence:

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

- (a) was of a kind that ordinarily occurs as a result of product defect; and
- (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY § 3.

B. history of products liability

The law of products liability began with food for human consumption. *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913) (discarding privity of contract); PROSSER & KEETON § 97.

Escola v. Coca Cola (Cal. 1944)

In July 1944, Justice Traynor of the California Supreme Court wrote a concurring opinion that was twenty years ahead of its time. In this case, “Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand.”

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann.Cas.1916C, 440 established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345; *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in

defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be **insured**⁷ by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection (see *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345; *O'Rourke v. Day & Night Water Heater Co., Ltd.*, 31 Cal.App.2d 364, 88 P.2d 191; *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576), or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is 'clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law.' *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868, 870. An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

In the case of foodstuffs, the public policy of the state is formulated in a criminal statute. Section 26510 of the Health and Safety Code, St. 1939, p. 989, prohibits the manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food. Section 26470, St. 1941, p. 2857, declares that food is adulterated when 'it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health.' The statute imposes criminal liability not only if the food is adulterated, but if its container, which may be a bottle (§ 26451, St. 1939, p. 983), has any deleterious substance (§ 26470(6)), or renders the product injurious to health (§ 26470(4)). The criminal liability under the statute attaches without proof of fault, so that the manufacturer is under the duty of ascertaining whether an article manufactured by him is safe. *People v. Schwartz*, 28 Cal.App.2d Supp. 775, 70 P.2d 1017. Statutes of this kind result in a strict liability of the manufacturer in tort to the member of the public injured. See cases cited in Prosser, TORTS, p. 693, note 69.

⁷ Boldface by Standler. PROSSER & KEETON, § 82 explains this significance of insurance.

The statute may well be applicable to a bottle whose defects cause it to explode. In any event it is significant that the statute imposes criminal liability without fault, reflecting the public policy of protecting the public from dangerous products placed on the market, irrespective of negligence in their manufacture. While the Legislature imposes criminal liability only with regard to food products and their containers, there are many other sources of danger. It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.

The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product. *Goetten v. Owl Drug Co.*, 6 Cal.2d 683, 59 P.2d 142; *Mix v. Ingersoll Candy Co.*, 6 Cal.2d 674, 59 P.2d 144; *Gindraux v. Maurice Mercantile Co.*, 4 Cal.2d 206, 47 P.2d 708; *Jensen v. Berris*, 31 Cal.App.2d 537, 88 P.2d 220; *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; *Race v. Krum*, 222 N.Y. 410, 118 N.E. 853, L.R.A.1918F, 1172. This warranty is not necessarily a contractual one (*Chamberlain Co. v. Allis-Chalmers, etc., Co.*, 51 Cal.App.2d 520, 524, 125 P.2d 113; see 1 WILLISTON ON SALES, 2d ed., §§ 197–201), for public policy requires that the buyer be **insured**⁸ at the seller's expense against injury. *Race v. Krum*, supra; *Ryan v. Progressive Grocery Stores*, supra; *Chapman v. Roggenkamp*, 182 Ill.App. 117, 121; *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 94, 120 N.E. 225, 5 A.L.R. 242; see Prosser, The Implied Warranty of Merchantable Quality, 27 MINN.L.REV. 117, 124; Brown, The Liability of Retail Dealers For Defective Food Products, 23 MINN.L.REV. 585. The courts recognize, however, that the retailer cannot bear the burden of this warranty, and allow him to recoup any losses by means of the warranty of safety attending the wholesaler's or manufacturer's sale to him. *Ward v. Great Atlantic & Pacific Tea Co.*, supra; see Waite, Retail Responsibility and Judicial Law Making, 34 MICH.L.REV. 494, 509. Such a procedure, however, is needlessly circuitous and engenders wasteful litigation. Much would be gained if the injured person could base his action directly on the manufacturer's warranty.

The liability of the manufacturer to an immediate buyer injured by a defective product follows without proof of negligence from the implied warranty of safety attending the sale. Ordinarily, however, the immediate buyer is a dealer who does not intend to use the product himself, and if the warranty of safety is to serve the purpose of protecting health and safety it must give rights to others than the dealer. In the words of Judge Cardozo in the *MacPherson* case [111 N.E. 1050, 1051 (N.Y. 1916)]: 'The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.' While the defendant's negligence in the *MacPherson* case made it unnecessary for the court to base liability on warranty, Judge Cardozo's reasoning recognized the injured person as the real party in interest and effectively disposed of the theory that the liability of the manufacturer incurred by his warranty should apply only to the immediate purchaser. It thus paves the way for a standard of liability that would make the manufacturer guarantee the safety of his product even when there is no negligence.

