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products liability—where is the borderline now?

james d. ghiardi

When I was originally assigned this topic I assumed that I was to discuss the borderline and limitations of products liability from a substantive and procedural point of view. However, developments in the area of products liability during the past year have greatly enlarged the parameters of the subject. The president of the National Association of Insurance Commissioners recently stated "that product liability is this country's most serious insurance problem."[1]

Students of the automobile no-fault era of the mid-sixties will readily recognize the comparisons between the so-called products liability crisis of today and the automobile insurance crisis of the sixties. The latter crisis continues but has been temporarily shunted aside awaiting the results of no-fault legislation and because of the hysteria associated with the medical malpractice crisis. Commissioner Rawls stated, "The medical malpractice tangle has somewhat leveled off but large awards continue in Texas, Nevada, California and New York."[2] Thus a serious consideration of this topic encompasses not only the interests of the legal profession but also the interests of the consumer, the manufacturer-seller, the insurance industry and the competing legislative interests of the states and the federal government.

the legal climate

The onset of the products liability era began in the early sixties and in a period of approximately fifteen years has grown to the tremendous proportions that exist today.[3] In this period of time

1. *Rawls, The National Underwriter*, May 27, 1977.
2. *Id.*
3. Twerski, "From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts," 60 *Marq. L. Rev.* 297 (1977).

1. The onset of the products liability era can be variously marked by Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 1161 A.2d 69 (1960) or Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Ca. Rptr. 697 (1963). *See*, Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 *Yale L.J.* 1099 (1960). The adoption by the American Law Institute of Restatement (Second) of Torts § 402A (1965) triggered a revolution in American tort law establishing strict liability. In 1972

HeinOnline -- 13 Forum 206 1977-1978

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thousands of judicial decisions have sought to identify and clarify the ramifications of the shift from the doctrine of negligence to that of strict liability for injuries caused by defective and dangerous products. The focus of judicial attention is no longer upon the conduct of the defendant but rather upon the product in its use and its environment.[4] The tort becomes the selling of a defective product.

The concept of defect in product liability law has been the source of much litigation and confusion. All agree that a product, to be a likely subject for a products suit, must have a defect, but much disagreement arises as to what attributes of a product make out a defect. The defect can result from design, marketing (including warnings), materials, machining, heat-treating, assembly, packaging, etc.

All of this has resulted in expanded litigation. The Wall Street Journal recently reported that in 1960 there were approximately 50,000 product liability lawsuits, whereas in 1976 about one million lawsuits were filed. The increase in product litigation has led to problems not only for the legal profession and the judicial system, but also for every other segment of our society.[5]

The parameters of products liability continue to expand. Some

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Professor Dix Noel had noted that some 36 jurisdictions had expressed their general approval of the strict liability doctrine. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 *Vand. L. Rev.* 93 n.4 (1972). *See* Prod. Liab. Rep. (CCH) § 4050 for a listing of the states accepting strict liability doctrines. The most recent adoptions of strict liability doctrine have been by the Alabama and Florida courts. *See* Atkins v. American Motors Corp., 295 Ala. ___, 335 So. 2d 134 (1976); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

4. Restatement (Second) of Torts § 402A (1965).

5. 37 *Journal of Insurance*, No. 3, pp. 13, 14 (May/June 1976).

HeinOnline -- 13 Forum 207 1977-1978

courts appear to want to expand the application of the doctrine to almost any situation in which a product contains a defect which causes injury, whether or not the product is "unreasonably dangerous" to the user.[6]

The spread of strict liability continues by bringing in a larger range of so-called sellers of products. A recent Alaska case held that the purchasers of a mobile home which was destroyed by a fire originating within the home had a valid cause of action in strict liability for damage to their property if they could prove that the damage was attributable to a defect in the product.[7] The Pennsylvania Supreme Court recently held that all suppliers of products including lessors who were in the business of supplying products for use and consumption by the public are now subject to strict liability.[8]

