

SHAPO
ON THE LAW OF
PRODUCTS LIABILITY

VOLUME 1

MARSHALL S. SHAPO



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Volume 1

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I have written, co-authored, or co-edited some twenty-nine books, and these volumes are my eleventh book-length work on this subject. With each successive book, I become more aware how much I owe to many benefactors.

A platoon of excellent professors at the University of Miami Law School launched my legal education. Remembering many of them gratefully, I express my particular thanks to Minnette Massey. Several members of the Harvard Law School faculty provided further stimulation during my graduate year in residence there.

For forty-seven years, my faculty colleagues at Northwestern, Virginia and Texas have contributed mightily to my understanding of the law and its operation in the controversial area analyzed in these volumes. At faculty workshops and in scores of informal conversations, they have deepened my comprehension of how law develops, what law means, and how the law might be improved. I want to mention in particular the late Page Keeton, my first dean and collaborator, who gave me both his wisdom and his encouragement when I launched my scholarship in this area more than forty years ago. His combination of intellectual rigor and a judgment born of common sense provided an important example. Another beacon in my legal education was Leon Green, my teacher and colleague, a mighty source of insight and legal imagination.

I am especially grateful to David Ruder and David Van Zandt, deans at Northwestern during my tenure here, for support that has enabled me to complete each edition of this work. I further acknowledge the help of several contributors to research at Northwestern for support of various aspects of this work: the Corporate Counsel Center of Northwestern University School of Law, the Edward B. Berglund Fund, the Edwin Walsh Fund, the Clemens and Jane Werner Faculty Enrichment Fund, and the Northwestern University School of Law Summer Faculty Research Program.

I have appreciated the willingness of the leaders of my law schools to support very long-term research. I note that these volumes build upon four decades of that research, which originally began publication life in a work published in 1987 by Warren Gorham & Lamont and continued through editions under the Butterworths label. It is symbolic of the continued growth of the law that this edition approximately triples the size of the first edition. CCH/Wolters-Kluwer expanded the work in editions published in 2001 and 2010. I was thankful for the editorial assistance of editors for prior publishers. Now, I am especially grateful for the wise guidance of Pam Maloney, managing editor for Wolters

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Every schoolteacher draws ideas from his or her students. I have been stimulated by both questions and answers from my classes in torts and products regulation at Northwestern. I owe special thanks to the student assistants who have helped me with the innumerable scholarly minutiae with which one must deal to produce a work of this sort. Notably, these students include Kelly Begg, Prudence Beidler, Matt Burke, Cristina Carmody Tilley, Lauren Daniel, Rob Drizin, Michael Doornweerd, Tish Eggleston, Jim Groth, Paige Harrison, Kelly Hollingsworth, Paul Janaskie, Scott Jones, Todd Kossow, James Larry, David Lee, Leighton Leib, Amanda MacDonald, Laura MacDonald, John Martin, Brian McLain, Doug Noren, Kevin Osborn, James Phalen, Joseph Prater, Brooke Pyo, Chuck Regan, Abby Russell, Ian Schwartz, Bob Sell, Jonathan Shaub, Rebecca Stamey-White, Jennifer Sutter, Marcia Tiersky, Seth Traxler, and Kristina Wilson.

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My work as an Adviser to Restatement (Third) of Torts: Products Liability deepened my knowledge of the law in many ways. I learned much from discussions among the Reporters and Advisers and in the cut and thrust of debate on the floor of the American Law Institute. The late Charles Alan Wright, then president of the Institute, provided great encouragement in this endeavor.

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I also benefited from an informal seminar on products liability at Balliol College, Oxford, organized by Donald Harris, who was for many years Director of the Center of Socio-Legal Studies at Wolfson College, Oxford, and Jane Stapleton. As I worked on earlier editions, I profited from conversation about European law with many other persons. Just a few who aided my research with information and insights were Anthony Jolowicz, Basil Markesinis, Dr. Hans Claudius Taschner and Mary Sharpe of the European Commission; and Christopher Newdick. More recently, I have derived benefit from seminars and other programs at LUISS Guido Carli University in Rome, and in Rio de Janeiro, both organized by Antonio Claudio Tarre; in Kobe, Osaka and Tokyo, organized by Toshihiko Oinuma; in Girona, organized by Miguel Martin Casals; in Pisa, organized by Emanuela Navarretta; in Barcelona, organized by Pablo Salvador Coderch; and in Bremen, organized by Norbert Reich. I am grateful to Jaap Spier for his help in facilitating several of these programs.

