“The people’s good is the highest law.”

*Cicero*

*The Triumph of Justice*
*by Hans von Aachen*
Was Cicero asserting “truth” or ideals?

Food line, U.S. 1930s
Is thinking of the common good...common?
Because if deception occurs...

DOGBERT, VP OF MARKETING

AS HEAD OF PUBLIC RELATIONS, IT WILL BE MY JOB TO EXPLAIN YOUR MARKETING CLAIMS.

SO?

YOU CLAIM OUR PRODUCT CAN TURN TAP WATER INTO UNLEADED GASOLINE AND REANIMATE THE DEAD.

ARE YOU ASKING ME TO DO A LOUSY JOB OF MARKETING JUST SO YOUR JOB IS EASIER?

UM...
or products are defective...

Air Tran flight, Atlanta to Orlando, 7/13/04. Airliners.net
Injury May Result!
(nailgun backfired)
This presentation is about . . .

Contorts: Breach of Contract With A Tortious Twist
Breach of Warranty lawsuits and Product Liability lawsuits are based on contractual promises that the product will perform as expected.

- Duty not to harm, duty to fulfill promise

When the contract is breached, the breach causes physical and/or economic injury.
Theories of Liability

- Caveat emptor was the rule two centuries ago, but with industrial revolution, the law began to change.

- To protect consumers from economic loss and personal injury, five legal theories developed: express warranty, implied warranty, negligence, fraud, and strict tort liability.
Nature of Harm

- Until 20th C, only those in privity of contract could sue
- Defective products may cause harm to
  - person, property, economic or commercial interests

Withdrawn from market by Merck
Privity No Longer a Requirement

Now, third persons may sue

Example: Passengers in rollover of SUV with defective tires

Ford Explorer rolled over, had Firestone tires that delaminated
Express Warranties

Definition: statement by the defendant relating to the goods that is part of the basis of the bargain

“…the Travelocity Guarantee is our commitment to you that everything about your booking will be right, or we'll work with our partners to make it right, right away. ...We can't control some things, like the weather or mechanical difficulties, but we can be there to help you navigate when a problem arises. We can also be there to help you avoid some problems altogether....”
Express Warranties

- No particular form or words required
- Found orally, writing, or in conduct
- Immaterial whether at time of sale or after
- Sample or model can be express warranty
Example of Express Warranty

Felley v. Singleton: Felley bought a used car from the Singletons based on statement of “good mechanical condition”

Car actually was in poor condition

Court: “In the context of a used car sale, representations by the seller such as the car is ‘in good mechanical condition’ are presumed to be affirmations of fact that become part of the basis of the bargain"
Seller’s Opinion

“Puffery” ≠ warranty
Opinion may be warranty if “expert” opinion on which buyer relies

Roy Rogers Restaurant ad
Pizza Hut sued Papa John’s about this claim (and lost!)
Federal Trade Commission (FTC) regulates commerce, including warranties

- Federal *Magnuson-Moss Warranty Act* applies to sales of consumer products > $10 per item
- *Full warranty*: seller obligated to fix or replace a defective product w/in a reasonable time without cost to buyer”

The *Oreck XL® Deluxe Vacuum* comes with a 5-year, worry-free motor warranty and a full 10-year housing warranty. Oreck will repair or replace, free of charge, to the original purchaser, any part which is found to be defective in material or workmanship within five years of the date of purchase; ten years on housing. This limited warranty applies to normal domestic use. Oreck's limited warranty is valid only if you retain proof of purchase from Oreck or an Oreck Authorized Retail Dealer for this product.
Implied Warranties

Warranty implied by law rather than seller

- **Warranty of Title or Warranty Against Encumbrances** *(title is good)*

- **Warranty of Merchantability** *[UCC 2-314(1)]*
  - Merchantable means the goods are fit for the ordinary purpose for which they are to be used

- **Warranty of Fitness for Particular Purpose** *[UCC section 2–315]*
  - Seller knows that goods may be used for unique purpose by buyer and knows buyer relies on seller
Hong v Marriott Corp.

