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THE PLAINTIFF'S ATTORNEY AND THE PRODUCTS LIABILITY CASE

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If one understands that "Products Liability" is a new field of tort law, that one does not have to be an engineer to handle products liability cases and the prime requisite is a philosophy of safety, then he or she is psychologically equipped to represent one injured by a defective product and prepared to build a substantial practice in this rapidly expanding area of law.

"Products Liability" is the liability of a manufacturer, assembler, processor, non-manufacturing seller or installer for injury, to the person or property of a buyer or third party, caused by a product which has been sold. The necessity of our society to protect itself against the effects of these injuries has resulted in a dovetailing of effort by legislatures, governmental administration bodies, safety organizations, scientists and engineers and the courts in such a way as to bring about a qualitative and quantitative growth in the law which had previously protected the development of our industrial complex from suits which might have stiffled its expansion.

EDUCATE YOUR ASSOCIATES AND YOURSELF

The infancy of this field will be best understood if it is realized that the two major works on the law were both first published as late as 1961. Either *American Law of Products Liability* by Hursch, a four volume set published by the Lawyers Co-Operative Publishing Company or *Products Liability* by Frumer and Friedman, a two volume set published by Matthew Bender, is a must for any office library.

The general practitioner can expect to be consulted concerning such diverse products liability injuries as those caused by poor auto design, unguarded industrial machines, untested drugs, defective ladders, exploding bottles, tank explosions, cosmetics producing allergic re-

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actions, negligently manufactured cranes, hoists, derricks, elevators, escalators, unguarded farm machines, defective golf carts and motor boats, poorly insulated products which cause electrical shock, improperly warranted kitchenware or children's toys.

A thorough knowledge of the theories of liability is not only necessary for the preparation of these cases but also for a recognition of them. The attorney, who has educated himself, will serve society if he educates his professional associates, especially his referring attorney, that the law now provides a remedy for these torts.

THE THEORIES OF LIABILITY

The main areas of liability are: breach of express warranty, breach of implied warranty, deceit, misrepresentation, negligent design, negligent installation, negligent failure to warn, negligent failure to guard, negligent inspection, violation of federal or state safety laws such as the Federal Hazardous Substances Labeling Act and the food and drug laws.

Every lawyer should have a checklist of the theories of liability and use it during the investigation of every injury case. The common law is experiencing its greatest growth in the extent of the duty now recognized to design machines safely, guard machines completely at point of operation and warn of any hazards, whatsoever, of which the manufacturer, retailer or installer would have superior knowledge.

Hundreds of thousands of injured persons consult lawyers each year and receive either no representation or inadequate representation because lawyers have not yet become acquainted with the theories upon which liability can be predicated.

A NEW PHILOSOPHY

The attorney should approach each case by asking the question, "How could this injury have been prevented?" The search for the answer will lead to the inevitable conclusion that safety is not just common sense but is extremely sophisticated business and only comes about where there is a body of experience, research, study, experimentation and statistics combined with purpose. Most industries can be negligent industries. Heretofore, there has not been the economic motivation necessary in our profit economy to compel manufacturers to produce safe products. Where they have adopted standards or practices, they are usually negligent standards or unsafe practices. This is a

necessary conclusion if one is to present the plaintiff's proof in the most favorable manner. Reasonable care, not customary method, is the standard of the law and the plaintiff most often must proceed by showing that the whole industry has cut corners, has used shoddy materials and has been guilty of negligent practices.

A starting point is basic design. Could the product have been designed in such a way as to have prevented injury? Was there a safer way? Design not only includes the blueprint for construction or assembly, but it also includes materials. Often safer materials could be used. Frequently materials of incompatible strength are used adjacent to each other. Proper design should anticipate negligent maintenance and negligent use. The negligence in design does not cease to be a proximate cause of injury even with improper maintenance or use unless the intervening negligence was so unreasonable as not to be foreseeable.

Could the machine have been guarded in such a way as to prevent injury? Again, if a manufacturer of a farm or industrial machine installs a guard, the removal of which he might have reasonably foreseen, he is negligent if, in the exercise of ordinary care, he should have installed a guard which was much less likely to have been removed.

Was there a warning by decal, instruction sheet or label which could have prevented the injury? Was the warning given of the character and intensity required by the gravity of the risk? If we accept the proposition, as we must, the safety is sophisticated business, then we must recognize the superior opportunity of a manufacturer to become aware of the hazards of its products.

SAFETY CODES, MANUALS, FILMS

The attorney with products liability cases will quickly realize that he must have a safety library. There is one book which lists, for the general practitioner, all the safety organizations, safety standards and codes, governmental information centers, technical publications, safety film libraries and safety libraries together with expert witnesses and manufacturers of safety equipment. This book is *Sources of Information For The Trial Lawyer And Legal Investigator* by Robb and Philo, published by the Advocates Publishing Company. The two major organizations in the United States which have codes and standards are the American Standards Association and the National Safety Council.

An office safety library can be developed by ordering the basic safety manuals, safety standards and codes. Many can be purchased from the federal government at minimum cost. A component negligence lawyer should possess a safety library for the cost of a safety library will be counterbalanced by larger verdicts in the future.

Technical libraries are important tools in ascertaining how an accident could have been prevented. The two most important and useful indices are the *Applied Science and Technology Index* and the *Engineering Index.* These indices, possessed by all major universities and municipal libraries, will lead to articles in technical magazines and scientific and engineering papers. The American Chemical Society publishes *Chemical Abstracts* which is the largest indexed collection of technical articles for use in product's injury litigation involving chemicals.