A version of the material in Part XI appeared in my article, *Comparing Products Liability: Concepts in European and American Law*, 26 *Cornell Int'l L. J.* 279 (1993). I appreciate the editorial assistance of the editors of the *Journal*.

I mentioned in the Introduction the controversy that has surrounded this subject in the halls of Congress. I have had the honor of testifying to senatorial committees on this subject several times. Some of my testimony drew sharp comment from the senators who invited me, but their invitations always guaranteed a respectful audience. These occasions have advanced my knowledge of the subject and have further sensitized me to its political complexity. Since judge-made law is at some level politics—Tocqueville's observation that major American issues tend to wind up in court has the corollary that disputed questions of substantive law sometimes wind up before legislatures—these experiences have contributed to my scholarship. They also have confirmed me in the belief that our democracy is a pretty wonderful institution. I found myself moved to say to Senator Stafford on one occasion that I wished my parents had lived to know that I was discussing the law with United States senators. That is no small privilege, and for me it is no trivial symbol of the freedoms we enjoy.

A generation of faculty assistants at Northwestern University School of Law has contributed to the making of these volumes: Michael Sobczak and Derek Gundersen were indispensable. I am also grateful to Christy Bailey, Joe Rogers, Dianne Brubaker, Fay Reid and Karen Khalil at Northwestern, and to Gail Branch at Texas for their work as I developed the research base for the treatise.

Finally, I thank my family, not least for the example of their own endeavors, which have been a continuing inspiration to me. I am naturally in accord with the observation that as children get older, they decide that their parents may after all possess some small corner of wisdom. But I also learn more each year from the sage observations of my sons Nat Shapo, himself a lawyer and former Director of the Illinois Department of Insurance, and Benjamin Shapo, a research engineer.

I express my greatest gratitude to Professor Helene S. Shapo. Her acuteness and clarity of analysis, and the refinement of her critical judgment, serve as a standard for anyone who writes about the law.

Chicago and Evanston

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INTRODUCTION

This book addresses an area of the law that reflects many of the stresses and tensions in the American personality.

PRODUCTS AND SOCIETY

T.J. Wertenbaker captured the intense spiritual emphasis of early New England in his description of Puritan ministers who thundered that congregants “must not substitute Mammon for the true god.” In his book *The Puritan Oligarchy*, Wertenbaker quoted John Norton’s admonition to listeners to his election sermon in 1675: “It concerneth New England always to remember that originally they are a plantation religious, not a plantation of trade.” This attitude, Wertenbaker wrote, underlay the displeasure of the New England clergy with the “absorption of acquiring worldly riches” of the developing “merchant aristocracy.”

Generations of commentators and novelists have expounded on the materialist side of our national life. Vernon Parrington, in a classic work on American intellectual history, recorded that the attitude of the leaders of Massachusetts Bay to “[t]he community of goods that marked the early days of Plymouth” was one of such dislike “as to account it almost sinful.” Depicting the objects of this criticism, Wertenbaker wrote of the gusto with which the port merchants “built handsome residences and filled them with fine furniture and silver.” And in an especially delicious underscoring of the ironies of a later time, John Updike created an automobile salesman who avoids a direct and prolonged spousal effort at sexual intercourse by reading the *Consumer Reports* entry, “Summer cooling, 1979: air conditioner or fan?” In this episode in *Rabbit is Rich*, Harry Angstrom tries “to skim the list of advantages and disadvantages peculiar to each (*Bulky and heavy to install* as opposed to *Light and portable*, *Expensive to run* as against *Inexpensive to run*).”

Indeed, the ironies abound. Here are dedicated “environmentalists,” presumably dedicated to the simple life, setting up elaborate candelabra on the lawn at outdoor symphony concerts. Here are collegians, equally convinced of their personal simplicity, who cannot cram into an SUV enough goods to support a supposedly spartan dormitory existence.

Like it or not, and most of us like it more than sneakingly, Americans often define the good by their goods. As one reflects on the foundations of our historical attitudes, one need not adopt the views of Charles Beard, in *An Economic*

Interpretation of the Constitution of the United States, to understand the importance that Americans always have attached to property of various kinds. Today, with an increasing devotion to chattels, and to chattels that have complex innards, we become more disappointed than ever when those goods do not work, and we are positively dismayed when their lack of function contributes to personal injuries.