This court and many others have extended protection according to such a standard to consumers of food products, taking the view that the right of a consumer injured by unwholesome food does not depend 'upon the intricacies of the law of sales' and that the warranty of the manufacturer to the consumer in absence of privity of contract rests on public

⁸ Boldface by Standler. Strict liability in tort makes the defendant an insurer, when the plaintiff is injured by the defendant's defective product.

policy. *Klein v. Duchess Sandwich Co., Ltd.*, 14 Cal.2d 272, 282, 93 P.2d 799, 803; *Ketterer v. Armour & Co.*, D.C., 200 F. 322, 323; *Id.*, 2 Cir., 247 F. 921, 160 C.C.A. 111, L.R.A.1918D, 798; *Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479; see Perkins, Unwholesome Food As A Source of Liability, 5 IOWA L. BULL. 6, 86. Dangers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products. See Bohlen, STUDIES IN TORTS, BASIS OF AFFIRMATIVE OBLIGATIONS, AMERICAN CASES UPON THE LIABILITY OF MANUFACTURERS AND VENDORS OF PERSONAL PROPERTY, 109, 135; Llewellyn, On Warranty of Quality and Society, 36 COL.L.REV. 699, 704, note 14; Prosser, TORTS, p. 692. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-442 (Cal. 1944) (Traynor, J., concurring).

Greenman v. Yuba Power Products (Cal. 1963)

In January 1963, Justice Traynor wrote the opinion for a unanimous California Supreme Court, in a case where serious injuries had been inflicted by a "Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe."

Moreover, to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty as defined in section 1732 of the Civil Code.[repealed in 1963, replaced with Uniform Commercial Code] A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective. (*Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 347, 5 Cal.Rptr. 863, 353 P.2d 575 (grinding wheel); *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal.App.2d 35, 42-44, 11 Cal.Rptr. 823 (bottle); *Jones v. Burgermeister Brewing Corp.*, 198 Cal.App.2d 198, 204, 18 Cal.Rptr. 311 (bottle); *Gottsdanker v. Cutter Laboratories*, 182 Cal.App.2d 602, 607, 6 Cal.Rptr. 320, 79 A.L.R.2d 290 (vaccine); *McQuaide v. Bridgport Brass Co., D.C.*, 190 F.Supp. 252, 254 (insect spray); *Bowles v. Zimmer Manufacturing Co.*, 7 Cir., 277 F.2d 868, 875, 76 A.L.R.2d 120 (surgical pin); *Thompson v. Reedman, D.C.*, 199 F.Supp. 120, 121 (automobile); *Chapman v. Brown, D.C.*, 198 F.Supp. 78, 118, 119, *aff'd. Brown v. Chapman*, 9 Cir., 304 F.2d 149 (skirt); *B. F. Goodrich Co. v. Hammond*, 10 Cir., 269 F.2d 501, 504 (automobile tire); *Markovich v. McKesson and Robbins, Inc.*, 106 Ohio App. 265, 149 N.E.2d 181, 186-188 (home permanent); *Graham v. Bottenfield's Inc.*, 176 Kan. 68, 269 P.2d 413, 418 (hair dye); *General Motors Corp. v. Dodson*, 47 Tenn.App. 438, 338 S.W.2d 655, 661 (automobile); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 76-84, 75 A.L.R.2d 1 (automobile); *Hinton v. Republic Aviation Corporation, D.C.*, 180 F.Supp. 31, 33 (airplane).)

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (see e. g., *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413, 418; *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, 614, 75 A.L.R.2d 103; *Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 617, 164 S.W.2d 828, 142 A.L.R. 1479), and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 84-96; *General Motors Corp. v. Dodson*, 47 Tenn.App. 438, 338 S.W.2d 655,

658-661; *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449, 455-456; *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J.Super. 476, 164 A.2d 773, 778; *Linn v. Radio Center Delicatessen*, 169 Misc. 879, 9 N.Y.S.2d 110, 112) make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.

