

Product Liability: A Brief History of Its Early Origins.

This is the first in a series of short articles intended to serve as an introduction to product liability law, with an emphasis on the legal risks faced by the manufacturers and distributors of food products. Keep in mind that what is written here will, by necessity, be an oversimplification of a complex subject that varies considerably from state to state. Still, a general understanding of a complex subject is better than no understanding at all. So, to start, here is a brief history on the origins of product liability law.

Pretty much since the beginning, the law existed as a means of enforcing rights or obligations. And as far back as ancient Rome, there were two kinds of obligation: those that arose by agreement (contract) and those that arose out of a wrong (tort). Thus, if I agreed to sell you a bushel of wheat, you could sue me if I failed to deliver it, and collect *contract* damages. (Note: damages will be the subject of a future article.) On the other hand, if I stole wheat from your field, you could sue me for *tort* damages. In each of these cases, I breached an obligation, one arising from contract, the other arising from tort.

Product liability law evolved from contract law, with the first decisions strongly favoring manufacturers. For a very long time, the “general rule” was that a manufacturer could not be sued, even for negligence, by someone with whom he had no contract. This was called the “rule of privity,” and it was most famously set forth in an 1842 case that is bane of every first year law student’s existence—*Winterbottom v. Wright*.

In this case, Mr. Wright was injured when a mail coach he was driving collapsed because of its shoddy construction. He sued the manufacturer of the coach, but soon had his lawsuit thrown out of court. Showing no sympathy to Mr. Wright at all, the court said “the only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favor of [allowing] the action is, that this is a case of hardship; but that might have been obviated, if [Mr. Wright] had made himself party to the contract. ”

And to a certain extent this was true. In law, exceptions over time usually swallow the rule, so courts are right to avoid them. Also, the world Mr. Wright lived in was still small enough to have not yet made impractical face-to-face dealing with manufacturers of the products used in daily life. So you could seek a promise that a product was safe, and thus had a means to hold the manufacturer to it. But that was soon to change. And it did so with the rise of the merchant class, a whole new breed of retailers who stood between the manufacturer and the purchaser, making direct-dealing impossible.

Exceptions to the rule that you could only sue the person from whom you bought the product developed over time. The first was for manufacturers who misrepresented the quality of the product, where it was said that the misrepresentation (a tort) caused injury, and the rule of privity did not apply. The second was for inherently dangerous products, such as guns, explosives, and poisons, where it was said that a manufacturer assumed the risk of liability to injured third-parties by putting out for sale a product that could not be

made safe to use. The third was for cases of negligence where the product was unsafe to use because of a defect in construction.

The fourth exception to the rule of privity is the one that most concerns us now. It is the one that involves food products. As it turned out, it was also the exception that the court in *Winterbottom v. Wright* feared: the exception that ends up eating the rule. And it comes about at the turn of the century around the same time as publication of *The Jungle*, national agitation over defective food, and the adoption of national food and drug laws.

It was thus in 1913 that the Washington Supreme Court announced that: “To the old rule that a manufacturer is not liable to third persons who have no contractual relations, for negligence in the manufacture of an article, should be added another exception—not one arbitrarily worked by the court—but arising, as did the three [earlier exceptions mentioned], from the changing conditions of society. An exception to a rule will be declared by courts when the case is not an isolated instance, but general in its character and the existing rule does not square with justice. Under such circumstances, a court will, if free from the restraint of some statute, declare a rule that will meet the full intendment of the law.” And so the court held that anyone injured by a food product had the right to sue the manufacturer for breach of an implied warranty that the food was safe.

This is the beginning of modern food product liability, the story of which will be continued next month when we discuss the rise of strict liability, liability without regard to negligence or fault.

The original article appeared in ID Access, . . . (<http://www.idmagonline.com>)