In a demanding market of more than three hundred million people, every day some will experience intermittent frustration and even anguish in encounters with products. The combination of human and legal stories in these episodes makes the study of products liability law an endlessly fascinating one. The law as it has developed, and the law that is yet to come, represents society's resolution of disputes involving consumers, goods, and firms at high points of legal tension.

Our society's response to these situations has been grounded in a blend of morality, custom, and law. In our tradition, the freedom to sell and to buy ultimately entails the freedom to sue. While there has been much criticism of expansions of consumer opportunities to take advantage of that freedom and its associated rights, some alternatives may be worse. In the words of a commentary on the tort liability system, "I'll see my lawyer" has a much better ring than "I'll see my bureaucrat."

In playing its role in this area, the law becomes a major reconciling agent of spirituality and materiality, of prices and images, of realities and dreams. It acts as a mediator of bargaining and ethics in a culture suffused by mass advertising. This is a difficult job, involving efforts to deal with the potential of advancing technology, the psychological effects of affluence and of economic cycles, and the self-conscious discovery of limits. With all these ingredients at work, it is no wonder that there has been pressure for legislation to constrain the development of substantive rights. Promotion of this sort of "law reform" already has proved persuasive, in some degree, in some state legislatures. And after many years of lobbying, Congress passed a products liability bill, although it was vetoed.

Continuing developments in judge-made law and legislation have demonstrated the importance of accurate statement of the law, as well as clear articulation of the premises on which it rests. There will always be spirited disagreement on premises clearly stated, but often a precise expression of them will focus the need for more inquiry into social facts: facts about the incidence of injury, the rate of suit, the transaction costs of suing and how they compare with the rest of the world of litigation, the amount of money transferred between distributors and claimants, how accurately those transfers reflect the true social costs of product injuries, the role of the insurance mechanism in dealing with these problems, the effects of law on the conduct of all actors in the drama. Heightening the complexity implied by these factual questions are the diverse issues of justice that twine around products liability cases.

In various forums, I have indicated my conviction that the courts have done at least tolerably well in dealing with the legal issues that emerge atop this pile of factual and philosophical questions. Even as legislation becomes part of the mix

of products liability law, it seems clear that the judiciary will continue to play a major role in shaping the legal framework that governs disputes over products injuries. This book focuses principally on that role, describing it, analyzing it and seeking critically to explore its significance in our society.

PRODUCTS AND THE LAW

This particularly fascinating branch of the law blends aspects of the two great common law subjects: tort, with its focus on personal injury and vulnerability, and contract, with its fundamental assumptions about marketplace bargaining and pocketbook loss. For a scholar, it presents a remarkable unit for historical investigation. The modern law of products liability has blossomed in the space of just a half century, providing an endless group of lessons about legal institutions, about law and politics, and about law and culture.

For the practicing lawyer, the civil action for product injury takes many forms. Sometimes it may be a suit for misrepresentation. On other occasions the doctrinal basis for litigation will be express warranty, implied warranty, negligence, or strict liability. The typical case profile includes a manufacturer who produces on a mass basis, a consumer who buys because of the attraction of various forms of product promotion, and a complex scheme of distribution. In many cases involving products shown to cause large numbers of injuries, the legal background will include a scheme of government regulation of design, manufacture, or advertising. This book focuses on decisive legal elements of fact and law related to the processes of buying and using products, as well as relevant aspects of production, advertising, and distribution. It reviews intensively the theories of liability over which lawyers do battle, examining the function of those doctrines as vehicles for the policy considerations that lie close to the surface of all legal regulation of product injuries.

The social rationales invoked by the courts in products liability cases are quite various and indeed sometimes prove to be at odds with one another. An important theoretical basis of this area of law is a model of individuals freely contracting for the allocation of particular risks. The theory is that the price of a product in the marketplace will reflect the value that consumers place on that good, including the bundle of advantages and risks they perceive in the product as an integrated unit. The ideas of efficiency inherent in that model give one meaning to the concept of deterrence, embodied in the idea that the law should aim to achieve an economically optimal level of accidents. A rather different, moralizing approach to deterrence eschews technical economic concepts and emphasizes the reduction of accidents as an independent goal. Judges taking this view exhort product sellers in terms urging "maximum protection" against injury risks. Whichever deterrence theory attracts courts, the decisions are replete with the notion that liability rules can affect conduct, pushing entrepreneurs toward safer design and greater care in the processes of production and sale. At the same time, people intuitively understand that deterrence is not an absolute concept.

