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# Recovery for On-the-Farm Personal Injuries: A Glance at Products Liability Law

David J. Hogue, David M. Saxowsky, and Owen L. Anderson

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Department of Agricultural Economics
North Dakota State University
Fargo, ND 58105-5636

School of Law
University of North Dakota
Grand Forks, ND 58202

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## *Highlights*

*The combination of farming as the most hazardous occupation and the numerous inputs purchased and used in agriculture is resulting in increased attempts to impose legal responsibility upon the manufacturer of the product that was being used at the time of the injury. This area of the law is generally referred to as products liability and any one or a combination of three legal theories frequently is used to establish the liability of a manufacturer for personal injuries caused by its product. These theories are negligence, strict liability, and breach of an implied warranty.*

*Manufacturers and suppliers have various legal defenses with which to counter arguments that they are legally responsible. These defenses include negligence on the part of the injured person in using the product, assumption of risk, alteration of the product by the injured person, manufacturer or supplier is not the seller, injured party is responsible for the injury, and exclusion or inapplicability of warranty.*

*This publication provides an awareness of products liability law as it applies to agriculture including theories and defenses. It is not intended to substitute for competent professional advice, and persons who encounter a situation involving a potential products liability issue are encouraged to seek such advice.*

# RECOVERY FOR ON-THE-FARM PERSONAL INJURIES:

# A GLANCE AT PRODUCTS LIABILITY LAW

David J. Hogue, David M. Saxowsky, and Owen L. Anderson*

Farming ranks number one--even above mining--as the nation's most hazardous occupation, according to federal government statistics. An estimated one in nine farm families suffer a farm-related accident each year. One reason for the high incidence of injury is the environment in which farmers work. Few industrial occupations subject the worker to a greater variety of self-operated mechanical equipment and the accompanying potential for injury than a typical farming operation during planting or harvesting season.

The American legal system recognizes that someone other than the injured person may be responsible for the injury or at least legally obligated to compensate an injured individual. Workmen's compensation and general insurance coverage often are used to minimize adverse economic consequences (e.g., medical bills, lost ability to work) which result from physical injury. Another party that may be liable for an injury is the manufacturer of the equipment that was being used at the time of the injury. Products liability is the body of law which addresses the question of whether a manufacturer or seller may be legally responsible for injuries resulting from the use of their products. This body of law provides a method of allocating loss from "defective" products between a seller (supplier) of goods and the buyer (consumer).

A "defective" product may cause the plaintiff to suffer property loss, bodily injury, or both. A simple example will clarify this distinction. Assume a tire guaranteed to last 40,000 miles is defective and sustains a blowout after just 200 miles of use. Assume further the blowout occurs at high speed on the highway causing the driver to lose control, with the end result being total destruction of the car as well as serious personal injuries to the driver. The same defective tire is responsible for the loss of property (destruction of the automobile) and the personal injury. Loss of property, although it is often a natural consequence of on-the-farm accidents and resolved in the same lawsuit as a claim for personal injury, is excluded from this report to give adequate discussion to personal injury claims.

This report examines the potential liability of modern farm equipment manufacturers when use of their product results in bodily injury. Three principal theories of recovery under products liability law are discussed; negligence, strict liability for selling a defective product,

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*Hogue is a student researcher at the School of Law, Saxowsky is an assistant professor, Agricultural Economics, and Anderson is a professor of Law.

and strict liability for breach of an implied warranty. Several defenses that manufacturers are likely to raise are reviewed and include negligence on the part of the injured party (either comparative or contributory negligence) and assumption of risk. The goal of this report is to provide the reader with enough information to understand the basic principles of products liability law and thereby assist the reader in recognizing situations where injuries might give rise to a legal claim.

