PRODUCT LIABILITY IN SPORTS GOODS

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ABSTRACT

When a person is injured by a defective product that is dangerous or unsafe, the injured person may have a claim or cause of action against the company or the person who designed, manufactured, sold, distributed, leased, or furnished the product. In other words, the company or the person may be liable to the injured person for his injuries and, as a result, may be required to pay for his damages.

This research paper will be dealing with law of product liability, especially as it relates to sports good. Sports involve the use of a large number of products; baseball bats, football helmets, hockey sticks, bicycles, parallel bars, special footwear, sports cars, ski bindings and javelins, to name a few. Hence the number of lawsuits for injuries caused by sports and recreation equipment is more and it has given genesis to an entirely new dimension in products liability law.

The nature of sports, however, is such that a great many of the products used serve the sole purpose of protecting the one using the products. Face masks, batting helmets, releasable ski bindings, knee pads and braces, football helmets, goggles, railings, floor pads, mouth pieces, roll bars and shoulder pads are a few examples of such protective products. A defect in a piece of protective sports equipment is more apt to make that product "unreasonably dangerous" because its sole purpose is to protect the user. It is clear that the very nature of "sports" is such that it will continue to be a breeding ground for product-caused injuries.
Today a person injured by a defective product has a choice of distinct, yet related, theories of recovery upon which to base his action, e.g., strict liability, negligence, or breach of warranty. While deciding product liability cases nowadays in India, the courts have adopted a pro-consumer approach.
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Research Methodology

The method of research is deductive. The data used is Primary and Secondary in nature in the form of:

**Primary:**

Primary data has been gathered from case laws, international conventions and national laws. Since the topic is a foreign concept therefore limited primary data was available.

**Secondary:**

The theoretical information is gathered from secondary sources and the assimilated information is analyzed on the basis of which conclusions may be drawn. The research is dependent on the following secondary data:
1. Books and Newspapers
2. International reports
3. Online News, Journals, Articles and Research Papers
Product Liability in General

Product liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. Although the word "product" has broad connotations, product liability as an area of law is traditionally limited to products in the form of tangible personal property.

When individuals are harmed by an unsafe product, they may have a cause of action against the persons who designed, manufactured, sole, or furnished that product. The law has changed from caveat emptor to strict liability for manufacturing defects that make a product unreasonably dangerous. Manufacturers and others who distribute and sell goods argue that product liability verdicts have enriched plaintiffs’ attorneys and added to the cost of goods sold.

In most jurisdictions, a plaintiff's cause of action may be based on one or more of four different theories: Negligence, breach of Warranty, Misrepresentation, and strict tort liability.

I. Development at Common Law

The history of the law of product liability is largely a history of the erosion of the doctrine of privity, which states that an injured person can sue the negligent person only if he or she was a party to the transaction with the injured person. In other words, a defendant's duty of reasonable care arose only from the contract, and only a party to that contract could sue for its breach. This meant that a negligent manufacturer who sold a product to a retailer, who in turn sold it to the plaintiff, was effectively insulated from liability. The plaintiff was usually without a remedy in tort because it was the manufacturer and not the retailer whose negligence caused the harm.

Every distinct area of the law has its own case which serves as the traditional touchstone for discussion of that topic. For example, one cannot properly undertake a discussion of the law of damages without beginning, "In Hadley v. Baxendale¹ ..."

Similarly, the legal gods would look with revulsion upon the poor soul who began a discussion of American constitutional law without referring to *Marbury v. Madison*. So, in an effort to appease the legal gods as well as to provide a complete background on the issue, we will begin where every discussion of products liability law begins, with the English case of *Winterbottom v. Wright*.

Winterbottom enunciated the English doctrine of "privity of contract." A plaintiff could not recover damages from a defendant for injury caused by defective goods unless the plaintiff obtained the goods directly from the defendant.

"Privity of contract" remained a bar to defective product cases in England and in this country for over sixty years until *MacPherson v. Buick Motor Company*. It was, of course, still necessary to establish the standard elements of negligence, but the archaic notion that the person responsible for the negligently made product must be in direct privity of contract with the person ultimately injured by the product before an action for damages would lie, was finally abandoned.

Some forty years after MacPherson, strict liability was applied to defective product cases on a warranty theory. The case was *Henningsen v. Bloomfield Motors*, which has been called "the progenitor of modern products liability law."

