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Products Liability - A Symposium: Introduction

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INTRODUCTION

by

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This symposium consists of papers delivered at the Institute on Personal Injury Litigation in November, 1964. The authors include four distinguished professors of tort law who are acknowledged scholars in this field and a distinguished physician with legal training who has done special research, lectured and written in the field of allergies.

The dramatic development in the law of liability for injuries from defective chattels, now called products liability, in recent years is astounding to many lawyers who have not been close students of the subject. This may be illustrated by several facts: The publication in 1960 and 1961 of the first two treatises devoted exclusively to products liability, with new supplements to each in 1963; the material on the subject in torts casebooks used to begin with the old English case of *Winterbottom v. Wright* and end with *McPherson v. Buick Motor Co.* Now the latest edition of one of the most widely-adopted books uses *McPherson* as a starting point, followed by such recent landmark cases as *Greenman v. Yuba Power Prods., Inc.* and *Goldberg v. Kollsman Instrument Corp.* The developing trend to strict liability has been so spectacular as to justify the appellation "revolutionary" and to bring forth the prediction by some commentators that it will soon become the established law of the country. The rapid pace here is evidenced by the evolutionary progress of section 402A of the American Law Institute's *Restatement of Torts (Second)*. The original *Restatement* contained no provision for strict liability on the part of a seller for physical harm caused by a defective product. In April, 1961, Tentative Draft No. 6 of the *Restatement (Second)* recommended the adoption of a new section 402A which recognized the seller's strict liability but limited it to claims for "food for human consumption." Within a year the Reporter and his advisors decided that the category was too narrow, and in Tentative Draft No. 7, issued in 1962, the coverage of the section was enlarged to include

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"products intended for intimate bodily use." A comment to the section stated that this included products of an intimate character intended for external application or contact. In two year's time the course of decisions convinced the Reporter that this broadened version was inadequate. So in May, 1964, the Institute approved a new draft of section 402A making the rule applicable to all products. Professor Prosser supported the proposed change in these words. "Since 1962 there have been so many decisions extending strict liability beyond products 'for intimate bodily use' that it has become evident that this is the law of the immediate future. . . . With the exception of the change in the law with respect to prenatal injuries, this is the most radical and spectacular development in tort law during this century." In this area we have an unusual situation in which the courts rather than the professors have taken the lead in bringing about change. The rapid development toward strict liability since 1960 was neither anticipated nor recommended by writers in the field. Their approach was a more cautious one—*i.e.*, restricting strict liability to food and chemical products.

In his paper Dean Wade discusses the several approaches to strict liability, which include (1) breach of warranty and its extension, (2) the relaxation of the privity requirement, (3) the use of *res ipsa loquitur* and negligence per se as devices for holding defendant strictly liable and (4) the more recent development of frankly disregarding the warranty language as superfluous and forthrightly declaring the basis for recovery to be strict liability in tort. He poses such questions as what is meant by strict liability? What is plaintiff required to prove in a strict liability case? Is it really different from negligence? Is it the same as an insurer's liability?

Although the trend toward strict liability is the more spectacular development, the expansion of the manufacturer's liability for negligence is also of great significance. The vast majority of all products liability cases reaching the courts continue to be based upon some kind of negligence. Dean Keeton's paper deals with the very practical problems of proof. One of the more frequent grounds of negligence relied upon is the failure to give adequate warning of dangers involved in the use of a product or adequate instructions to avoid such dangers. What proof is necessary to establish negligence in such a case? Is the safety history of the product admissible? Is a manufacturer to be judged simply on the basis of what he knows and what manufacturers generally know, or is he expected to know at least what an investigation of the scientific literature would disclose? To what extent is the doctrine of *res ipsa loquitur* applicable

if the injury resulted from a defect in the product caused by negligent conduct in the manufacturing process? Does the mere occurrence of the accident in the course of use of the product justify application of the *res ipsa* doctrine? If not, what must plaintiff prove? May a defect in the product be inferred from proof negating other probable causes? Are there different views concerning the responsibility of an assembler who is not the actual manufacturer of the defective part? In so far as it is possible to do so the writer supplies the answer to these and other intriguing questions.