THE EXPERT WITNESS

Every article written in the field of products liability stresses the fact that proof of liability involves plaintiff's use of an expert or experts, either scientist, engineer, safety expert or one with at least a technical background. While this point is correct, even more important, the plaintiff's attorney must be the most knowledgeable person concerning the particular safety problem. This is because of the low safety level of industry in general and the fact that almost any expert consulted has probably acquiesced in industry's negligent practices. The plaintiff's attorney must do the basic safety research so as to educate his expert.

Experts can be found at local universities, on code committees, engineering associations, government agencies and testing laboratories. The plaintiff's expert should be competent, philosophically for safety and a good witness in court. There are many excellent consultants who will not testify in court and they may be useful, but the plaintiff always needs at least one good witness who can explain the problem to the jury.

LOOK FOR MORE THAN ONE DEFENDANT

Because of the complexity involved in manufacturing a finished product, there will usually be more than one defendant in products liability litigation. Potential defendants include among others: the manufacturer, manufacturers of component parts, assemblers, in-

stallers, retailers, owners, contractors, lessors, insurance carriers and common carriers. There is generally a conflict of interest between defendants. They, therefore, must investigate, employ experts, take original depositions to prove their co-defendants liable, all of which accrues to the benefit of the plaintiff's case at little or no cost.

Often the testing and stress analysis or other scientific investigation as well as original depositions in major cases can be quite costly. The expense may well prevent a plaintiff from adequately preparing his case unless his attorney is able to get a co-defendant to bear the brunt of the expenses.

INTERROGATORIES

The most useful discovery tool is extensive interrogatories. *Benders Form of Interrogatories* and *Proof of Facts* are excellent guides for questions to be posed and are so thorough that no additional comment need be made here. While economic hardship usually compels the indigent plaintiff to accept low settlements, interrogatories, which require corporate and legal expense to answer and whose answers may prove liability, are in some measure an equalizer. Always ask for the name of the executive officer in charge of safety. Every defense counsel will answer that with some name even if the title is bestowed by the interrogatory. A follow up deposition might well reveal the total incompetence of the person so newly assigned to the title.

DEPOSITIONS

Pre-trial discovery depositions are a must. In addition to the vice-president in charge of safety, you should consider deposing the director of sales, the director of research, design engineers, salesmen, defendant's experts, defendant's investigators and quality control personnel. Hourly employees who are union members, therefore much more susceptible to telling the whole truth, may be deposed to recount all the times that the plant superintendent replaced absent production workers with inspectors and left inspection stations vacant or the great number of times the department foreman convinced the quality control foreman that production quotas would never be met if quality standards were not lowered.

Use should be made of checklists for depositions. Care should be used to take the deposition in such a way that it could be helpful when used *de bene esse.*

Engineers should be reminded of the code of ethics of the engineering profession. One should seek the memos which prove that the marketing and sales department prevented the design change or that a warning was given by the engineers. One should seek statements of the recognition of the duty to design safely, to guard the point of operation and to warn of hazards. Witnesses will necessarily have to admit that negligent maintenance is to be expected. They will admit membership in associations which have promulgated safer standards and subscriptions to and reading of technical journals which have pointed out the safe way.

The opinion of the mechanics evidencing equipment failure is mandatory. If the defendant employs an industrial psychologist, then his knowledge of fatigue, noise and distraction can be helpful in negating contributory negligence.

NEGATING CONTRIBUTORY NEGLIGENCE

There is often a question of contributory negligence on the part of the plaintiff. In this instance the theory of liability assumes paramount importance. Since contributory negligence is not a defense to breach of express warranty, it behooves the plaintiff's advocate to seek out the representations, the conversations, the assurances, either from salesmen, brochures, advertisements or installers which will constitute an express warranty.

For more than twenty-five years Australian courts have held that contributory negligence can never be a defense to a violation of a safety statute established for the protection of an industrial worker. There are a few such holdings in the United States.

It may well be argued that contributory negligence cannot be a defense where the negligence is failure to guard since due care, on the part of the defendant, would have eliminated any possibility of contributory negligence. This most certainly will be the law as society advances.

CONFLICT OF LAWS

During these transitional years where some states have eliminated the privity requirement and some have not, it is incumbent on the attorney for a plaintiff, in a jurisdiction which has not eliminated the privity requirement and where the conflict rule makes the state's law applicable, to wait until the last moment to file the case and

proceed slowly to trial. By the time of trial, it may well be that the law will then be favorable while an earlier trial could result in a no cause for action.

TRIAL THEME

The most effective trial theme may well be:

They didn't know about safety.

They didn't care about safety.

They didn't do anything about safety.

The thrust of the safety propaganda heretofore has stressed the human factor in the prevention of accidents. Many good safety engineers believe the emphasis on working and driving safely may well have caused more accidents in the long run than it has prevented since it has slowed the emphasis on proper design, proper planning, proper guarding and proper warning.

This means that the general public presently will require adequate explanation in the *voir dire,* opening statement, testimony and closing argument of the real responsibility for accident prevention.

Products liability cases are challenging, exciting and interesting. The plaintiff's attorney generally sees the plaintiff and all the witnesses before a claims adjuster has baffled and befuddled them. The injuries are often serious and, allowing for adequate preparation, the plaintiff is seldom unable to collect for the total damage. Even more important, however, lawyers should be compelled to work closely with scientists and engineers in a way that will increase the scope and horizon of each for, in so doing, each may make a small contribution to a safer, more moral society and advance the rule of law.