Shortly after Henningsen, the California Supreme Court extended the strict liability theory to apply to actions in tort, relieving the analytic problems that were sometimes presented by employing an implied warranty theory. The most recent development in products liability law came in the 1981 California decision allowing punitive damages in an action based on strict liability in tort. With this decision, the law of products liability has now evolved from a position of refusing to impose liability without privity of contract as recently as 1915, to a position of allowing punitive damages on a theory of strict liability in tort.

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II. Merchantable Quality as given Sale of Goods Act, 1930.

In an article called “Merchantable Quality” by John Livermore, merchantable quality has been defined and various tests have been given to find out if a product is of the same quality or not. The ‘merchantable quality’ term refers to an implied condition regards about the state of goods which sold in the field of business. The goods that sold should be regard as to fit the common purpose of the buyers, as well as the descriptions of the goods need to take into account. This also includes price if it is relevant and all the other related and relevant circumstances. If the buyer has checked the goods that sold by the seller when the contract is made, the condition is not applicable to the defects that specifically drawn to the buyer’s attention or the defects that the buyer has realized or noticed. So, in general, it means that the goods that sold to the buyers are required to fit for the particular purpose to the extent that they were sold. However, the goods are failed or unable to perform the purpose when they have been sold, they are considered as unmerchantable.

In *Australian Knitting Mills Ltd v. Grant*\(^7\) case, the appellant who contracted dermatitis of external origin as a result of wearing a woolen garment where he purchased from the garment retailer. The woollen garment was in a defective condition due to the existence of sulphites when it was found that negligently left in the manufacturing process. He alleged that it is in breach of warranty the underwear was not fit for the purpose and was not of merchantable quality. Thus, he claimed the damages from the retailers. However, the retailer denied the liability. The court held that the retailer was liable for this breach of warranty or condition.

According to Section 15 of Sale of Goods Act 1930\(^8\), sale by description refers to there is an allusive condition about the goods that are going to sell need to correspond with the description when there is a sale of goods by description contract exists between sellers and buyers. It is hard for the majority of the goods to fulfill with the description if the sale of goods sold is by sample and by description as well. The term ‘sale of goods by description’ must applicable to all cases where by the buyer have not seen the goods but it is relying solely on the description alone when the contract is made. So, in this condition, the obligation of the seller under this section is absolute and it is no defense that the defect in goods is latent. It would most frequently apply to

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7. *Australian Knitting Mills Ltd v. Grant*, (1933) 50 CLR 387.
unascertained goods but it may also be applicable to the specific goods where there is no identification otherwise than by description.

III. Summary

Today a person injured by a defective product has a choice of distinct, yet related, theories of recovery upon which to base his action, e.g., strict liability, negligence, or breach of warranty. While in practice the distinctions between these theories of recovery will often seem blurred, factual situations are bound to present themselves that are particularly suited for one specific theory. Each theory has its own advantages and disadvantages that have to be weighed by a plaintiff’s attorney preparing to file a products liability suit. Because strict liability in tort is generally considered to provide the most encompassing basis for liability, it is this theory for recovery that will be most often referred to throughout this article.

Application to the Sports Industry

The area of sports law is a relatively new branch of law, still in its formative years and developing with the rapid pace of progress in the field of sports. Sports law overlaps considerably with tort law, contract law, and labour law. In the project, the author strictly discusses and sticks to the law of contract in sports. Contract in sports are essentially no different than contracts in everyday life. Sports contracts define the rights, duties and responsibilities of the various participants in the now-established business of professional sports.

I. Nature of the Sports Industry

Sports involve the use of a large number of products; baseball bats, football helmets, hockey sticks, bicycles, parallel bars, special footwear, sports cars, ski bindings and javelins, to name a few. The sheer number and variety of sports products alone would permit the inference that product liability cases abound in the sports industry.

Furthermore, when one considers the context in which these products are used, it becomes quite apparent that a defect is apt to cause injury to the sports participant. A discussion about the use of

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9 Sairam Bhatt, Law of Business Contracts in India, Sage Publications (2009), pp 244.
protective equipment in sports will serve to illustrate the point. Whereas the majority of non-sport products have some useful purpose other than protection of the user, a defect in such a product would not necessarily make it "unreasonably dangerous." For example, failure of a pen to write would not make it unreasonably dangerous. Failure of a telephone to ring would not make it unreasonably dangerous. Failure of a car to get good mileage would not make it unreasonably dangerous. In other words, a defect in a product which has some purpose other than protection may make it useless without necessarily making it "unreasonably dangerous."