Normally it is necessary for a plaintiff to establish that the product was defective when it left the manufacturer's hands. Professor Noel points out that this may be difficult to do if the article has been used and/or misused over a considerable period of time prior to the accident. And the court or jury may be convinced that the defect arose after delivery of the product. In an increasing number of cases plaintiffs have sought to establish negligence on the part of the manufacturer by showing that the basic design of the product was unsafe, at least if not accompanied by more adequate instructions for use or warnings. If plaintiff is successful in this he has in effect killed two birds with one stone—*i.e.*, he has shown fault on defendant's part and also that the defect existed at the time the product left the manufacturer's plant.

Manufacturers are not required to make products which are "accident-proof." The standard is whether the article is unreasonably dangerous. Professor Noel deals with factors relevant to this issue such as obvious defects, using the power mower cases for illustrations; extensive use by the manufacturer of the same design, whether safe or unsafe; the need for directions and warnings; representations concerning safety; the manufacturer's duty as affected by techniques and safety devices employed by others in the industry; and foreseeability of unintended uses. He concludes with a discussion of major categories of design negligence—concealed dangers, failure to provide safety features or devices and defective composition.

In recent years there has been considerable debate among tort professors, in the courts and by members of the American Law Institute as to whether there is or should be any distinct and separate defense of assumption of risk; this debate continues unabated. Professor Robert Keeton, one of the defenders of the doctrine, begins therefore with a somewhat heavier burden when he undertakes a discussion of assumption of products risks. But a reading of his paper will disclose that he carries the burden rather well.

Professor Keeton discusses the trend toward holding explicit dis-

claimers of liability beyond that stated in the purchase contract unenforceable because against public policy. He explains that the *Restatement* controversy over recognition of assumption of risk as a defense is in part a dispute over terminology. There is no argument that in some situations even though defendant has created a risk he is entitled to judgment upon a finding that plaintiff voluntarily exposed himself to the risk with full appreciation of it. One group would express this result in terms of assumption of risk. The other would say defendant owed plaintiff no duty in the situation. But Professor Keeton insists that there is more to the controversy than the matter of terminology. He explains some of the new limits which have been imposed by the courts on the scope of the defense of assumption of risk and presents some policy arguments.

Finally, he raises the question whether in a strict liability jurisdiction plaintiff may be barred from recovery for injury caused by the use of a defective product if he voluntarily exposed himself to a known risk from its use? In this connection he mentions that in *Greenman v. Yuba Power Prods., Inc.*, the court qualified its conclusion by stating that plaintiff was not aware of the defect.

The various problems, social and economic, involved in the development and marketing of new drugs and cosmetics are vast and complex. A new product may take years of research and millions of dollars to develop. Average time required to secure approval of new drugs is now about eighteen months. Yet with all this, no drugs or cosmetics are completely free from adverse reactions. Dr. Whitmore suggests that a lawyer with a case involving alleged injury from a particular drug or cosmetic needs the answers to such questions as: Is the drug product capable of producing the type of reaction which occurred? Was adequate pre-marketing testing carried out? Were Food and Drug Administration requirements met? What is the frequency of the type of reaction which occurred? Was the manufacturer aware of the incidence of reactions? Did the particular drug or cosmetic cause the reaction? Was adequate information regarding the use and safety of the product placed in the hands of the physician, patient or consumer? As an aid in securing answers to these questions, Dr. Whitmore discusses steps involved in pre-marketing scientific evaluation of new drugs and cosmetics, types of reactions to drugs, types of tissue reactions to cosmetics and post-marking performance of drugs and cosmetics.

In summary, it may be said that all five papers are of high quality. The *Journal* is to be congratulated on presenting a Symposium of such excellence on a subject which is undergoing rapid change.