

Overview of Emerging Issues

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Product Liability and Safety Framework

Primary Concerns:

- *Safety - preventing accidents*
- *Legal and Regulatory Issues - following the rules*
- *Civil Liability - winning lawsuits*

Typical Liability Claims

- Negligence (focus on conduct)
- Strict Liability (focus on product)

Both depend on a product being “defective.”

Is Your Product “Defective”?

Defect is measured **at the time of sale**.

Generally relates to:

- Design (Did you plan it properly?)
- Manufacturing (Was it made the way you intended?)
- Labelling/Instructions/Warnings (Did we fail to warn?)

A Post-sale Duty to Warn can exist **later** under certain circumstances.

“Defect” Defined:

- *Unreasonable* Danger (Not Inherent Danger)
- Risk/Utility Test
- Consumer Expectation Test

- Patent v. Latent Hazards:
 - Flows from definitions above
 - Open and obvious danger defense
 - Assumption of the risk defense
 - Sophisticated user defense

Where Do Plaintiffs Get Their Arguments?

- Statutes and Regulations (FDA, CPSC, EPA, etc.)
- Decisions of Other Courts
- State of the Art / Industry Standards
- Competitors (product innovations or problems)
- Vendors (problems with their products)
- Distributors' Conduct (performance promises)
- Customers (contracts, warranties, labelling)
- Users (accidents)

Common Defenses

- No negligence
- No “defect”/no unreasonable danger/open and obvious hazard
- Assumption of risk / sophisticated user
- Contributory negligence/comparative fault
- Misuse
 - Assembly
 - Maintenance
 - Operation
 - Failure to heed instructions

New / Evolving Risk Areas

Forever Chemicals

Enhanced regulatory scrutiny (CPSC, EPA, FDA, etc.)

Diesel Exhaust and Diesel Particulate Filter Technology

- Autonomous Vehicles
- Internet of Things
- Artificial Intelligence
- Post-sale duty to warn
- More plaintiffs' attorneys looking for work

Software-Based Products

Most AI/IoT/Autonomous vehicle issues relate to software failures - not hardware.

Strict liability took form in Section 402A of the Restatement (Second) of Torts **in 1965**. Does not fit neatly with software.

Interesting questions have been raised

- Is software a “product,” as defined by States’ PL statutes?
- Can software be unreasonably dangerous?
- What if AI leads to changes not crafted by the original designers?

Is Software a Product or a Service?

Courts commonly found software to be a service, not a product, requiring issues to be resolved through contract.

Courts are starting to go the other way, to some extent due to public policy.

- 10B to 20B IoT devices are estimated to be in use.
- What law should apply when personal injuries arise?

Product Liability Claims Allowed

Holbrook v. Prodomax Automation (W.D. MI 2021)

Software held to be a product under MI product liability statute because it was an integral and essential part of **automated assembly line** that malfunctioned.

Maynard v. Snapchat (Ga. 2022) and *Lemmon v. SC* (9th Cir. 2021).

Allowing claims that **app's "speed filter"** was negligently designed to entice users to drive recklessly.

A.M. v. Omegle.com, LLC (D. Oregon 2022)

Plaintiff adequately stated claims for defective and negligent design and warning of an **online chat room**.

Other Cases Pursued

Umeda v. Tesla, Inc. (N.D. Cal. 2020)

Plaintiff alleged product liability claims involving an **autonomous vehicle**.

Nilsson v. Gen. Motors LLC (N.D. Cal. 2018)

Negligence claim alleged against manufacturer of self-driving vehicle.
GM admitted the car was required to use reasonable care.

Additional cases . . .

Escudero v. Tesla, Inc. (Alameda County, CA 2021)

Plaintiff alleged that the **autonomous** mode in a Tesla **vehicle** was defectively designed or manufactured.

Cruz v. Talmadge (Mass. 2015)

Product liability claims alleged re failure of **GPS systems** to identify height restrictions on a specific road.

Post-Sale Duty to Warn

In traditional product liability claims, the focus is on the date of sale. Was the manufacturer negligent then? Was the product defective then?

But a PSDW claim questions whether it is reasonable to require a manufacturer to warn **previous purchasers** of defects discovered **after product is sold**.

Determining whether a PSDW exists:

General Factors:

- (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; *and*
- (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk; *and*
- (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; *and*
- (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Managing Post-Sale Warning Risk

- Evaluate claims for newly discovered hazards.
- Safety Committee to evaluate magnitude of risk and the relevant factors.
- Confer with counsel re whether to warn.
- Memorialize decision in attorney-client communication. You may need to use that as evidence when the post-sale claim arises - typically years later.

New Opponents

- No longer just injured persons
- Regulators are more active
- Governmental entities are bringing consumer protection claims
- Mass Tort attorneys - **Watch out for fraud**

What Other New Claims Are Coming?

- Monitor your products' performance and claims
- Work with industry groups, track developments
- Watch your competitors
- **Think like a juror**
- Ask your counsel to perform an audit:
 - Evaluate safety issues with the product
 - Review labelling (manuals, decals, etc.)
 - Analyze allocation of risk with vendors, customers and insurers
 - Consider need for post-sale communications

Thank You!

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