Indemnification, Contribution, and Allocation of Fault: Shifting the Blame.

As hopefully you will recall, the strict liability doctrine started with a court decision that allowed a person injured by a defective product to sue its manufacturer even though the product had been purchased from someone else in the chain of distribution. Soon the doctrine expanded to include everyone in the chain of distribution, meaning that the sale of a defective product was enough to create liability, even in cases where the seller had no reason to suspect the product was defective, and no opportunity to prevent or warn about the defect.

Not surprisingly, when deciding who to sue over an injury-causing defective product, the immediate seller was the most popular choice. One big reason for this was the rule of joint and several liability. With joint liability, anyone who in any way contributed to causing the injury is liable for the entire amount of the damages. In contrast, several liability is liability for only that portion of the damages for which you can be deemed responsible for causing. The rule of joint and several liability—a stupid name, really—means that you are both jointly <u>and</u> severally liable.

It is because of the rule of joint and several liability that we get the term “deep pocket” defendant. When a severely injured person is looking to sue he will want to pick the defendant that has either the most money or insurance, *i.e.*, one with “deep pockets,” so he can recover all of his damages from one defendant, rather than being forced to sue multiple defendants in order to fully recover his damages.

What, then, was the seller hit with a big product-related damage award to do? One thing was an indemnity action, a lawsuit filed to recover the damages paid on behalf of the person or company actually at fault. So, for example, if you own a bicycle shop and end up getting sued for selling a defective bicycle, you could pay the damage award (or, more likely settle) and then turn around and sue the manufacturer to recover what you paid.

Your right of recovery can be based either in contract or equity. In contract, it is because you have a written agreement from a manufacturer, or your supplier, to pay damages you incur as a result of the product, often including attorney fees. In equity, the right to recover is because the law deems it unfair for you to be liable for anything but your own negligence. Of course, you might ask why then does the law allow you to be held liable to the plaintiff in the first place? That is because preference is given to the injured person and her right to recover first. Thus, the additional burden of having to file an indemnity action is not deemed too much to impose on one who profited from the sale of the product.

Another means of reimbursement for the seller is a contribution action. This is much like an indemnity action, except that here the seller is not without fault, and is not entitled to the full reimbursement of the damages or settlement paid. Instead, it is alleged the seller paid more than its fair share and that it is entitled to be reimbursed for the amount too much it paid. It thus seeks a contribution from another for its share of the damages.

Indemnity and contribution actions can arise in all sorts of circumstances. They can arise, like in our bicycle shop example, when a seller unknowingly sells a defective product that it did not manufacture, or they can arise when a manufacturer sells a defective product because it used a defective component part. They can also arise, for example, when a product defect results from the manner of its transport or storage. You should note, however, that in all of these examples we are speaking of fault in terms of negligence, something that the plaintiff does not have to prove to recover, but that a participant in the chain of distribution will have to prove if it wants to shift the blame from itself to another. Strict liability does not apply to indemnity and contribution.

During the last twenty years, indemnity and contribution actions have become much less common in cases involving product-related injury. A majority of state legislatures have modified the rule of joint and several liability in cases where more than one solvent party is available to be sued. This means that a plaintiff must add all of the parties to the lawsuit, and the jury is asked to allocate a percentage of fault to each party. The plaintiff is still entitled to a full recovery, but she must recover it from each party according to its respective fault. There are exceptions, of course, and the law varies quite a bit from state to state.

It may seem confusing that issues of fault are present in a strict liability case, where fault is supposed to be legally irrelevant. But that is still the case. The plaintiff need only prove that the product was defective in order to recover, and usually that is all that the plaintiff will choose to prove. Having joined the necessary defendants, it will be left to the defendants to point fingers at each other, and for the jury to decide which defendant is going to pay how much.