## Negligence as a Basis of Recovery

In a lawsuit based on negligence, an injured party (plaintiff) attempts to persuade the trial court and jury that the cause of the injury was the manufacturer's (defendant's) negligence. The plaintiff has to establish the existence of the following four elements:

1. A Duty of Care existed between the plaintiff and defendant--the law recognizes a duty to use reasonable care for the protection of others.

2. Breach of Duty--plaintiff must prove the defendant's conduct failed to comply with the duty of care owed.

3. Causation--plaintiff must prove a connection between the defendant's conduct and the resulting injury.

4. Damages--plaintiff must prove the extent to which defendant's conduct harmed him.

A party is legally negligent if existence of the first two elements is proven.

A negligent manufacturer may loosely be defined as a manufacturer who fails to act as a "reasonable and prudent" manufacturer would given the circumstances under which it is manufacturing. The following cases will illustrate how negligence is applied to a personal injury situation.

### Duty of Care and Its Breach

An inexperienced employee of a potato harvesting operation injured her hand and arm in the case of Lindenberg v. Folson.[1] The injury occurred while the potato harvesting machine was moving down the field. The plaintiff's job was to separate potato vines from potatoes on a platform of the machine. The employee lost her balance and instinctively grabbed for the first object within reach--a chain driven sprocket. The injured plaintiff sued the potato farmer who employed her and the manufacturer of the potato harvester.

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[1]138 N.W. 2d 573 (N.D. 1965).

The plaintiff's claims were based on negligence. She alleged that her employer was negligent in failing to provide a safe working area and that he failed to warn her of the dangers inherent in working on the potato harvesting platform. The plaintiff also alleged the manufacturer negligently designed the potato harvester and was negligent in failing to warn her of the dangers inherent in operating the potato harvesting machine. Evidence indicated that the sprockets in which the plaintiff's hand became entangled were only partially shielded. The jury found for the plaintiff and both defendants appealed.

The North Dakota Supreme Court affirmed the trial court's decision for other reasons but still elaborated on the negligence of the farmer and manufacturer. It noted that while the employer and manufacturer are not required to point out obvious dangers, they must warn and give safety instructions of dangers which are incident to work upon the potato harvesting machine, especially when the employee is inexperienced. The court also pointed out that the employer has a duty to provide employees with safe machinery, tools, and appliances. Finally, the court noted that both the manufacturer and employer should have foreseen the possibility of an employee losing her balance and instinctively reaching out for something to prevent the fall.

The ability to foresee an event often imposes a legal duty to use reasonable care in preventing injury. Thus, the law imposes a duty upon the manufacturer and employer to use reasonable care in avoiding injury from loss of balance if they should have foreseen the possibility of employees/users losing their balance on the potato harvester.

Perhaps the clearest illustration of this point is Ford Motor Company's liability for its early 1970s "Pinto" model automobiles. The Pintos' gas tanks had a tendency to explode upon a rear-end collision. Ford's liability was premised on the fact that it knew, or should have known, that Pintos would be involved in rear-end collisions and, therefore, was under a duty to use reasonable care in designing the automobile to prevent serious injuries upon such collisions. By analogy, it is not difficult to foresee an employee losing her balance on a moving machine and instinctively grabbing for the first object within reach. Therefore, both employer and manufacturer were under a duty to use reasonable care to prevent injury should a loss of balance occur. Whether a manufacturer could have foreseen the event and whether it used reasonable care in preventing injury are two questions decided exclusively by the jury.

Several practical lessons seem clear from the court's discussion in Lindenberg. First, farmers have a duty to warn employees about the dangers inherent in operating particular pieces of machinery. Second, if it is foreseeable that a particular event may occur, such as losing one's balance on a moving machine, the farmer as the employer and the manufacturer as the seller have an affirmative duty to use reasonable care in preventing injury should the event occur. The jury may have concluded in this case that both the manufacturer and employer breached the duty of care by failing to fully shield the sprockets, which were objects within reach of the plaintiff as she fell.

