1959

Viewpoint of the Consumer

Catherine H. Hotes

Advertised-Product Liability:
Viewpoint of the Consumer

*Catherine H. Hotes**

WHEN ADAM SMITH described his self-regulating economy in the 1770's, he assumed that its motive power would be provided by the interplay of mutual demands and concessions between economic entities, and that such interplay would result in a balance of power. Since that time, the growth of huge corporations that employ modern technology, complex manufacturing processes, mass production, and mass advertising, into "clusters of private collectivisms" has substantially upset any such supposed balance of power.

The Position of the Consumer

The resulting disparity in bargaining strength has been at the expense of the individual unorganized consumer. Moreover, the very technological force that has given the consumer a superior product in many instances has made him correspondingly less capable to judge good from bad. The development of elaborate goods with buried technical qualities, the creation of superficially unique "kinds" of products through the exploitation of minor differences, distinctive packaging, and brand names, together with the multiplication of unstandardized grades and sizes, and conflicting advertised claims, have only increased consumer confusion.

However, the vulnerability of the consumer has not gone unrecognized. The protections already available include such extralegal helps as the cooperative, the magazine "institute," the advisory facilities of professional associations (such as the American Medical Association and the Better Business Bureaus), and services like Consumer's Research. There are also legal protections. Regulations include state and federal food, drug, and cosmetic laws; safety and sanitation regulations for the manufacture of clothing, bedding, and electrical equipment; licensing laws regulating the production of such commodities as liquor, baked goods, and milk, and the selling of articles by

* B.A. in Economics, Flora Stone Mather College of West. Res. Univ.; an executive secretary at The Standard Oil Company (Ohio), and a second-year student at Cleveland-Marshall Law School.

auctioneers, brokers, and peddlers; statutes regulating advertising and labeling; statutes governing the ownership and sale of dangerous items such as firearms and gasoline; and laws protecting trade-marks and guarding against the passing off of a seller's articles as those of another. In addition, there are antitrust laws, installment sale and usury restrictions.

The law has also given the consumer weapons to wield himself. In private legal controversy, he has available the doctrines of negligence, fraud and deceit; the doctrines of duress and undue influence; the law of warranty; laws protecting in some cases the title of the bona fide purchaser for value; and doctrines of rescission and avoidance for incapacity because of infancy, insanity, and sometimes marriage.

Some of these laws are intended primarily for the protection of the consumer; others benefit him incidentally.

Despite the foregoing protections, the consumer's vulnerability has increased with the increasing superiority of the maker's ability to know the ingredients and capacities of elaborately manufactured commodities. The consumer turns to the law for new protections.[1]

Direct Liability in the Manufacturer

The simplest approach is to create a direct liability to the consumer without fiction or analogy. A few states that have done away with privity rules have done so largely because policy

---

[1] See Dickerson, Products Liability and the Food Consumer, 3-5 (1951); Burr v. Sherwin Williams, 42 Calif. 2d 682, 268 P. 2d 1041, 1048 (1954); Foote v. Wilson, 104 Kans. 191, 192, 178 P. 430 (1919); Kniess v. Armour & Co., 134 Ohio St. 432, 442 (1938); Randall v. Goodrich-Gamble, 138 Minn. 10, 54 N. W. 2d 769, 771 (1952); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 248, 4 O. O. 2d 291, 294, 147 N. E. 2d 612, 615 (1958); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 500, 78 S. 365, 366 (1918); 2 Harper and James, The Law of Torts, 1573—footnote (1956). See also: Worley v. Procter and Gamble, 253 S. W. 2d 532 (St. Louis, Mo. Court of Appeals) (1952)—"food products . . . and . . . other articles dangerous to life"; 1 Williston on Sales, Secs. 237, 244a, 617, 618, 648-649 (Rev. ed. 1948); Baxter v. Ford Motor Co., 68 Wash. 456, 12 P. 2d 409, 412, 15 P. 2d 1118, 88 ALR 521, 526 (1932); (See also: Free v. Sluss, 87 Cal. App. 2d Supp. 933, 197 P. 2d 854 (1948)—where a soap package contained a printed guaranty of quality; Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N. W. 309 (1939)—where an automobile manufacturer represented the top of a car to be made of seamless steel; and Simpson v. American Oil Co., 217 N. C. 542, 8 S. E. 2d 813 (1940)—where a representation on a label stated that the insecticide was non-poisonous to human beings); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Anderson v. Tyler, 223 Iowa 1033, 274 N. W. 48 (1937); Ward Baking Co. v. Trizzino, 27 O. App. 475, 161 N. E. 557 (1928); Grinnell v. Carbide and Carbon Chemicals Corp., 282 Mich. 509, 276 N. W. 535 (1937).