We need not canvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated in the cases cited above. (See also 2 Harper and James, TORTS, §§ 28.15-28.16, pp. 1569-1574; Prosser, *Strict Liability to the Consumer*, 69 YALE L.J. 1099; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, concurring opinion.) The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. (See Prosser, *Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1124-1134.) In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or more of the implied warranties of the sales act arose. (Civ.Code, § 1735.) 'The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales.' (*Ketterer v. Armour & Co.*, D.C., 200 F. 322, 323; *Klein v. Duchess Sandwich which Co.*, 14 Cal.2d 272, 282, 93 P.2d 799.) To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 900-901 (Cal. 1963) (Traynor, J.).

Greenman v. Yuba has been recognized as the **first** products liability case involving a nonfood product.

- PROSSER & KEETON, § 98.
- *Hurd v. Munford, Inc.*, 378 So.2d 86, 88 (Fla.App. 1979) ("Strict liability was first applied to a products liability fact situation in the classic case of *Greenman v. Yuba Power Prod., Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963).");
- *Lester v. Magic Chef, Inc.*, 641 P.2d 353, 362 (Kan. 1981) (Prager, J., dissenting) ("Products liability was first mentioned in a California case in 1944, *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944). It was first applied nineteen years later in *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963). In 1965, the American Law Institute (ALI) adopted the philosophy of *Greenman* in § 402A of the Restatement. Thereafter, jurisdiction after jurisdiction followed the ALI's lead in recognizing strict liability in tort for product defects.");

- *Corporate Air Fleet of Tennessee, Inc. v. Gates Learjet, Inc.*, 589 F.Supp. 1076, 1078 (M.D.Tenn. 1984) (“The doctrine of strict liability was first applied in a products liability fact situation in *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).”).
- *Gonzalez v. Rutherford Corp.*, 881 F.Supp. 829, 838 (E.D.N.Y. 1995) (“Tracey A. Batemann, Annotation, Products Liability: Application of Strict Liability Doctrine to Seller of Used Product, 9 A.L.R.5th 1, 14 (1993) (hereinafter “Batemann, Products Liability ”) (strict liability first applied in *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963)).”);
- *Ontiveros v. 24 Hour Fitness Corp.*, 86 Cal.Rptr.3d 767, 771 (Cal.App. 2008) (“Our high court first adopted the strict liability doctrine in *Greenman v. Yuba Power Products, Inc.* (1963) ...” quoting *Bay Summit Community Assn. v. Shell Oil Co.*, 59 Cal.Rptr.2d 322, 327 (Cal.App. 1996.);
- *Webb v. Navistar Intern. Transp. Corp.*, 692 A.2d 343, 346 (Vt. 1996) (“The doctrine of strict products liability was first developed by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 901 (1963), and then set forth in the Restatement (Second) of Torts § 402A (1965). This doctrine was created in response to the limitations of traditional negligence and warranty actions for injuries caused by defective consumer goods.”).

The statement that *Greenman* is the first strict liability case is, of course, wrong. Courts in the 1800s sometimes applied strict liability for ultrahazardous activities, such as using explosives in inhabited areas or owning ferocious animals. *Greenman* is the first products liability case involving a nonfood product.

Suvada v. White Motor (Ill. 1965)

In May 1965, the Illinois Supreme Court recognized products liability:

Recognizing that public policy is the primary factor for imposing strict liability on the seller and manufacturer of food in favor of the injured consumer, we come to the crucial question in this case, namely, is there any reason for imposing strict liability in food cases and liability based on negligence in cases involving products other than food. Arguments advanced to support the imposition of strict liability in food cases have been: (1) The public interest in human life and health demands all the protection the law can give against the sale of unwholesome food. (*Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210.) (2) The manufacturer solicits and invites the use of his product by packaging advertising or otherwise, representing to the public that it is safe and suitable for use. Having thus induced use of the product, the law will impose liability for the damage it causes. (*Patargias v. Coca-Cola Bottling Co.*, 332 Ill.App. 117, 74 N.E.2d 162.) (3) The losses caused by unwholesome food should be borne by those who have created the risk and reaped the profit by placing the product in the stream of commerce. (See *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210.) Without extended discussion, it seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.