Proximate Cause

A plaintiff must establish a connection between the conduct of the defendant and the plaintiff's injury in order to recover under the theory of negligence. Simply stated, it must be proven that the defendant's negligence caused the plaintiff's injury.

United States Rubber Co. v. Bauer[2] involved a North Dakota farmer injured when his combine drive belt broke and struck him in the head. He alleged that the belt broke due to its defective condition; that the defective condition was the result of the belt manufacturer's negligence; and that, therefore, the manufacturer's negligence caused his injury.

The particular belt model which injured the farmer had previously been recalled by the belt manufacturer. The actual belt which caused the injury was a replacement belt installed by the farmer one year before the injury occurred. There was conflicting evidence as to whether the belt had been properly installed by the farmer. A witness for the defendant belt manufacturer testified that extensive wear on the side of the belt was strong evidence that the belt pulleys were misaligned and that such a misalignment caused the belt to break. The farmer's witness, a mechanic, testified that the pulleys were properly aligned when he installed the belt that replaced the broken one. The trial court, sitting without a jury, concluded the belt was defective and found for the injured farmer.

The appeals court reversed because the farmer failed to prove that a defect in the belt caused it to break. The court interpreted the manufacturer's recall of the particular belt model as a precautionary measure to protect its goodwill rather than a tacit concession that the belt was defective. The added fact that the belt had been used in two separate harvesting seasons with evidence that it had been improperly installed raised further doubt that the cause of the breakage was due to a defect in the belt. The appeals court concluded that it would be too speculative, in view of all the other possible causes, to conclude that the belt broke because of a defect in its original condition. The plaintiff's case thus appears to have failed on the element causation; that is, there was not sufficient evidence to establish a link between the manufacturer's conduct of producing a belt that needed to be recalled and the resulting injury to the farmer.

It should be noted that the North Dakota Supreme Court--the highest judicial authority for determining North Dakota state law--ruled that a plaintiff must show that it was more likely than not that the resulting injury was caused by a defect in the product. Thus, under the facts of Bauer, a plaintiff would have to prove that it was more likely than not that the cause of the injury was due to a defect in the belt.

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[2]319 F. 2d 463 (D.N.D. 1963).

## Defenses to a Claim Based on Negligence

A defendant in a products liability lawsuit is not without legal defenses. Two theories of defense are contributory negligence (as well as its modified form--comparative negligence) and assumption of risk. They are distinctive defenses but both assert that the injury was caused by the plaintiff's conduct, not the defendant's, and that the defendant consequently should not be liable for any damages.

### Contributory and Comparative Negligence

The defendant who raises a defense of contributory negligence is arguing that the injured party did not exercise the care of a reasonable and prudent person. A defendant concludes this argument by urging that the injured party should not recover monetary damages from the defendant because the plaintiff failed to exercise this level of care. The traditional legal view was that only one party's negligence could be found legally responsible for an injury and that plaintiffs could not recover if their conduct contributed even marginally to the cause of the injury. This view had severe consequences in some cases because it prevented an injured party from being compensated if the plaintiff was even slightly negligent regardless how grossly negligent the defendant may have been.

North Dakota and at least 24 other states now apportion the legal responsibility for personal injuries by allocating the incidence of negligence between the injured party and the manufacturer. This is known as comparative negligence and permits an injured party to recover damages even though the plaintiff had been negligent. The amount of damages the defendant must pay is reduced to reflect the plaintiff's negligence. Both parties consequently share the cost of the injury based on their negligence.

North Dakota's comparative negligence law (North Dakota Century Code 9-10-07) permits plaintiffs to recover money damages as long as their negligence is not as great as the defendant's negligence. Thus an injured person may recover if a jury determines the defendant's negligence was greater than the injured party's (plaintiff). The amount injured parties will recover, however, is reduced in proportion to their negligence.