In *Ray v. Alad Corp.,*[9] the court held that a successor corporation could be held strictly liable for its predecessor's manufacture of a defective product. Component part manufacturers are constantly being found liable under the concept of strict liability.[10] Manufacturers are also being held liable for failing to discover latent dangers in the product resulting from a use not generally contemplated by the manufacturer. In *Moran v. Faberge, Inc.,*[11] the manufacturer of cologne was held liable for failing to warn of latent dangers involved when the cologne was poured over a burning candle. The expansion of liability continues by the encompassing of parties who are not direct sellers. The Federal District Court in *Arnstein v. Manufacturing Chemists Association, Inc.,*[12] allowed the plaintiff to join as a co-defendant the Manufacturing Chemists Association, Inc., a nonprofit New York corporation, as a defendant in a case where damages were sought to recover for the plaintiff's decedent's death from cancer which resulted allegedly from his employment with various chemical manufacturers. This concept of "enterprise liability" is being promoted in other areas, such as the DES cases wherein nineteen drug companies are being sued for millions and millions in compensatory and punitive damages.[13]

As a result of the enlarging of the circle of strict liability by the

6. Knepper, "Review of 1976 Tort Trends," 26 *Def. L.J.* 1, 5 (1977).
7. Cloud v. Kit Manufacturing Co., 1977 CCH Products Liability Rptr., ¶ 7909 (Alas. Sup. Ct. 1977).
8. Francioni v. Gibsonia Truck Corp., 1977 CCH Products Liability Rptr., ¶ 7911 (Pa. Sup. Ct. 1977).
9. 1977 CCH Products Liability Rptr., ¶ 7885 (Cal. 1977).
10. *See* Pust v. Union Supply Co., 1977 CCH Products Liability Rptr., Sec. 7887 (Colo. Ct. App. 1976); Herman v. General Irrigation Co., 247 N.W.2d 472 (N.D. 1976).
11. 332 A.2d 11 (Md. 1975).
12. 414 F. Supp. 12 (E.D. Penn. 1976).
13. Abel v. Eli Lilly & Co., Wayne County No. 74 030 07NP (Mich., filed May 16, 1977).

HeinOnline -- 13 Forum 208 1977-1978

courts the parameters of products cases have now expanded to a point where the borderlines are being considered by many outside of the legal system.

the insurance climate

Affordability and availability are the key words in products liability today. In testimony before the House Small Business Subcommittee the following statistical findings were testified to: 21.6 per cent of those who sought products liability insurance could not obtain it; the average increase in premium costs from 1970 to date has been 944.6 percent; and the growth rate for premiums was 5.8 times greater than that for annual sales of the companies reporting.[14]

Depending on who you ask, the problem is blamed on the tort system, greedy lawyers, on insurance companies trying to recoup stock market losses, on manufacturers who put defective or unnecessarily hazardous equipment into the marketplace, on owners who make unexpected modifications in equipment, on careless workers, on inflation or an increasing awareness by consumers of their right to compensation for injuries. There is no one cause and all contribute to some extent although there is no evidence that increased insurance rates are attributable to an increase in personal injury judgments.

The two most popular solutions proposed by the insurance industry appear to be tort reform and improved product safety. A study prepared by McKinsy & Co.,[15] for the Commerce Department Interagency Task Force on Product Liability, concluded that there was no crisis in the product liability market and that "the problem of availability and affordability" is concentrated among small firms in a few specific industries. The study concluded that the availability problem may be improved by the industry's improved financial results and the affordability problem could be affected by reducing the number of accidents by improving product design, quality control, instructions and labelling for users, and modification of the tort liability system. The study concluded that the tort liability system "is basically sound and does not necessitate a major overhaul."

Many insurance industry spokesmen see reform of the tort system as the solution to the affordability and availability problem. Ralph Nader is quoted[16] as stating "that it's a cheap fix to try to solve the problem of product liability insurance by tort reform." Nader is further quoted as stating, "the problem is one of unsafe products and insurance company gouging."