The recent and often cited cases of *Henningsen v. Bloomfield Motors, Inc.*, (1960) 32 N.J. 358, 161 A.2D 69, 75 A.L.R.2d 1; *Greenman v. Yuba Power Products, Inc.*, (1963) 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 and *Goldberg v. Kollsman Instrument Corporation*, (1963) 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 typify the increasing number of decisions which are extending the concept of strict liability to the manufacturers of products whose defective condition makes them unreasonably dangerous to the user or consumer. At the time Professor Noel wrote his article, *Strict Liability of Manufacturers*, for the May 1964 issue of the AMERICAN BAR JOURNAL (50 A.B.J. 446) he listed cases from twenty different jurisdictions (50 A.B.J. 446, 449 n. 15) as supporting the rule. While some of these decisions are not rendered by the highest court of the State, or are rendered by a Federal court noting the lack of authority in that State, on close examination are not clear cut on the matter, they nevertheless support his statement that 'The decisions since 1960, * * *, particularly the ones in the *Henningsen*, *Greenman* and *Goldberg* cases, may well turn the tide (to strict liability) in the near future as to many kinds of products.' (50 A.B.J. 446, 449.) More recent cases are collected in 1 Hursch, AMERICAN LAW OF PRODUCTS LIABILITY, § 6.62 (Supp. 1965) and 1 Frumer & Friedman, PRODUCTS LIABILITY, secs. 16, 16A (Supp. 1964.)

Professor James and Dean Prosser in their influential articles, *Products Liability*, 34 TEX.L.REV. 44 (1955), and *Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960), respectively, gave a thorough and critical analysis to this whole area of the law and not only advocated the imposition of strict liability, but urged that such liability be based upon something other than the implied warranties of the commercial law. Professor James advocates development of 'a warranty theory in products liability cases which is tailored to meet modern needs in that field,' (34 TEX.L.REV. 44, 228,) while Dean Prosser suggests, 'If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.' 69 YALE L.J. 1099, 1134.) The New Jersey court in *Henningsen* imposed strict liability on the theory of an implied warranty. The California court in *Greenman* arrived at the same result on the theory of strict liability in tort. The New York court in *Goldberg* imposed liability on the theory of implied warranty while acknowledging that 'strict tort liability' is a more accurate phrase.

In analyzing the basis for the imposition of strict liability[,] Justice Traynor, speaking for the California court stated,

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (citations) and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (citations) made clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by (its) defective products unless those rules also serve the purposes for which such liability is imposed.

[*Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963)]

We agree.

Suvada v. White Motor Co., 210 N.E.2d 182, 186-187 (Ill. 1965).

Dippel v. Sciano (Wisc. 1967)

In 1964, “a large coin-operated pool table collapsed”, injuring plaintiff's foot. Defendants owned a tavern that included the pool table. In a landmark decision adopting products liability, the Wisconsin Supreme Court wrote:

Without belaboring its development it can now be said that the majority of the jurisdictions of the United States no longer adhere to the concept of no liability without privity of contract.[footnote omitted] The reason, which has been reiterated most often, is that the seller is in the paramount position to distribute the costs of the risks created by the defective product he is selling. He may pass the cost on to the consumer via increased prices. He may protect himself either by purchasing insurance or by a form of self-insurance. In justification of making the seller pay for the risk, it is argued that the consumer or user has the right to rely on the apparent safety of the product and that it is the seller in the first instance who creates the risk by placing the defective product on the market. A correlative consideration, where the manufacturer is concerned, is that the manufacturer has the greatest ability to control the risk created by his product since he may initiate or adopt inspection and quality control measures thereby preventing defective products from reaching the consumer.

[long discussion of privity of contract and disclaimers of warranties omitted. The Wisconsin Supreme Court quoted a law review article by Prosser:]

Although the writer was perhaps the first to voice it, the suggestion was sufficiently obvious that all of the trouble lay with the one word ‘warranty,’ which had been from the outset only a rather transparent device to accomplish the desired result of strict liability. No one disputed that the ‘warranty’ was a matter of strict liability. No one denied that where there was no privity, liability to the consumer could not sound in contract and must be a matter of tort. Why not, then, talk of the strict liability in tort, a thing familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, libel, misrepresentation, and respondeat superior, and discard the word ‘warranty’ with all its contract implications?

Prosser, [The Fall of the Citadel,] 50 Minn.L.Rev. 791, 801 [(1966)].