The case of Keller v. Vermeer Manufacturing Co.[3] involved a North Dakota farmer, experienced in operating a round hay baler, who lost his arm by attempting to dislodge a lump of dirt from a round baler while the power take-off shaft was still engaged. The farmer argued at the trial that his injury was the result of the baler manufacturer's negligence in designing, assembling, and labeling the machine. The manufacturer contended that it was the farmer's negligence in placing his hand near the baler's rollers while the power take-off was engaged that caused his injury.

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[3]360 N.W. 2d 502 (N.D. 1984).

The jury was responsible for determining which party's negligence caused the injury. It found the manufacturer to be 50 percent at fault and the injured farmer to be 37 percent at fault. The remaining 13 percent was attributed to a third party defendant. The injured farmer was allowed to recover since his negligence was "not as great as" that of the manufacturer. The jury determined that the farmer suffered $800,000 in damages for loss of his arm. His award was reduced to $504,000 as a result of his own negligence (37 percent). The farmer would not have recovered under North Dakota law if the jury had determined that his negligent conduct contributed 50 percent or more to the cause of the injury.

Negligence can be difficult to prove since it requires evidence that the defendant manufacturer failed to act as a reasonable and prudent manufacturer would have acted. In practice, however, juries may tend to be more sympathetic with a local plaintiff than a large manufacturing corporation.

## Assumption of Risk

Assumption of risk is commonly raised as a defense by the defendant when an injured party disregarded the danger of a situation which the injured party knew or should have known to be hazardous. A manufacturer is arguing with the defense of assumption of risk that it should be relieved of liability to the injured party because that person knew or should have known of the danger but still voluntarily proceeded to take the action that resulted in an injury. A defendant is arguing that the voluntary act is an acceptance of the dangerous situation and consent to relieve the manufacturer of liability. The manufacturer in the Keller case would raise the defense by arguing that the plaintiff farmer assumed the risk of injury by placing his hand near the rollers while the power take-off was engaged. He knew or should have known that putting a hand near an engaged hay baler is hazardous.

A second reason why this legal defense should be available is that manufacturers cannot build machinery that is accident proof and should not be liable when a person consciously disregards an obvious danger and is subsequently injured. Imposing such an obligation upon our nation's manufacturers may hamper economic development to the disadvantage of all.

The defense of assumption of risk, like the defense of contributory negligence, is less relevant in North Dakota since enactment of the "comparative negligence" statute discussed in the preceding section.[4]

## Strict Liability as a Basis of Recovery

An injured party may recover money damages without proving the defendant was negligent in manufacturing the product. This is referred to as "strict liability." One theory of strict liability is embodied in

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[4]Wentz v. Deseth, 221 N.W. 2d 101 (N.D. 1974).

Section 402A of the Restatement (Second) of Torts which provides that a seller is liable for physical harm resulting from any product sold in a defective condition unreasonably dangerous to the user or consumer or that person's property.

Support for holding manufacturers and sellers strictly liable under Section 402A is predicated on several economic assumptions. First, it is believed that the manufacturer/seller is better able to bear the cost of an injury than the buyer/consumer. The manufacturer can, with insurance, protect itself against possible loss and incorporate the insurance expense into the cost of the product. Second, it is believed that holding manufacturers and sellers strictly liable will encourage them to design safer products.

Section 402A implies that an injured party must prove the injury was caused by a "defect" in the product. A product may be defective in three ways: (1) the product fails to perform as intended; (2) the manufacturer fails to warn (or give adequate warning) of the dangers inherent in operating or using the product; or (3) the product's design subjects the user to an unacceptable degree of risk of bodily injury.