14. *See*, *The National Underwriter*, April 8, 1977.
15. *The National Underwriter*, April 15, 1977.
16. *The National Underwriter*, May 20, 1977.

HeinOnline -- 13 Forum 209 1977-1978

The House Small Business Committee recently resumed its in-depth examination of the product liability insurance problems. Representative John J. LaFolce, chairman of the Subcommittee on Capital, Investment and Business Opportunities stated at the opening session ". . . it seems absolutely essential . . . before the subcommittee should begin to involve itself in the complicated process of analyzing alternative tort remedies or federal reinsurance mechanisms, that we determine that the problem does not lie with the providers of product liability insurance themselves."[17]

There is no doubt that products liability insurance is in need of reform. The general liability policy and the method of rating products liability risks appear to be outdated. There just is no statistical base to provide accuracy in product liability rate making. The *Journal of Commerce*[18] reported that Employers Insurance of Wausau is working to improve product liability rate making. A company spokesman is quoted as saying, "Because of the need to achieve a broader statistical base, we have refined composite rating. The benefits will not begin to be seen until 1980 when experience first appears in the rate making data base. At the same time, product classifications and rate making have been greatly expanded to produce more credible experience results for future premium determination." Employers have also begun to separate product liability rates from general liability rates to pinpoint product liability losses. The need for this is great and it is hoped that the insurance industry will develop its base so that we can readily focus in on the problem areas rather than condemning the entire product liability system.[19]

The problem with insurance has been well stated by an experienced insurance executive, Mr. Robert Clements, Senior Vice-President, Marsh & McLennan, Inc.[20] He states that the product liability insurance headache is due to the fact that underwriters are unable to measure product liability risks. They are often unable to tell whether a liability episode is covered or not, *i.e.*, the industry has been unable to define an "occurrence" in order to establish liability limits. This difficulty in measuring risks and setting limits makes it impossible to distribute the premiums equitably among products and producers resulting in rating problems especially for small manufacturers and product lines which have no measurable historic loss frequency record. This is aggravated by the custom of dividing the risk among several insurance companies which es-

17. *The National Underwriter*, June 10, 1977.
18. *The Journal of Commerce*, April 8, 1977.
19. The I.S.O. closed claim study, covering claims through March 15, 1977, for 23 insurers is due for a final report soon.
20. *The Journal of Commerce*, May 5, 1977.

HeinOnline -- 13 Forum 210 1977-1978

tablishes an adversary relationship between policy holders and their insurance companies.

Mr. Clements also pointed out that the insurance market is seriously under-capitalized. As a result, the insurance companies give first preference for liability coverage to the most predictable risks whereas coverage for the least calculable risks, such as products, suffers. The resolution of the insurance problems is as vital to solving the product liability problem as any tort reform.

the manufacturing climate

Product liability litigation manifests itself in increased costs to the manufacturer and seller of products. Estimates indicate that direct and indirect costs of product litigation amounts to five to eight percent of the manufacturer's overhead. The problems that manufacturers and sellers of products face depend on whether or not they carry liability insurance or are self-insured. Those carrying liability insurance, in addition to the problems of availability and affordability, are finding that they are being asked to take over part of the liability exposure by steady increases in the deductible feature of their policies. Self-insurers of course, incur the cost of defense directly. However, indirect costs resulting from long and involved litigation and claims procedures due to liberal discovery procedures, result in a misallocation of management and technical time and effort. Companies find that these discovery procedures and preparation for defense are very disruptive of personnel, particularly those in middle management. Many complain that the time spent by management and engineering personnel could be more profitably used to improve their products and provide better service. Very few manufacturers believe that there has been any increase in product safety and quality as a result of the product liability explosion. Many state that if there has been any improvement in product design and manufacture it is due to the company's knowledge and awareness of responsibility to society, not because of product liability exposure. However, the increased cost of product liability insurance has in many instances caused top management to seek the production of a safer product.