California explicitly abandoned the use of warranty concepts in 1962. *Greenman v. Yuba Power Products, Inc.* (1962), 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049. [FN8: “Also see *Suvada v. White Motor Company* (1965), 32 Ill.2d 612, 210 N.E.2d 182.”]

[quotation from *Greenman* omitted.]

The approach has been lauded:

... This innovation avoids the need for making apologies to warranty doctrine for each abrogation of the privity requirement to permit another, more remote, class of plaintiffs to recover. The plaintiff's status prior to his injury is irrelevant under the new dispensation; he need only be a human being,

Schreiber and Rheingold, PRODUCTS LIABILITY, 4:26, 4:27. Reprinted from COLUMBIA LAW REVIEW (1964), Vol. 64, p. 916.

[Defendant argued that the common law should not change.]

Assuming arguendo that the common law of Wisconsin in 1848 did require privity of contract, this argument was rejected in *State v. Esser* (1962), 16 Wis.2d 567, 584, 115 N.W.2d 505, 514, wherein the court stated:

We conclude that the function of sec. 13, art. XIV, Wis.Const. was to provide for the continuity of the common law into the legal system of the state; expressly made subject to legislative change (in as drastic degree within the proper scope of legislative power as the legislature might see fit) but impliedly subject, because of the historical course of the development of the common law, to the process of continuing evolution under the judicial power.

The court's reasoning is in full accord with that expressed by the United States Supreme Court in *Funk v. United States* (1933), 290 U.S. 371, 383, 54 S.Ct. 212, 216, 78 L.Ed. 369:

It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.

In *State v. Esser*, ... 115 N.W.2d [505,] 513, the court, with approval, quoted from the works of Justice Cardozo. A portion of that quote is particularly applicable here:

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Changes of this character should not be left to the legislature.

[*Dwy v. Connecticut Co.*, 92 A. 883, 891 (Conn. 1915) (Wheeler, J.), quoted by Cardozo, *The Nature of the Judicial Process*, Adherence to Precedent, p. 142, 150-152.]

The respondent [defendant] also argues that the legislature by enacting sec. 402.318, Stats., has acted in the field and has specifically limited the seller's liability for breach of implied warranty to the buyer's family and guests. The answer to this argument is that the comment to the section provides: ' * * * the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.' Uniform Commercial Code, § 2-318, Comment 3.

The abrogation of the privity requirement is not strictly and exclusively a matter of sales and contract law. When the manufacturer or the seller offers a product for sale which he expects to be used by the consuming public within its intended use and such product is defective and injures the consumer, his liability in tort can be based upon a breach of duty quite apart from contract obligations. In these situations the Uniform Commercial Code is inapplicable. [citing: *Henningsen v. Bloomfield Motors, Inc.*, supra, and RESTATEMENT SECOND OF TORTS, § 402A, comment *m.*]

We are of the opinion that the rule which requires privity of contract in products-liability cases should not be used to defeat a claim based upon a defective product unreasonably dangerous to a nonprivity user. For products-liability cases we adopt the rule of strict liability

in tort as set forth in sec. 402 A of Restatement, 2 Torts (2d), pp. 347, 348. The section is as follows:

The term strict liability in tort might be misconstrued and, if so, would be a misnomer. Strict liability does not make the manufacturer or seller an insurer nor does it impose absolute liability. From the plaintiff's point of view the most beneficial aspect of the rule is that it relieves him of proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts.

Dippel v. Sciano, 155 N.W.2d 55, 58-63 (Wis. 1967).

Standler's comment

Commentators about tort law often observe that products liability transfers the cost of defective products to the sellers and manufacturers of those defective products, as if society were punishing the sellers/manufacturers. But the sellers purchase liability insurance *and* sue the manufacturers for indemnification. And the manufacturers or importers of products purchase liability insurance. So the effect of products liability is to increase the cost of products, as sellers and manufacturers increase their prices to cover their cost of insurance.

An alternative is to have a society in which everyone has (1) health insurance, (2) disability income insurance to provide an income while unable to work, and (3) life insurance. Such insurance is a good idea, because insurance covers diseases and accidents for which there is no tortfeasor to sue, as well as accidents where the tortfeasor has minimal assets to pay for damages. In such a system, the person's own insurance would cover most of the cost of any physical injury, regardless of cause. One advantage of using the victim's insurance to pay for medical care and living expenses is that the insurance will pay promptly, unlike products liability litigation that can take years to pay for damages (and the plaintiff's attorney typically takes 1/3 of the award, as a contingency fee). And when damages are severe, victims could sue for "pain and suffering" and other damages not covered by insurance.