The nature of sports, however, is such that a great many of the products used serve the sole purpose of protecting the user. Face masks, batting helmets, releasable ski bindings, knee pads and braces, football helmets, goggles, railings, floor pads, mouth pieces, roll bars and shoulder pads are a few examples of such protective products. A defect in a piece of protective sports equipment is more apt to make that product "unreasonably dangerous" because its sole purpose is to protect the user.

There are other circumstances about the sports industry that would suggest that injuries from products should be expected. The ever-increasing popularity of sports and recreation in our society has led to a rise in the number of participants and spectators and, understandably, a rise in the number of injuries. It is estimated that every year there are some 45,000 concussions and 285,000 leg and ankle injuries arising out of football alone. Baseball and bicycling are also traditionally ranked as high injury sports. Added to this is the fact that, due largely to improved training methods and nutrition, today's athletes are bigger, faster and stronger than their predecessors.

This makes for a faster, harder-hitting game; places increased emphasis on protective equipment, and in turn, increase the risk of injury. The foregoing statements are compounded by the uniquely American fetish with sports records. In light of all this, it seems clear that the very nature of "sports" is such that it will continue to be a breeding ground for product-caused injuries.

II. Duty to Warn

A manufacturer has a duty to instruct users as to the safe use of the product, and to warn of the dangers associated with using the product, even if the product has no manufacturing or other design defect. Users of the product need this information to determine whether to expose themselves to the risks involved. The standard used to determine whether such a warning need be given is based upon what is reasonable under the circumstances. Some factors to be considered include the normal
expectations of the consumer, the degree of simplicity or complexity of the operation or use of the product, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including the information.

Gymnastic equipment and trampolines are examples of sports products that often require warnings and instructions. In *Nissen Trampoline Co. v. Terre Haute First National Bank* a 13-year-old boy was injured when his foot passed through the elastic cables which connected the trampoline to the frame. The evidence revealed that the defendant company's own tests prior to marketing of the trampoline had discovered the possibility of such an accident. The company nevertheless marketed the trampoline without including any warnings or instructions. The jury returned a verdict in favor of all defendants involved but the trial court granted a new trial to the manufacturer. The Indiana Court of Appeals upheld the trial court's action and stated that where a manufacturer has failed to provide a warning, it is presumed that any warning accompanying the product would have been heeded.

Where the manufacturer of a product does supply warnings as to the safe use of the product and a consumer is nonetheless injured, the sufficiency of the warnings is often called into question. This is especially the case with sports products which may be expected to be used by children. In *Baughn v. Honda Motor Co.* a two eight-year old boys were injured when the mini-trail bike they were riding on a public street was struck by another vehicle. The Washington Supreme Court held that the warnings against the use of the trail bike on public streets given by the manufacturer, which included a prominent sticker on the gas tank immediately in front of the driver and a bold warning on the first page of the owner's manual was sufficient to satisfy the duty to warn. Since there was no design or manufacturing defect, the product was not unreasonably dangerous. The court stated the general standard for determining a warning's sufficiency as follows: "Was the warning sufficient to catch the attention of persons who could be expected to use the product; to apprise them of its dangers and to advise them of the measures to take to avoid those dangers?" The court felt that this standard adequately accounted for products marketed primarily for children.

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There is, of course, no duty to warn of dangers that could have been readily recognized by the ordinary user. In *Prince v. Parachutes, Inc.*, the court emphasized that it is the knowledge of an ordinary user of the product that determines the need to warn of danger in using the product, not the knowledge of the particular person injured by the product. In that case the plaintiff had been injured while using an advanced parachute. He argued that the manufacturer should have attached a warning to the parachute explaining that it should be used only by advanced parachutists. Reversing the trial court's grant of summary judgment to the manufacturer, the Alaska Supreme Court held that the question of whether an ordinary parachutist would recognize that this type of parachute should be used by experienced parachutists only was a question of fact.

A similar question is presented with regard to the sufficiency of a warning that uses technical language or is written in a language which is not understandable by a particular consumer. As in *Prince v. Parachutes, Inc.*, discussed above, the appropriate standard for determining sufficiency of a warning would seem to be whether an ordinary consumer could read and understand the warnings so as to be able to take the necessary precautions. "Whether or not a given warning is adequate depends upon the language used and the impression that it is calculated to make upon the mind of an average user of the product.”