There is no doubt that the emphasis on product safety, the federal government's Consumer Product Safety Commission, the potential exposure for failing to correct risks that are discovered resulting in recall and warnings are an important part of improved product safety. On the other hand, comparisons between product safety and product quality cannot be measured since they may involve different items such as dollars and lives.

Certainly, as a result of the increased cost of product liability

HeinOnline -- 13 Forum 211 1977-1978

litigation manufacturers and sellers are actively seeking reform in the tort system and the insurance mechanism. Their influence is being felt on both the federal and state legislative level.

the legislative climate

Both the federal and state governments are taking a deep interest in product liability litigation. Legislation has been introduced in nearly every state of the union. In at least twenty-five states specific product liability legislation has been introduced. Commissioner Rawls complained, in a recent speech,[21] that in the state of Oregon alone, 125 insurance bills had been introduced during the current session of the legislature. Not all of these dealt with product liability but it is an indication of the legislative awareness of the problems in the insurance product liability mechanism.

A quick summary of current legislative efforts indicates that state action is primarily a two-pronged attack. One is to provide relief in the insurance area by making certain that insurance is available at an affordable price. The second involves tort reform. Tort reform generally involves statutes of limitation, punitive damages, limitation on the amount recoverable for noneconomic loss, contingent fees, etc. Some of the reforms deal solely with product liability while others affect tort liability in general.

At the time of the preparation of this paper, only one state, Utah, had passed a new product liability act.[22] Utah law provides for a statute of limitations on product liability actions of six years from the date of initial purchase or ten years from the date of manufacture.[23] It limits liability where the product has been altered or modified subsequent to its sale. In addition, it requires unreasonable danger to the user or consumer at the time of initial sale as a prerequisite to finding that the product was defective pursuant to the statutory definition of "unreasonably dangerous." The statute provides that conformity of the product to government standards in existence at the time of planning or designing raises a rebuttable presumption of freedom from defect. Before the 1977 legislative year ends it appears very likely that other states will enact legislation to deal with the twin problems of insurance and tort reform. Most of the legislation indicates that reform will be the keynote rather than the destruction of the insurance or tort systems.

The federal government has been active in the product liability field as well. To date, no legislation has been passed. The primary

21. *The National Underwriter*, May 27, 1977.
22. Utah Code 1953, § 78-15-3, as added by Laws 1977, S.B. No. 158, approved March 22, 1977.
23. The new limitations apply to causes of action occurring after May 9, 1979.

HeinOnline -- 13 Forum 212 1977-1978

emphasis has been on legislation to insure the availability of insurance coverage for manufacturers and sellers of products. Time and space do not permit a complete analysis of the various studies and proposals pending in the United States Congress. These will continue to grow. Hasty federal action was deterred by the initial report of the Commerce Department's Interagency Task Force on Product Liability which stated that it had not found a "crisis in product liability insurance" requiring government action.[24] The agency report made numerous findings. These findings have provided the basis for additional study by identifying the most promising remedies for congressional scrutiny and state legislative action. The initial report was inclined toward a pooling mechanism under which all product liability insurers would provide insurance coverage by taking a portion of the risk based on the amount of insurance written.

The final report of the Interagency Task Force on Product Liability is expected early this summer. Many congressional committees are awaiting this report before drafting any comprehensive product liability legislation. For example, the Senate's Small Business Committee will wait for this report before it completes mark-up of a products liability reinsurance bill intended to provide reinsurance to primary insurers as a short term answer to the products liability insurance problem.

Some legislation has already been introduced. Senate bill S 403 proposes the establishment of a federally funded independent agency, the National Product Liability Insurance Administration, which would provide reinsurance to insurers writing products liability coverage or to qualifying captive insurance companies. H.R. 239 calls for the creation of a select twelve member committee, with subpoena power, to study liability insurance rate increases.