C. Massachusetts uses breach of warranty

Surprisingly, Massachusetts does not recognize products liability as a tort. Instead, in Massachusetts, litigation for a defective product proceeds on a theory of breach of warranty. The highest court in Massachusetts has repeatedly assured us that breach of warranty gives the same results as the mainstream tort of products liability.

- *Swartz v. General Motors Corp.*, 378 N.E.2d 61, 62 (Mass. 1978) ("We hold that there is no 'strict liability in tort' apart from liability for breach of warranty under the Uniform Commercial Code, G.L. c. 106, §§ 2-314 2-318.");

- *Back v. Wickes Corp.*, 378 N.E.2d 964, 969 (Mass. 1978) (“The Legislature has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed in RESTATEMENT (SECOND) OF TORTS § 402A (1965). For this reason, we find the strict liability cases of other jurisdictions to be a useful supplement to our own warranty case law. [citations to three cases in other states]”);
- *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1313 (Mass. 1988) (“Liability for breach of warranty stands on a much different footing [than negligence]. In Massachusetts, liability for breach of warranty of merchantability is governed by G.L. c. 106, §§ 2-314-2-318 (1986 ed.), and this court has noted that these provisions are congruent, in all material respects, with the principles expressed in RESTATEMENT (SECOND) OF TORTS § 402A (1965), the Restatement's definition of a seller's strict liability for harm suffered by a user or consumer of a seller's product. *Correia [v. Firestone Tire & Rubber Co.]*, 446 N.E.2d 1033, 1039 (Mass. 1983); *Hayes [v. Ariens Co.]*, 462 N.E.2d 273, 277 (Mass. 1984); *Back v. Wickes Corp.*, [378 N.E.2d 964, 969 (Mass. 1978)].”);
- *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1326 (Mass. 1997) (“We have declined to allow claims for strict liability in tort for defective products, but we have recognized that, by eliminating most contractually-based defenses to the implied warranty of merchantability (such as the requirements of privity and of notice), the Legislature has imposed duties on merchants as a matter of social policy, and has expressed its intent that this warranty should establish liability as comprehensive as that to be found in other jurisdictions that have adopted the tort of strict product liability. [cites *Swartz* and *Back*]”);
- *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923 (Mass. 1998) (quoting with approval *Back v. Wickes*).

Warranties in Massachusetts

The warranties in the Massachusetts version of the Uniform Commercial Code are:

§ 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified by section 2-316,⁹ a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must at least be such as

(a) pass without objection in the trade under the contract description; and

⁹ Note by Standler: in Massachusetts, § 2-316A invalidates exclusion or modification of implied warranties of merchantability and fitness for a particular purpose.

- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified by section 2-316, other implied warranties may arise from course of dealing or usage of trade.

Massachusetts General Laws, chapter 106, § 2-314 (enacted 1957, still current June 2011).

§ 2-315. Implied Warranty; Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified¹⁰ under the next section an implied warranty that the goods shall be fit for such purpose.

Massachusetts General Laws, chapter 106, § 2-315 (enacted 1957, still current June 2011).

§ 2-316. Exclusion or Modification of Warranties

(1)

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and,

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

¹⁰ Note by Standler: in Massachusetts, § 2-316A invalidates exclusion or modification of implied warranties of merchantability and fitness for a particular purpose.

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4)

(5) The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purposes of this Article be considered commodities subject to sale or barter, but shall be considered as medical services.

Massachusetts General Laws, chapter 106, § 2-316 (enacted 1957, amended 1965, still current June 2011).

Note that Massachusetts has largely abrogated § 2-316 of the Uniform Commercial Code by enacting § 2-316A, which is valid only in Massachusetts: Section 2-316A was one of two changes to the Uniform Commercial Code in Massachusetts that effectively replaced products liability.

§ 2-316A. Limitation on Exclusion or Modification of Warranties

(1) The provisions of section 2-316 shall not apply to the extent provided in this section.

(2) Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable.

(3) Any language, oral or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of such manufacturer's express warranties, shall be unenforceable, unless such manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations.