It is clear that a warning using hyper-technical language not understandable for an ordinary consumer of that product is not a sufficient warning. For instance, in *Giglio v. Connecticut Light and Power Co.*[^13^], the court held that a warning sticker on a stove which was intended for service personnel was inadequate to satisfy the duty to warn users of the stove.

Even a warning which would ordinarily qualify as sufficient may be held insufficient if there is something about the product to suggest that the ordinary consumer of it might require something more. For instance, in *Hubbard-Hall Chemical Co. v. Silverman*[^14^], an action was brought against the manufacturer of farming insecticides when two farm laborers were killed while using it without masks. A warning, written in English, was prominently displayed on the insecticide container, but the First Circuit Court of Appeals nonetheless held the warning insufficient. The court implied that the manufacturers of such a product should have foreseen that the ordinary users, farm laborers,

[^14^]: *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965).
were generally of limited education and reading ability, and often were immigrants who could not speak or read English. In such a situation, the manufacturer would need to include universal symbols, such as a skull and crossbones, in order to satisfy the duty to warn. The duty to warn and adequacy of warnings given are likely to remain much litigated issues in sports products liability cases.

**Defenses Available**

I. Contributory Negligence

"There is no doubt that where the plaintiff’s [products liability] action is founded on negligence, his contributory negligence will bar his recovery to the same extent as in any other negligence case." That rule does not necessarily hold true, however, in an action based on strict liability.

The contributory negligence is not an available defense to a strict liability claim, while assumption of risk is:

*Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.*

The failure to discover a defect is not a defense, but that use after discovery of a defect is.

II. Assumption of the Risk

It has been said that, "the major distinction drawn between contributory negligence and assumption of risk is that the former is tested by an objective standard, i.e., whether the person failed to act as a reasonable person, while the latter is tested for a subjective standard, i.e., whether this plaintiff actually understood and voluntarily accepted the risk of danger." Although the defense of assumption of risk has been proper defense to a strict liability claim. Furthermore, there is a
traditional line of thought that participants in athletic events and spectators at those events . . . [are] held to have assumed the risks of injury normally associated with the sport."

This idea that athletes assume the risks associated with the contest was established early and has proven difficult to dispel. In Vendrell v. School District No. 26C\textsuperscript{15}, the court discussed the assumption of risk defense as it applied to football:

\textit{The playing of football is a body contact sport. The game demands that the players come into physical contact with each other constantly, frequently with great force. . . . Body contacts, bruises, and clashes are inherent in the game. There is no other way to play it. No prospective player need be told that a participant in the game of football may sustain injury. That fact is self-evident. It draws to the game the manly; they accept the risk; blows, clashes, and injuries without whimper.}

More recently, however, courts have acknowledged that a participant does not automatically assume all risk of injury inflicted on the playing field, but only those which are normally associated with the sport. Furthermore, assumption of the risk will seldom, if ever, be a valid defense against a product liability claim by an athlete because the risk of dangerously defective equipment is not a risk normally associated with sports.

\textbf{III. Comparative Negligence}

The applicability of comparative negligence principles to a strict liability claim has created conceptual problems for courts and commentators. The problem arises because it is difficult to compare the negligence of the plaintiff consumer with the defectiveness of the product. Although a majority of the jurisdictions which have faced this issue have ruled in favor of some kind of comparison between plaintiff’s misconduct and the defendant's defective product, some courts have refused to allow a comparative negligence defense in such an action.

The courts that do not allow a comparison defend their position with either a strict reading of the applicable comparative negligence statute, or by arguing that strict liability and comparative negligence are simply conceptually incompatible.

Several theories have been developed to ease the conceptual difficulties that have troubled the courts. The most important of these theories utilizes the concept of "fault" instead of negligence. The leading case is *Sandford v. Chevrolet Div. of Gen. Motors*16. Under this theory, fault is considered broader than negligence and in the strict liability context the defendant's "fault" is to be found in the act of putting a dangerously defective product on the market. Plaintiff's damages are then reduced according to the percentage of fault apportioned to him. It is generally felt that the application of comparative liability principles to strict products liability will result in a much fairer allocation of damages than under the harsh, all-or-nothing rule of contributory negligence. The only problem remaining is a conceptual one: how to compare the "apples" of plaintiff's negligence with the "oranges" of defendant's defective product.

