Definition

- **PRODUCTS LIABILITY** = The responsibility of a manufacturer or vendor of goods to compensate for injury caused by defective merchandise that it has provided for sale.
- Products liability is “[a] manufacturer's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product. Products liability can be based on a theory of negligence, strict liability, or breach of warranty.”
  
  *Black's Law Dictionary 1328 (9th ed.2009).*

In the aviation context, the typical defendant is an airframe or component parts manufacturer.
The development of the modern concept of products liability (or “enterprise” liability, as some refer to it) has proceeded through several stages. The steps in the metamorphosis were these:

1. During the early Industrial Revolution, products liability was characterized by an emphasis on “privity” between buyer and seller, with the remote manufacturer ordinarily being shielded from direct liability.

The French Civil Code in Article 1386-7 provides: A seller, a hirer . . . or any other professional supplier is liable for the lack of safety of a product in the same conditions as a producer. The remedy of a supplier against a producer is subject to the same rules as a claim brought by a direct victim of a defect.

Article 1386-1 provides: “A producer is liable for damages caused by a defect in his product, whether he was bound by a contract with the injured person or not.”
Exceptions to this strict rule gradually were carved out for (a) “an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind”, (b) “an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises”, and (c) “one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not”.

2 – Imminent Danger
With Cardozo J.'s New York decision in *MacPherson v. Buick Motor Co.*, courts began to jettison privity as a bar to recovery against remote manufacturers under negligence law.
Justice Traynor's concurring opinion provided the intellectual foundation for the movement toward strict liability in *Escola v. Coca Cola Bottling Co.*, in 1944. In addition to his focus on risk minimization (because the manufacturer is in a superior position to minimize the losses), and loss spreading (so that the cost of injury does not fall upon a single innocent consumer), Traynor noted that although the doctrine of *res ipsa loquitur*, where applicable, offered an inference of defendant's negligence, nonetheless, that inference could be rebutted by an affirmative showing of proper care, often leaving the person injured by a defective product without an ability “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”.

4 – Strict Liability
5 – Privity Eroded in Contract Actions

Beginning with the New Jersey decision in *Henningsen v. Bloomfield Motors, Inc.*, in 1960, privity, as a bar to recovery against remote manufacturers, began to be swept aside in contracts actions, and implied warranties were extended to ultimate purchasers. Standardized contractual disclaimers of liability were also swept aside in situations where the parties lacked equal bargaining power. In relation to the abolition of the privity requirement, the court observed: “In this way the burden of losses consequent upon the use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.”

*Henningsen* involved an injury caused by a defective Plymouth automobile purchased by the plaintiff’s husband. The contract of sale limited liability to one other than the original purchaser. The court held, “under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser”. “[S]he is such a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile. Accordingly, her lack of privity does not stand in the way . . . .”
With the 1962 decision of *Greenman v. Yuba Power Products, Inc.*, strict liability began to be adopted to the exclusion of negligence principles, a trend solidified by the adoption of Section 402A of the *Restatement (Second) of Torts* by the American Law Institute in 1965. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or 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.
After the adoption of Section 402A, defective design and duty to warn cases were expanded under traditional negligence doctrine.
8. Finally, beginning in the 1980s, several state legislatures, heavily lobbied by insurance companies, promulgated tort reform statutes limiting liability in various ways, including imposing limitations on damages and statutes of repose.
Rationale for Limited Liability

The early common law was developed during a period where buyers and sellers were in close proximity, frequently in the same town. The seller was often also the craftsman who built or assembled the product. The buyer and the seller stood in an arm's-length relationship in which both parties could look each other in the eyes and bargain on equal terms. Products themselves were relatively uncomplicated and conducive to inspection by a buyer seeking to evaluate their quality. The pro-business bias of the judiciary reflected a desire to promote the cottage industries and small-scale commerce of the day.
Rationale for Expanded Liability

As industrial enterprise grew, purchasers were buying products made by large assembly-line manufacturers in distant cities. Producers were selling to wholesalers who sold to retailers who sold to consumers. Privity of contractual relations was no longer likely. With the development of radio and television, marketing was becoming a mass media affair. Disparity of bargaining power made *caveat emptor* a one-sided legal doctrine. Moreover, the types of products manufactured in the 20th century were more dangerous to human life — the automobile, for example, which could reach speeds well beyond those of the horses and carriages they replaced, and the airplane, which defied gravity.
Breach of Express Warranty

- To recover for breach of an express warranty, a plaintiff must prove:
  - (1) an express affirmation of fact or promise by the seller relating to the goods;
  - (2) that such affirmation of fact or promise became a part of the basis of the bargain;
  - (3) that the plaintiff relied upon said affirmation of fact or promise;
  - (4) that the goods failed to comply with the affirmation of fact or promise;
  - (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and
  - (6) that such failure was the proximate cause of the plaintiff's injury.