(4) Any language, oral or written, used by a seller or manufacturer of goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify remedies for breach of those warranties, shall be unenforceable with respect to injury to the person. This subsection does not affect the validity under other law of an agreement between a seller or manufacturer of goods and services and a buyer that is an organization (see Section 1-201(28)), allocating, as between them, the risk of damages from or providing indemnity for breaches of those warranties with respect to injury to the person.

(5) The provisions of this section may not be disclaimed or waived by agreement.

Massachusetts General Laws, chapter 106, § 2-316A (enacted 1970, amended 1973, amended 1996, still current June 2011).

§ 2-317. Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Massachusetts General Laws, chapter 106, § 2-317 (enacted 1957, still current June 2011).

Section 2-318 — along with § 2-316A — was one of two changes to the Uniform Commercial Code in Massachusetts that effectively replaced products liability.

§ 2-318. Lack of Privity in Actions Against a Manufacturer, Seller, Lessor or Supplier of Goods

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.

Massachusetts General Laws, chapter 106, § 2-318 (enacted 1957, amended 1971, 1973, 1974, still current June 2011).

Although Massachusetts law does not recognize products liability, judicial opinions in Massachusetts contain many references to concepts from torts and mainstream products liability law. For example, in Massachusetts, the relationship between negligence and warranty of merchantability, § 2-314(2)(c), is:

“A defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true. A defendant cannot be found to have been negligent without having breached the warranty of merchantability.” *Colter v. Barber-Greene Co.*, ... 525 N.E.2d 1305, [1313 (Mass. 1988)], quoting *Hayes v. Ariens Co.*, ... 462 N.E.2d 273, [275 (Mass. 1984)]. *Haglund v. Philip Morris, Inc.*, 847 N.E.2d 315, 322, n.9 (Mass. 2006). Also quoted in *Caccavale v. Raymark Industries, Inc.*, 533 N.E.2d 1345, 1348 (Mass. 1989). See *Goulet v. Whitin Mach. Works, Inc.*, 506 N.E.2d 95, 98 (Mass. 1987) (“Finally, under Massachusetts law, a finding that a defendant in a products liability case is negligent is tantamount to a finding that the defendant breached its warranty of merchantability. *Hayes v. Ariens Co.*, 391 Mass. 407, 410,

462 N.E.2d 273 (1984). In such circumstances, liability for breach of warranty would be established unless the defendant could prove either prejudicial failure of the plaintiff to give timely notice of the defect, or unreasonable use of the product once the plaintiff has knowledge that the product is defective and dangerous. *Id.* at 410 n. 2, 462 N.E.2d 273.”).

Fraud

Fraud is part of classical contract law, while deceit (i.e., fraudulent misrepresentation) is a tort. In practice, the two terms are used interchangeably. The elements of a cause of action for fraud/deceit are:

1. a false representation (i.e., misrepresentation)
2. D knew, or believed, that his representation was false (scienter: D acted knowingly)
3. D intended to induce P to act, or refrain from acting, in reliance on the false representation (i.e., deception by D)
4. justifiable reliance by P
5. damage to P as a result of reliance on the false representation.

See, e.g., *Channel Master Corp. v. Aluminum Limited Sales, Inc.*, 151 N.E.2d 833, 835 (N.Y. 1958); *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 979 (N.Y. 2009); *Neuman v. Corn Exchange Nat. Bank & Trust Co.*, 51 A.2d 759, 763 (Pa. 1947) (elements of deceit); *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994); RESTATEMENT (SECOND) OF TORTS § 525, et seq. (1977); PROSSER AND KEATON ON THE LAW OF TORTS § 105.

Note that elements (2) and (3) make fraud an intentional tort, *not* “the product of forgetfulness [or] oversight” as in an ordinary tort.¹¹

Fraud must be proven by “clear and convincing evidence”,¹² a higher standard than the usual preponderance of the evidence in civil cases.

Under the Federal Rules of Civil Procedure, Rule 9(b), fraud must be “stated with particularity”.

¹¹ See, e.g., *State Farm Fire and Cas. Co. v. Simpson*, 477 So.2d 242, 250 (Miss. 1985). Quoted in *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1417 (5th Cir. 1990).

¹² See, e.g., *Gaidon v. Guardian Life Ins. Co. of America*, 725 N.E.2d 598, 607 (N.Y. 1999); *Moser v. DeSetta*, 589 A.2d 679, 682 (Pa. 1991).

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