IV. Misuse

Another defense applicable to products liability claims is that of "misuse." This defense is akin to contributory and comparative fault and may in fact be described as derivative of those principles. The underlying idea is that a seller is entitled to expect that his product will be put to the use normally intended for it.

At the same time, some uses of a product may be reasonably foreseeable though they are not the "normal" use which the seller intended." 'Normal use' is not necessarily synonymous with intended use. Misuse, if expected or reasonably foreseeable, should not constitute an excuse to commercialize an unreasonably dangerous product." Indeed, the issue of foreseeability should be examined objectively, rather than from the manufacturer's subjective viewpoint, to ensure that liability for reasonably foreseeable misuse cannot be avoided by allowing the manufacturer to define narrowly the intended use of the product.

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In *Sipari v. Villa Olivia Country Club*\(^{17}\), the plaintiff was injured when the golf cart he was operating at full speed tipped over and injured him. The defense of misuse did not bar plaintiff’s recovery because in spite of the manufacturer's intended use of the golf cart, it was foreseeable that the cart might be driven at top speed. An extreme illustration is *Wyatt v. Winnebago Industries*\(^{18}\) where the court held that hotwiring a motor home was not misuse as a matter of law, but is a question for the jury.

Where the manufacturer's warnings are deemed to be inadequate, that fact is likely to have an adverse effect upon the manufacturer's misuse defense. Of course, manufacturers are not required to warn against every conceivable type of misuse, but prudent manufacturers will warn against all activities which, while obviously misuse of the product are arguably foreseeable.

For instance, in *Pell v. Victor J. Andrew High School*\(^{19}\), a 16-year-old plaintiff was injured while doing a somersault off of a mini-trampoline. The manufacturer of the mini-trampoline agreed that the product was not intended for such a purpose and that plaintiff’s conduct constituted misuse. The court rejected the argument: We are of the opinion that the evidence showed that because the warnings as well as any other information AMF provided about the mini-tramp were ineffective and failed to warn that use of the equipment without a safety device and proper supervision could result in permanent injury, Plaintiff was unaware that somersaulting off of this product could result in serious injury.

One cannot help but wonder whether a 16-year-old high school student really needs to be warned that a somersault off of a mini-tramp could cause serious injury, but the fact remains that such an act is arguably foreseeable and a prudent manufacturer would have expressly warned against it.


\(^{18}\) *Wyatt v. Winnebago Industries*, 566 S.W.2d 276 (Tenn. 1977).

V. Risk benefit approach

Under the risk-benefit approach, the following factors are considered and balanced against one another:

1) the gravity of potential harm of the chosen design,
2) the likelihood of dangers,
3) the feasibility of safer alternative design choices, and
4) the reduced utility of the product if such alternative designs were chosen.

Where this approach is accepted as an alternative to, or supplement for, the consumer expectation test, the fact that the product in question is a piece of sports equipment would seem to be of some importance. After all, the nature of sports is such that it would seem to call for as great a degree of unfettered movement as possible. There is no doubt that a baseball batting helmet with a face mask would be safer than the type of open-face batting helmets in use today.

But an open-face batting helmet does not constitute a design defect because most hitters need an unobstructed view of the pitch in order to hit it. Alternative designs would reduce the utility of the batting helmet to such a degree as to outweigh the benefit.

Conclusion
This paper presents an analysis of the changing impact of products liability risk on various individuals, firms, and institutions in today's society. After defining products liability and products liability risk, the pendulum-like evolution of products liability law is documented. Then an analysis of some of the most important factors responsible for the recent increases in the frequency and severity of products liability litigation is presented. Several of these elements have apparently combined to produce a synergistic increase in products-related lawsuits. These elements include recent developments in the law of products liability, together with a newly emerging products claim consciousness, public concerns about product safety, and the plethora of old and new products in use today.

The rapid development of products liability law has coincided, to a large degree, with the increasing popularity and importance of sports in our society. There is every indication that the sports industry will continue to burgeon and that products liability law will continue to be defined. In times such as these it is imperative that a personal injury attorney, whether bringing a product liability claim or defending one, take the time to acquire an understanding of the special issues and problems associated with the application of products liability law in the sports industry.
# Index of Authorities

## Books

- Mark A. Geistfeld, “Principles of Product Liability”, Foundation Press

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