North Dakota adopted Section 402A including its definition of "unreasonably dangerous" by judicial declaration in Johnson v. American Motors.[5] Five years later in 1979, the North Dakota legislature defined an "unreasonably dangerous" product as one which is

> . . . dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses, together with any actual knowledge, training, or experience possessed by that particular buyer, user, or consumer. N.D. Cent. Code § 28-01.1-05(2)

Keller affords an opportunity to understand this definition of an "unreasonably dangerous" product, and thus a "defective" product. The manufacturer was not held liable under strict tort liability because the jury determined the baler was not in an unreasonably dangerous condition when it left the manufacturer's control. The farmer admitted at trial that he knew it was dangerous to be near the compression rollers while the power take-off was engaged. The North Dakota statute defining an unreasonably dangerous product requires the jury to consider whether an "ordinary and prudent" farmer would appreciate the danger of placing a hand near an engaged round baler, as well as whether the particular farmer (Keller) had the ability to appreciate the danger. One may conclude that the Keller jury determined that the dangers inherent in the manufacturer's round baler were known by "ordinary and prudent" farmers and were in fact known by the injured farmer. Thus, the plaintiff was not allowed to recover under strict liability in tort.

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[5] 225 N.W. 2d 57 (1974).

## Defenses to a Claim Based on Strict Liability

### Alteration or Modification

A plaintiff who alters the condition of the product against the advice or instructions of the seller/defendant may be barred from recovering under strict liability in tort. For example, a plaintiff who permanently removes a safety shield from a drive mechanism and is later injured as a result of the unshielded mechanism may be barred from recovery. The North Dakota Legislature provided in Section 28-01.1-04 of the North Dakota Century Code that sellers and manufacturers may not be held liable where a "substantial contributing cause of the injury . . . was an alteration or modification of the product . . . which changed the purpose of the product . . . from that for which the product was originally designed, tested, or intended."

### Defendant is Not a Seller

A defendant must be "engaged in the business of selling such product(s)" in order to be liable under strict liability in tort. One who is not in the business of selling the product which caused the injury, therefore, is shielded from strict tort liability. A farmer who sells a piece of machinery to another farmer, for instance, is probably not liable under strict liability in tort because he is not likely to be "engaged in the business of selling such product."

This defense was successfully raised by a Wisconsin implement dealer selling a 1949 Minneapolis-Moline corn picker. The plaintiff was injured when his hand became entangled in the corn picker's unguarded power take-off shaft. The Wisconsin court ruled that the implement dealer who sold different models of new and used corn pickers but not Minneapolis-Molines could not be held liable under strict liability in tort because it was not a regular dealer in used Minneapolis-Moline corn pickers.[6]

Courts generally have been reluctant to hold sellers of used equipment strictly liable under tort law. One rationale is that the buyer of used equipment usually pays less and, therefore, cannot expect the quality and warranties of new products. A second rationale is that sellers of used products would be saddled with too great an economic burden if they were forced to inspect, repair, warn of obvious dangers, and insure against possible injuries from the sale of used products.

### Plaintiff is Partially Responsible for Injury

Additional defenses that a manufacturer may raise in a products liability action brought on a theory of strict liability in North Dakota

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[6]Burrows v. Follette and Leach, Inc., 340 N.W. 2d 485 (Wis. 1983).

are assumption of risk and unforeseeable misuse of the product. These defenses have been explicitly recognized by the state supreme court in several decisions. The court stated in Mauch v. Manufacturers[7] that the trier of fact must determine what percent of the injury was due to a dangerous defect in the product manufactured by the defendant and what percent was due to assumption of risk or unforeseeable misuse by the plaintiff.

Facts in the Mauch case are that the plaintiff was injured when the hook on a nylon rope being used to pull-start a tractor broke. The rope instantly recoiled and hurled a portion of the broken hook still attached to the rope through the window of the cab on the pulling tractor, striking and injuring the plaintiff. The injured party argued the product was defective in that the package in which it was sold lacked a label warning that a stretched rope will recoil with tremendous force when released. The manufacturer argued the rope was improperly attached to the tractor being pulled and that the party's injury was caused by her own negligent use of the rope.