considerations are said to require absolute liability of the manufacturer. There appear to be two policy considerations: (1) Manufacturers' liability tends to correct the evil at its source. (2) Such a liability provides a kind of consumer insurance whereby the aggregate of people consuming the particular product, by paying slightly higher prices, share the financial burdens caused by defective products.[2] This is called "spreading" the risk or loss.

There are two separate issues here: (1) Should the manufacturer bear the final burden of liability where the defect is traceable to the product in his hands? (2) If so, should the manufacturer be directly liable to the consumer?

It is usually assumed that for improperly fabricated goods the manufacturer is the proper person to bear the full brunt of civil responsibility. The reasons are: (1) the manufacturer made the goods and ought to stand behind them; (2) he is in the best position to control their quality; and (3) he is the appropriate person to generate the basic price increase which, with increases by subsequent sellers, results in spreading the risk or loss.[3]

It is possible to impose absolute liability on the manufacturer with the ultimate legal benefit accruing to the injured consumer without doing away with privity. This is by a chain of buyer-seller actions against the retailer, the respective intermediate distributors, and the manufacturer. The argument against this approach is that courts should avoid circuity of action where the manufacturer is accessible to the consumer. "Perhaps the most convincing argument for extending the obligation of warranties, to subvendees at least, lies in avoiding piling up of costs where each vendee can sue his vendor and liability will rest eventually in the manufacturer or a remote vendee."[4] Unnecessary circuity wastes time and money. "A system which depends upon a series of recoveries over is not only wasteful and circuitous, but subject to constant failures."[5]

The financial burden of unavoidable injuries can be shared by consumers by the device of spreading the risk or loss through increased manufacturer's prices. Risks that are unavoidable as a class (by the manufacturer) are usually caused by the manu-

[2] Notes, 7 Wash. L. Rev. 351, 358 (1932); 10 Minn. L. Rev. 1, 5 (1925).

[3] Dickerson, op. cit., 273.

[4] Comment, 33 Col. L. Rev. 868, 869, n. 7 (1933).

[5] Note, 42 Harv. L. Rev. 414, 418 (1929).

facturer's suppliers, employees, or other third parties. Here liability tends to result in pressure by the manufacturer on the person at the root of the trouble.

One argument against the imposition of absolute liability on the manufacturer to the consumer is that the change in the rule requiring privity should be left to the legislature and not to the courts. "In substance that may be true, but if it is judicial legislation to hold that an old rule no longer obtains, it is just as much so to create a new exception to the old rule to cover the particular case." [6]

Another objection is that a new and substantial hazard would be added to the many already confronting the manufacturer. "If it is not too great a burden on the manufacturer of food stuffs, the same burden should not be too great for any other manufacturer. Moreover, allowing warranty suits directly against the manufacturer would not make him absolutely liable for the quality of the products he placed upon the market. The ordinary elements of an action for breach of an implied warranty of fitness for the purpose would still have to be shown, viz: (1) That the seller knew the purpose for which the goods were bought; (2) Reliance on the seller to furnish goods reasonably fit for such purpose. This would be an effective limitation against any unreasonable attempts to hold him liable." [7] In addition, each manufacturer could protect himself to a large degree by inspecting his products carefully and advertising them cautiously.