*AMERICAN EUROCOPTER CORPORATION v. CJ SYSTEMS AVIATION GROUP, 407 S.W.3d 274 (C.A. Tex. 2013).*

Privity may not be required for an action based on express warranty.

*TRISHAN AIR v. DASSAULT FALCON JET CORPORATION, 532 Fed.Appx. 784, 2013 WL 1869160 (C.A.9 (Cal.) 2013).*
Contemporary Jurisprudence: Three Types of Product Liability Actions

1. The Lemon Product
2. Defective Design
3. Defective Warning

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
- the seller is engaged in the business of selling such a product, and
- it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- the rule stated in Subsection (1) applies although
- the seller has exercised all possible care in the preparation and sale of his product; and
- the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Caveat*:
The Institute expresses no opinion as to whether the rules stated in this Section may not apply:
- to harm to persons other than users or consumers;
- to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
- to the seller of a component part of a product to be assembled.
The comments which follow § 402A reveal that:

1. the plaintiff has the burden of proving that the product was in a defective condition at the time it left the seller’s hands;
2. the seller can be a manufacturer, wholesaler, or retailer;
3. the seller is not liable for abnormal handling of the product;
4. contributory negligence in the form of the plaintiff’s failure to discover the defect or guard against the possibility of its existence is not a defense to liability;
5. however, assumption of risk in the form of “voluntarily and unreasonably proceeding to encounter a known danger” (sometimes known as "secondary assumption of risk") is a defense;
6. the nonexistence of a warranty is irrelevant;
7. the seller can avoid having his products deemed unreasonably dangerous with an appropriate warning; and
8. some products are obviously dangerous in the eyes of an ordinary consumer, and are unreasonably dangerous only to the extent not contemplated by him.
Causation

Plaintiff has the burden of proving the defect caused his injuries:

- “Defendant Jeppesen Sanderson . . . seeks summary judgment on all claims against it, asserting that Plaintiffs have not established a *prima facie* case that its navigational chart contributed to the cause of the crash. Because there is no evidence properly before the Court that Jeppesen's chart probably contributed to the cause of the crash, the Court grants Jeppesen's motion for summary judgment.”

*Hamilton Sundstrand Corp. v. Airservices Australia, 2014 WL 3107961 (N.D. Ill. 2014)*
Three Types of Products Liability Actions

1. The Lemon Product
2. Defective Design
3. Defective Warning

The “lemon” product is the easiest to comprehend. It is a product that rolls off the assembly line different from the others. It does not comport with the design of the product. It has been manufactured or assembled badly. In essence, there was “negligence” in its production, though the plaintiff need not prove negligence. It is enough that it is different from others of identical design, and that difference caused the damage.
Some courts have rejected the application of Section 402A of the American Law Institute's *Restatement (Second) of Torts* in the area of design defects, concluding that although it contemplates that the producer will be liable in the production of a defective product even where it has “exercised all possible care in the preparation and sale of his product”, nonetheless the “existence of a defective design depends upon the reasonableness of the manufacturer's action, and depends upon the degree of care which he has exercised . . .”.

The consumer expectations test and the risk/utility test have dominated products liability analysis in design defect cases.
The consumer expectations test asks what reasonable consumers expect of the product, the assumption being that products should perform as reasonable consumers expect.

This test flows from Section 402A of the Restatement (Second) of Torts, which imposes liability for defective products which are “unreasonably dangerous . . . to an extent beyond that which would be contemplated by the ordinary consumer . . .”
A consumer expectations test has been embraced by Article 1386-4 of the Civil Code of France:

- A product is defective within the meaning of this Title where it does not provide the safety which a person is entitled to expect.
- In order to appraise the safety which a person is entitled to expect, regard shall be had to all the circumstances and in particular to the presentation of the product, the use to which one could reasonably expect that it would be put, and the time when the product was put into circulation.
- A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Article 1473 of the Civil Code of Quebec provides: “The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the victim knew or could have known of the defect, or could have foreseen the injury. . . .”
Defective Design: The Patent Danger Rule

A defense often raised is that consumer expectations cannot be high where the risks posed by the product are obvious. Under the *patent danger rule*, defendants argue that the obviousness of the risk should bar recovery for a design defect as a matter of law. Many courts have rejected this defense, one noting that an “[u]ncritical rejection of design defect claims in all cases wherein the danger may be open and obvious . . . contravenes sound public policy by encouraging design strategies which perpetuate the manufacture of dangerous products”.
The Restatement (Third) of Torts rejects the consumer expectations test as an independent standard for judging the defectiveness of product designs because “[c]onsumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety”. Nonetheless, the Restatement recognized the usefulness of consumer expectations in “judging whether the omission of a proposed alternative design renders the product not reasonably safe”. The expectation of the consumer has not been deemed the exclusive means for determining design defect because the reasonable consumer often knows not what to expect.