In any event, we can expect some federal legislation during the current session of Congress which will have a direct impact on the handling of product liability claims litigation.

causes and solutions

If ever a subject has been subjected to overcommunication the product liability problem is one. An industry spokesman recently stated, "The products liability problem is an avoidable crisis which has been aggravated by over-communication that has created difficulties for manufacturers, consumers and insurers."[25]

Not a day goes by wherein another person is added to the list

24. *The Journal of Commerce*, Jan. 6, 1977.
25. *Fox, William V.*, Vice-President American Mutual Insurance Alliance; *The Journal of Commerce*, April 1, 1977.

HeinOnline -- 13 Forum 213 1977-1978

of those advocating the causes and the solutions for the products liability problem. Everyone from the man on the street to the executive offices of the White House is involved in offering a cure. Clearly the legal system plays a role in both the cause and the solution. However, as lawyers we must be alert to our being labelled the sole or principal cause of the problem so that a change in the legal system appears to be the panacea. A change in the auto reparations system didn't solve the automobile insurance crisis. The same is true for the products liability "crisis." There is no single, simple solution because the causes are varied and numerous.

Some of the causes that are most frequently listed are: a more liberal judicial climate; expanded consumer expectation; the public's adoption of a sue complex; the inability of the insurance industry to adapt quickly enough to changes in the market place; the failure on the part of the industry to keep adequate statistics on product losses which results in the inequitable escalation of premiums; the inadequacy of workers' compensation laws; failure on the part of sellers and manufacturers to provide adequate quality control and testing; the failure on the part of sellers to take prompt remedial action; government's crazy quilt of legislation which impedes and hinders progress, change and the exchange of information; the over-zealousness of claimant's counsel; the expensiveness of the legal system; the failure of defense counsel to mitigate costs; the incompetency of some of our judges; and, the largess of jury awards.

Other causes could be listed but the foregoing are sufficient to illustrate that there is no one cause nor one solution.

Proposals for solutions are rampant. The Insurance Information Institute in a recent pamphlet lists proposals from eleven different private groups.[26] Added to these proposals are those from literally thousands of individuals, hundreds of state legislators, plus those from congressional sources. A cursory listing of these proposals would tax the time and space limitations of this paper. However, solutions must be forthcoming, both long range and short term. Continued bickering and finger pointing between the legal profession, the insurance industry and manufacturers/sellers will only leave the solution to the legislatures and congress. This is an alternative which history has proven merely creates new and more serious crises.

Short term solutions that will affect the borderlines of product liability involve greater product safety, an adequate and available

26. Reprinted from 37 *J. of Ins.* No. 3, (May, June 1977).

HeinOnline -- 13 Forum 214 1977-1978

private insurance market and a more stable legal climate. The latter should include a redefined statute of limitations, a more limited and ascertainable definition of defect and liability, elimination of punitive damages except in cases of fraud or malice, the limiting of employee suits to workers' compensation systems, the development of a more realistic and enforceable cost system against the losing party, the development of more adequate defenses and the use of comparative negligence.

conclusion

The lawyer and the legal system are both part of the problem and part of the solution. However, I note a decided lack of coordinated activity by the organized bar. The plaintiffs and defense bars have spoken out and issued position papers[27] but little activity is found at the State Bar level and even less at the ABA level. This section in combination with other interested sections should seek the immediate establishment of a special ABA committee or commission, well-staffed and well-funded, to deal with the product liability "crisis." We should develop the facts so that we can influence the decisions that will define the parameters and the borderlines of product liability litigation in the next decade. We can and must influence public opinion in order to preserve the basic rights of our society and protect the interests of the individual.

27. Products Liability Position Paper, *The Defense Research Institute, Inc.*, Vol. 1976, No. 9.

HeinOnline -- 13 Forum 215 1977-1978