What were the facts?
What was the issue?
What was the court’s ruling and reasoning?
Disclaimers & Limitations

Must be conspicuous & not unconscionable

Examples:
- Disclaimers on a web site or TV advertisement
- Limitation of time (*e.g.*, car warranty of 12,000 miles or 2 years)
- Limitation of recovery (*e.g.*, photo shop warranty limiting recovery to film replacement)

Bulb replacement is the sole remedy available and liability for incidental or consequential damage is expressly excluded. Do not return the bulb to the store.
Warranties & Strict Liability

The law related to warranties is based upon the theory of strict liability

Society abhors a lie and the law attempts to protect consumers from those who break promises

Warranty theory and strict liability theory are the basis for Product Liability law

Honda recall because potential flaw in airbag inflator may cause inflator’s casing to rupture and shoot metal fragments when airbag is deployed. Mattel toys recalled due to lead paint
Dannon Co. agreed to pay $35 million on Sept. 18, 2009 to settle claims that the food giant spent millions on a misleading advertising campaign to convince customers to shell out more for certain yogurt containing probiotic bacteria (Activia and DanActive) by claiming they improved digestive health. Dannon, a unit of France’s Groupe Danone, denies any wrongdoing.
Based upon *absolute or strict liability*

imposed because society believes firms should not design and produce dangerous or defective products which may endanger the public.

Assumption is that manufacturers warrant their products are safe.

No fault required, only harm caused by the defective or dangerous product.

In 2007, Merck settled 27,000+ Vioxx claims for $4.85 billion.
The Elements of a Tort Apply

- Duty of Due Care
  - *e.g.*, duty not to breach a warranty, duty not to produce dangerous or defective products
  - Reasonable person standard

- Breach of Duty

- Causation
  - two prong analysis: proximate cause & foreseeability

- Injury
The Causation Element is the Key

- Causal relationship between act and injury *must* exist before liability is imposed
  - Act of third person (distributor, retailer, product user) does not negate liability for a manufacturer

- Two-prong test (both required for liability):
  - Proximate cause: “but for” test . . . But for the breach of warranty (defective product) the harm would not have occurred
  - Foreseeability: Was the harm caused by the defective product reasonably foreseeable?
Jarvis v. Ford Motor Co.

Allegations of Plaintiff:

- New Ford Aerostar suddenly accelerated and, despite applying brakes, acceleration resulted in injury to Jarvis
- Witnesses supported Plaintiff’s efforts to control van
- Witnesses recounted similar Aerostar incidents
- Expert witnesses testified that vacuum powered brakes would fail with sudden acceleration and design flaws existed in Aerostar system
Jarvis v. Ford Motor Co.

Defense of Defendant:

- Acceleration due to driver error
  - mistook accelerator for brake pedal
- Driver’s manual shows that pumping action Jarvis applied to brakes was improper for the situation

◆ Expert witnesses:
  Aerostar system not defective and had a safety backup

Photo from Safety Forum.com
Jury Verdict & Procedural History:

- Ford negligently designed Aerostar’s cruise control system – a substantial factor in causing accident
- Jarvis’s negligence also substantial causal factor
- Apportioned 65 percent of the fault to Ford and 35 percent to Jarvis, awarding $1 million+ damages
- Ford moved to set aside verdict; trial judge entered judgment for Ford

Result of 1998 Ford Lincoln Town Car sudden acceleration; one death
Jarvis v. Ford Motor Co.

Legal Opinion on Appeal:
- Court cannot assess weight of conflicting evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury.
- Conflicting evidence existed & not enough evidence supported Ford’s accident theory to satisfy requirement for judgment as a matter of law.
- Ultimate issue of Ford’s negligence is a jury question.
- Case remanded w/instructions to reinstate jury verdict.
  - $1.1 million judgment against Ford reinstated in 2002.
Countering Causation

Manufacturers or those in the service industry (e.g., doctor, accountant) often attempt to break causation link by placing warning labels or disclaimers on products or by providing informed consent.