A law review note neatly summarized the arguments for making the manufacturer strictly accountable to the consumer:

> Notably in the case of food products, sold in original packages, and other articles similarly dangerous to life if defective, the manufacturer, who alone is in a position to inspect and control their preparation, invites and even requires the reliance of the consumer. Whether he purveys his product by his own hand, by his clerk, or by a network of distributing agencies, the essence of the situation may be the same—a justifiable and damaging reliance by one person upon the self-serving representations of another. To recognize the applicability of the principles of warranty to all of these situations would be in keeping with the realities of modern economic life.[8]

---

[6] Note, 21 Minn. L. Rev. 315, 325 (1937).

[7] Ibid.

[8] 42 Harv. L. Rev., op. cit. n. 5, at 419.

So far as the consumer is concerned, it makes little difference who ultimately pays the bill as long as he is compensated for his injury or loss and the product is improved. As Dickerson [9] points out, the arguments for placing absolute liability in the manufacturer are strong but are based on some assumptions which are oversimplified and not always realistic: (1) The retailer and intermediate distributors are relatively small enterprisers with no substantial knowledge or control of the product and, with relatively small dollar volume, they play a subordinate economic role.[10] (2) The relatively rich and powerful manufacturer produces a single product in large volume and is in the origin of all defects. Dickerson suggests a different approach—absolute liability of the manufacturer and distributors, aiming at liability of the primarily responsible defendant. If the sellers in the chain of manufacture and distribution are made absolutely accountable to the consumer for the quality of the goods leaving their hands, the injured consumer could easily reach the person who is in the best position to correct the defect. When the consumer can recover directly against any seller to whom or through whom defective goods can be traced, in all likelihood he would set up a claim against the nearest available and most attractive "Big Name" in the manufacturing and distributing chain. The most attractive defendant, from the compensation viewpoint, is probably able to control the quality and price of the product itself or to be in a position to collect from those who do.[11] This approach would facilitate compensation and prompt elimination of the source of contamination or negligence.

Product Liability Insurance

With the small businessman, whether retailer or manufacturer, the problems of absolute responsibility are perplexing. Where the defendant is a chain store, or even a large independent, it is very well to say that a constant and moderate claim pressure is a useful inducement. But, with the corner grocer or shoestring manufacturer, the pressure of claims will be sporadic and entails the risk that a single blow may put the victim out of business. How is the small merchant to be protected adequately?

---

[9] Dickerson, op. cit. n. 1, at 273-274.

[10] Note, 18 Corn. L. Q. 445, 451 (1933); see also note, 42 Harv. L. Rev., op. cit. n. 5, at 417.

[11] Dickerson, op. cit. n. 1, at 277-279.

This brings up the question of the availability of product liability insurance. "Occasionally, liability insurance policies are issued which are specifically designed to protect the producer or manufacturer of goods against loss by reason of injury to the person or property of others caused by the use of his products. Such policies are but a variant of the usual liability insurance policies, devised to care for the specialized situation presented by persons who in the course of their business are exposed to claims by third persons on the ground that their products caused injuries or damages after they were no longer in the possession of the insured." [12]

The hazards covered by product liability insurance policies are usually described as accidents arising out of "the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for the use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured." [13]

As with other types of insurance contracts, the general principle that the policies, having been prepared by the insurer, must be construed most strongly against the insurer and in favor of the insured, applies to product liability insurance.[14]

Most cases dealing with product liability provisions raise the question of whether a specific loss or risk is within the coverage of the provision. The construction of a particular word or phrase in the product liability provision usually provides the answer to this question.[15]

Frequently liability insurance policies contain provisions specifically excluding from coverage liability for injury or destruction of goods or products manufactured, sold, handled, or distributed by the insured. Such product exclusion clauses deny coverage in those cases usually covered by product liability policies.