The court's explanation of when a risk is assumed is similar to the description presented in a preceding section of this report. The court also explained unforeseeable misuse as

> a manner [of use] for which the seller could not be expected to anticipate or provide in the manufacture or sale of the product and where the misuse is a proximate cause of the damages sustained (at 348).

It is clear from this decision that a defense of assumption of risk or unforeseeable misuse will not totally bar recovery from a manufacturer whose defective product caused bodily injury. The plaintiff's actions, however, are to be taken into account when apportioning responsibility for the injury and determining the amount of recovery. The court opinion also clarified that the state comparative negligence statute does not apply in product liability actions brought on a theory of strict liability; that is, plaintiffs will not be barred from recovery even though their contributing negligence or fault is greater than that of the defendant. This interpretation was reinforced in the decision of Day v. General Motors.[8] It is the role of the trial jury to determine each party's percent responsibility for the injury.

## Breach of an Implied Warranty as a Theory of Recovery

Without an explicit agreement to the contrary, the law will imply in the sale of a new product a warranty of "merchantability." The implied

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[7]345 N.W. 2d 338 (N.D. 1984).
[8]345 N.W. 2d 349, 357 (N.D. 1984).

warranty of "merchantability" parallels the "unreasonably dangerous" standard in the sense that it attempts to define a defective product. A plaintiff who seeks recovery under either strict liability in tort or strict liability for breach of an implied warranty has an initial burden of proving that the product was defective.

Two requirements of a "merchantable" product is that it must "pass without objection in the trade under the contract description . . . " and be "fit for the ordinary purposes for which such goods are used . . . " [N.D. Cent. Code §§ 41-02-31(2)(a), 41-02-31(2)(c)].

This definition of a defective product emphasizes the quality of product as it compares to its competitors. For instance, a round baler which fails to provide warnings concerning dangers inherent in operating the baler may be objectionable in the trade if the standard practice is to require prospective buyers to view a film on the safe operation of the baler. Similarly, a round baler with a greater likelihood to cause injury than its competitor may be unfit for the purpose of baling hay if safer models are available.

## Defenses to a Claim Based on Breach of Implied Warranties

### Exclusion of Warranty of Merchantability

As discussed earlier, North Dakota law implies in a contract for sale of goods that the goods shall be "merchantable" (i.e., pass without objection in the trade, or fit for the purpose for which goods are used). This warranty arises unless the parties exclude or modify the warranty.

A car dealer placing a "sold as is" or "sold with all faults" sticker on the inside of a used car is effectively disclaiming the warranty of merchantability which would otherwise arise by operation of law. Buyers of used equipment can usually expect to see some modification of the merchantability warranty.

### Warranty Does Not Apply to Injured Party

The implied warranty of merchantability arises from the contract for sale between the buyer and seller of the product, but does the warranty extend to a third person who was not a party to the contract for sale? For example, if a farmer's personal friend is injured while operating the farmer's tractor, can that friend sue the seller of the tractor even though he was not a party to the sale of the tractor? North Dakota law would allow the friend to sue the seller under breach of an implied warranty if it is determined that he could "reasonably be expected to use, consume, or be affected by the (tractor) and is injured by the breach of an implied warranty." The jury in North Dakota would have to decide whether the farmer's friend could "reasonably be expected to use" the tractor.

## Conclusion

This report is intended to provide an understanding of the basic legal principles which support an injured plaintiff's claim for money damages. Products liability law raises the cost of machinery by forcing manufacturers to insure against possible injury. But it also encourages the manufacturer to use greater care in the design of its products. Farmers in the aggregate may bear the cost incurred by manufacturers in insuring against liability, but the end result is that the manufactured product may be safer. Moreover, the individual farmer who is disabled as a result of the manufacturer's negligence or defective design is afforded an opportunity to recover for the loss incurred.

The foregoing list of defenses to negligence, strict liability in tort, and breach of implied warranty is by no means a comprehensive one. The above defenses are recurrent contentions raised by defendants who are sued for personal injury under the various theories of products liability law.