- e.g., a patient signs informed consent form prior to surgery re: knowledge of risks.
Countering Causation

Purpose: place burden of risk on buyer/user
   Example – Caterpillar skid steer loader lawsuit

Loader malfunctioned, D. Mitchell (son) checked engine & found leaking hydraulic fluid, tightened link and it began spraying, loss in pressure made blade fall onto and kill T. Mitchell (father)

Caterpillar might argue that cause of accident was equipment misuse, failure to follow safety procedures, etc.
Generally, liability is joint and several

- When two or more defendants (e.g., retailer & manufacturer) have caused harm to plaintiff, plaintiff may sue defendants for joint and several liability

Reasons: deep pocket, may speed settlement, evidence, and jurisdiction options
Examples of Product Liability

- Silicone Gel Breast Implants
- Dalkon Shield
- Asbestos
- Firestone Tires
- Sulzer Knee Implants
GM Trucks
Tobacco
Vioxx
PhenFen
Where Asbestos Litigation Money Goes

Total spending ($70 billion*)

- Defense transaction costs ($21 billion) (31% of total spending)
- Gross compensation to claimants ($49 billion) (69% of total spending)

- Claimants’ transaction costs ($19 billion) (27% of total spending)
- Net compensation to claimants ($30 billion) (42% of total spending)

* Estimated spending through 2002.
True=A, False = B

- Implied warranties are created by seller’s conduct rather than express statements.
- Merchantability, essentially, is that goods must be fit for the ordinary purposes for which such goods are used.
- A disclaimer is a clause in the sales contract in which seller attempts to eliminate liability seller might otherwise have under law.
Test Your Knowledge

True=A, False = B

- Under foreign–natural test, defendant is liable if object or substance is “foreign” to product, but not liable if it is “natural” to the product.
- Under the Restatement of Torts (Third), three kinds of product defects exist: manufacturing defects, inadequate warnings, design defects.
- The Magnuson-Moss Warranty Act requires every written warranty to be a full warranty.
Multiple Choice

Express warranty may be created by __________ that becomes part of the basis of the bargain for the agreement:

(a) a statement of fact or promise about goods
(b) a description of the goods indicating goods will conform to the description
(c) a sample or model of goods to be sold indicating goods will conform to the sample
(d) all of the above
(e) both A and B, but not C
Drew was injured when his car rolled over after the tires delaminated and caused him to lose control. Drew could sue, claiming:

(a) negligence (design or manufacture)
(b) strict liability
(c) breach of warranty
(d) all of the above
Product Liability Statistics

1990 to 2003: number of non-asbestos product liability trials concluded in U.S. federal courts declined 2/3 from 279 to 87 trials

- Plaintiffs prevailed in nearly 1/3 of those trials

- Motor vehicle claims comprised 20% of tort trials, product liability 13%, and medical malpractice 10%

- Juries decided 71% of trial tort cases, but plaintiffs won more often in judge compared to jury trials

(Department of Justice, 2003)
Plaintiffs prevailed less frequently in federal court trials involving medical malpractice (37%) or product liability (34%) issues compared to motor vehicle accident cases (57%) (DOJ)

Business cases (financial damages) account for 47% of all punitive damage awards (Rand Institute for Civil Justice, 1996)
Next Week: Contracts

IF YOU BITE A JAWBREAKER AND IT BREAKS YOUR JAW, CAN YOU SUE THE CANDY COMPANY ANYWAY?

AND IF IT DOESN'T BREAK YOUR JAW, CAN YOU SUE THEM FOR FALSE ADVERTISING?

AND TO THINK SOME PARENTS ACTUALLY WANT THEIR KIDS TO BE LAWYERS.

AND WHAT ABOUT LIFE SAVERS... SUPPOSE YOU ATE ONE WHILE YOU WERE DYING...