---

[12] 45 ALR 2d 994, 995.

[13] Schafer v. Maryland Casualty Co., 123 F. Supp. 873, 877 (D. C. S. C., 1954).

[14] 45 ALR 2d, 994 et seq.

[15] For example, George W. Deer and Son v. Employers' Indemnity Corp., 77 F. 2d 175 (C. A. 7, 1935)—"accident"—to be construed in usual sense meaning mishap; Boeing Airplane Co. v. Firemen's Fund Indemnity Co., 44 Wash. 2d 488, 268 P. 2d 654, 45 ALR 2d 984 (1954)—"account"—held to mean for the advantage, profit, or benefit of the insured.

A typical product liability exclusion clause provides that the policy does not cover "the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured or on premises for which the classification is stated in the declaration as subject to this exclusion." [16]

If a specific loss or risk comes within the terms of the product liability exclusion clause and within the meaning of the clause, the insurer is relieved of liability for the occurrence. However, if it does not so fall, then the insurer's liability must be determined in accordance with some other provision of the policy. Whether or not the insurer is liable in this case usually depends on the construction of a particular term or phrase contained in the exclusion.[17]

Although product liability insurance is available, many small sellers are unaware of the risk or are unaware that such coverage is available. Then, too, there may be some question whether some sellers can afford the premium expense.

The problem of expense has greatly decreased recently. In 1951 it was said that: "Premium rates were originally high because an underwriting practice that concentrated on the livelier risks resulted in an adverse selection of business. Now that more of this insurance is in effect, a broader and more favorable experience has lowered loss ratios sufficiently to permit substantial reductions in premium rates. On the average, rates for bodily injury have been about halved since 1939 and minimum premiums have dropped in most cases from $75 to $35 or less; the minimum for some food stores has dropped from $75 to as low as $15 or less. The result has been to make this kind of protection much more widely available. Even so, some doubt remains as to how many small sellers can even now afford protection." [18]

One device for providing cheap insurance for the small manufacturer and dealer is the deductible policy, under which the

---

[16] Liberty Mutual Ins. Co. v. Hercules Powder Co., 224 F. 2d 293, 295 (C. A. 3, 1955), 54 ALR 2d 513, 517.

[17] 54 ALR 2d 518, 520.

[18] Dickerson, op. cit. n. 1, at 266.

insured pays all losses up to a certain amount and the insurer pays all losses in excess of the named limit.[19]

Unfortunately, those who can most easily afford the premium expense need it least. Large risks tend to level off, and large companies which are covered by product liability insurance are actually only purchasing the services of a claim department. Although larger companies are entitled to lower rates in some cases, the costs of this claim service are found by many to be greater than the cost of financing their own claim departments. This is the reason for the large number of "self-insurers." [20]

Coverage is limited to accidents arising during the term of the policy, which may run from one year to three years, and to sales reported to the insurer as the exposure basis on which premiums are determined. Usually these policies are written on a "5-and-10" maximum basis with an aggregate limit of $25,000. Product liability insurance would seem to furnish adequate protection to at least the intermediate risk for whom the pressure of claims and the possibility of a large judgment represent a serious threat.[21]

> Our serious concern rests with the small enterpriser who is either ignorant of the protection available or feels that he cannot afford the cost. But the dangers here are more apparent than real. With the substantial reduction in rates (which are geared to the insured's volume of business) and minimum insurance premiums, this category has been substantially narrowed and is now highly marginal. More important, it is the Big Name in the chain of distribution that attracts and absorbs the pressure of claims, even though the little fellow is thrown in as makeweight. . . . Occasionally the large manufacturer includes his distributors as an additional risk when taking out insurance. Actually, therefore, the small seller has little to fear where his products are sponsored by large reputable houses. His own financial insignificance is his best protection.[22]

---

19 Ibid.

20 Ibid., 267.

21 Ibid., 268.

22 Ibid.