Barker v. Lull Engineering Co., 20 Ca. 3d 413, 573 P.2d 443, 143 Cal. Reptr. 225 (1978) held:

“[A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product’s design embodies ‘excessive preventable danger,’ or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. . . . [A] jury may consider . . . the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.”

Echevarria v. Caribbean Aviation Maintenance, 845 F.Supp.2d 467 (D.P.R. 2012), held that the consumer expectations test is not available when the underlying matter involves complex technical matters such as aircraft design, and therefore applied the risk/utility test.
In order to prevail in a products liability case based on a defective design, courts have considered the following criteria, for example:

- the foreseeable risk of harm that could have been reduced by a reasonable alternative design;
- the technological feasibility of manufacturing a product with the suggested safety device at the time the product was manufactured;
- the availability of the materials required;
- the chances of consumer acceptance of the device;
- the relative advantages and disadvantages of the product as designed and as it could have been designed;
- the effects of the alternative design on production costs;
- the effects of the alternative design on product longevity, maintenance, repair and aesthetics; and
- the overall safety impact of the alternative design, not only on plaintiff, but on other users of the product.
Defective Design: Reasonable Alternative Design

Though the feasibility of an alternative design may be proven by the plaintiff, some courts do not insist that the plaintiff prove the existence of a feasible alternative design in every case. The *Restatement (Third) of Torts* states that “reasonable alternative design is the predominant, yet not exclusive, method for establishing defective design”.

Defective Design: State of the Art

- Another question in defective design cases is whether the court should assess the state of the art in the manufacturer's trade of business at the time of its design, or at the time of the injury. Technology evolves rapidly so that more recently designed products can be made safe.

- The dominant view on the issue was expressed in *Bruce v. Martin-Marietta Corp.*, which measured the state of the art at the time the product (aircraft seats) entered the stream of commerce, in 1952 (at which time the seats satisfied FAA safety standards), rather than the prevailing safety standards at the time of the crash, in 1970. The court observed that the crucial question was the expectations of an ordinary consumer, who “would not expect a Model T to have the safety features which are incorporated in automobiles made today”.

- “The plane in this case was manufactured in the late 1990s; consequently, only issues with this plane model . . . are relevant.”

Defective Warning

- A problem with a warning may exist either because the warning was deficient in failing to appraise consumers of the product's dangers, or because there was no warning given in a situation where there should have been. In determining whether a warning should have been given, courts focus on the defendant's knowledge, actual or constructive, of the product's dangerous propensities at the time it was produced or sold.

- Thus, unlike other products liability cases which focus on the product, the failure-to-warn line of cases focuses on the conduct of the manufacturer. Nonetheless, though in negligence, the plaintiff must prove that the seller did not warn for reasons that fall below an appropriate standard of care, in strict liability, the reasonableness of the defendant's failure to warn is immaterial. Strict liability requires the plaintiff to prove only that the defendant failed to warn of a risk which was known or knowable in light of generally accepted scientific or medical knowledge existing at the time of manufacture and distribution.
Duty to Warn

- “In general, a supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use. . . . A supplier's duty to warn extends to all “reasonably foreseeable users. . . . We have described the duty to warn as consisting of two duties: (1) [t]he duty to give adequate instructions for safe use; and (2) the duty to warn of dangers inherent in improper usage. . . . To be legally adequate, [a] warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury. . . . Foreseeability is the linchpin for determination whether a duty to warn exists.”

- The duty to warn does not require that an aircraft supplier or manufacturer provide training, but does require that it provide accurate and thorough instructions on the safe use of the aircraft. Though the contract of sale included a provision that the manufacturer would provide flight training, a contractual breach does not support an action in tort.

- GLORVIGEN v. CIRRUS DESIGN CORPORATION, 816 N.W.2d 572 (Minn. 2012).
Duty to Warn

- “[B]oth negligence and strict liability standards impose a duty to produce products with appropriate warning instructions and other safety features. . . . The elements of both negligence and strict liability are the same with the exception that in negligence, the plaintiff must show that the defendant breached its duty of due care and in strict liability the plaintiff must show that the product was unreasonably dangerous. . . . Under both theories, Plaintiff must prove that the aircraft was in a defective condition and unreasonably dangerous.”

- “[Defendant] Saunders is not a manufacturer or seller engaged in the business of selling aircrafts to whom strict liability for failure to warn attaches . . . . Nor has Plaintiff sufficiently pled facts that establish a duty owed by Saunders, as a previous owner of the aircraft, to Plaintiff. . . . Plaintiff has failed to state a claim for failure to warn against Saunders under either strict liability or negligence.

Nonetheless, tort liability appears to have had a profound impact on small aircraft manufacturing, which fell from 17,000 aircraft per year in 1979 to little more than 1,000 by 1987. Professor Epstein notes that “about $100,000 in the cost of each new private plane covers potential liability insurance, given that some 90 percent of the crashes result in product liability actions against the manufacturer”.
Federal Preemption of Products Liability Law?

“Simply because Congress has enacted comprehensive legislation does not mean that field preemption should supersede state law, particularly in a field such as that here which the states have traditionally occupied. . . . There is no evidence that it was the ‘clear and manifest purpose of Congress’ for the Act to supersede state products liability, negligence, or breach of warranty law as applied to aircraft design and manufacture. The passage of GARA and its legislative history are strong proof to the contrary.”

The “Tort Reform Movement”, in which insurers and certain manufacturers prodded legislatures to circumscribe liability, manifested itself in the United States at both the state and the federal level. Congress passed the General Aviation Revitalization Act (GARA), which provided a shield from tort liability for aircraft 18 years after their manufacture.

Some States have a shorter repose period; Florida’s is 12 years.
GARA: Exceptions

- KNOWING MISREPRESENTATION TO FAA:
- [T]he claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft[, ] knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered....

To prevail, the plaintiff must prove:
- (1) the manufacturer had actual or constructive knowledge of information relevant to FAA type certificate or continuing airworthiness obligations;
- (2) the manufacturer knowingly misrepresented, concealed or withheld the information from the FAA;
- (3) the information was required by the FAA;
- (4) the required information was material and relevant to the performance, maintenance or operation of the aircraft; and
- (5) the knowing misrepresentation, concealment or withholding was causally related to the harm suffered.

MOORE v. HAWKER BEECHCRAFT, 2011 WL 6400670 (Del. Super. 2011)
The Hague Convention on the Law Applicable to Products Liability of 1973 (hereinafter “Hague Convention”) establishes “conflicts of laws” rules with respect to the liability of:

(1) manufacturers of finished products or component parts;
(2) producers of natural products;
(3) suppliers of products; and
(4) other persons, including repairmen or warehousemen, in the chain of preparation or distribution.
Three potential laws are specified in the convention.

(1) *The State of the Place of Injury.* The internal law of the State of the place of injury applies if that State also is:
(a) the place of the habitual residence of the person directly suffering damage;
(b) the principal place of business of the defendant; or
(c) the place where the product was acquired by the person directly suffering damage.

(2) *The State of the Residence of the Plaintiff.* The internal law of the State of the place of the habitual residence of the person directly suffering damage applies if that State also is:
(a) the defendant’s principal place of business; or
(b) the place where the product was acquired by the person directly suffering damage.

(3) *The State of the Defendant’s Principal Place of Business.* If neither of the above alternatives applies, the internal law of the State of the defendant's principal place of business applies, unless the plaintiff bases his claim on the internal law of the State of the place of injury.
To these alternatives is a blanket exception. Neither the laws of the State of the place of injury nor of the residence of the plaintiff shall apply if the defendant proves “that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels”. The Convention does not elaborate as to what law would apply in such a situation.
Applicable Law

- Eleven European States have ratified the Hague Convention: Croatia, Finland, France, Luxembourg, Montenegro, The Netherlands, Norway, Serbia, Slovenia, Spain and Macedonia.
- Note that France and Spain are major producers of Airbus aircraft and component parts. The Hague Convention also provides that the laws of the State chosen under the aforementioned conflicts rules need not be those of a State that has ratified the Convention.
- Thus, a suit brought against U.S. manufacturers dismissed from U.S. courts on *forum non conveniens* grounds to one of the eleven European States that have ratified the Convention might still have U.S. law applied to the case.
- Once the State whose laws will apply is determined, then the laws applicable to the case include, for example, laws defining the basis and extent of liability, grounds for exemption therefrom or limitations thereto, recoverable damages, who may file suit and the burden of proof.
- Recoverable damages include injury to persons or property as well as economic loss, but do not include damage to the product itself and any consequential economic loss.
Tupolev TU154M
Heading= 274°

Boeing B757-200
Heading=004°
welcome to the institute of

AIR & SPACE LAW

Postgraduate Law Degrees and Certificate Programs

www.mcgill.ca/iasl/