Since all life is risky, including that part of life associated with product use, the law seeks to achieve a reasonable balance between safety and utility, and does not try to provide complete protection from hazard.

Also drawing judicial attention is the goal of loss spreading, which emphasizes the apportionment over the general consumer population of the costs of injuries that have great impact on relatively small numbers of persons. This goal may conflict with that of economic optimization in many applications, while harmonizing with a moralizing kind of deterrence. For example, one could choose a rule of liability that achieved safer manufacturer conduct than the impersonal market “wanted” in order to cushion the burden of large losses upon particular individuals.

This brief summary of rationales and goals of the law does not exhaust the complex and sometimes conflicting ambitions of products liability jurisprudence. Courts also concern themselves with the delicate balance between legislature and judiciary in a society increasingly controlled by public regulation, with promoting economic stability, and, occasionally, with achieving results in particular cases that appeal to general notions of individualized justice.¹ But perhaps the major areas of tension in this developing legal territory are those that arise from the complex relationships among the goals of economic efficiency based on freedom of choice by informed consumers, accident prevention as an independent value, and loss spreading. Efforts by state legislatures to codify products liability law have responded to these concerns, in some cases readjusting their relative weight in the social calculus.

Like all common law in this country, products liability law has been primarily a product of the state courts. However, a social problem whose dimensions are seldom cabined by state lines has produced a nationalizing trend, into which have been woven the doctrinal changes associated with the expansion of strict liability for product injuries. Indeed, the products liability revolution inspired a federal court to assume for the basis of a lengthy memorandum “the existence of a national body of state tort law.” The court refers in that opinion to “[a] growing consensus on the substantive law in this country.”²

¹ For a summary of basic policy issues in products liability, see Marshall S. Shapo, “A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment,” 60 Va. L. Rev. 1109, 1371-1388 (1974). For a more general discussion of the “purposes, goals, rationales, and values” of tort law, see ABA, Special Committee on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice In American Tort Law*, chapter 4 (M. Shapo, Reporter, 1984).

² *Hall v. E.I. DuPont de Nemours & Co.*, 345 F.Supp.353, 360 (E.D. N.Y. 1972). ◀

INTRODUCTION

The appearance of several products liability cases in the United States Supreme Court provides an illustration of the power of this body of law as both a legal barometer and a cultural mirror.³

- The Court's *Daubert* decision, arising from the sympathetic framework of claimants' attributions of birth defects to a prescription drug, set general parameters of scientific proof both within and beyond the boundaries of products liability, elaborated on in subsequent decisions of the Court.⁴
- A series of preemption decisions has explored the nuances of the relationship between Congress and state courts in the context of the intricacies of regulatory schemes in particular product areas: cigarettes,⁵ prescription drugs,⁶ medical devices,⁷ agricultural chemicals,⁸ motor vehicle safety restraints,⁹ and motorboat equipment.¹⁰ The majority in one case, and pluralities in the others, pinned their reasoning to the specifics of the different statutory schemes.
- The Court's holding in the *East River* case, refusing tort liability for economic loss in the maritime setting, has produced a cottage industry of decisionmaking in general products liability law. Although this decision has captured the approval of many state courts, other courts have emphasized distinction grounded on "safety concerns" and the risk of injury to human beings.¹¹
- The Court's closely divided judgment in *Boyle v. United Technologies Corp.* defined a line beyond which military considerations require a government-like immunity for product contractors.¹²
- In a line of cases concerning products—one involving injuries in the rollover of an all-terrain vehicle, another arising from a failure to reveal the repainting of parts of a slightly damaged car, and still another

³ For development of this thesis, see generally Marshall S. Shapo, *Products Liability and the Search for Justice* (Carolina Academic Press 1993), Marshall S. Shapo, *Tort Law and Culture* (Carolina Academic Press 2003), and Marshall S. Shapo, *An Injury Law Constitution* (Oxford University Press 2012).

⁴ § 23.04[A][1]. Footnotes to this part usually refer to sections containing discussions of the text generalizations, rather than to concrete cases.

⁵ § 11.03[G][3].

⁶ § 11.03[G][4].

⁷ § 11.03[G][6].

⁸ § 11.03[G][8].

⁹ § 11.03[G][1][b].

¹⁰ § 11.03[G][14].

¹¹ § 27.05[G].

¹² § 12.12[B].

focusing on cigarette-caused illness—the Court has struggled to develop a jurisprudence of punitive damages.¹³

A handful of decisions from other tribunals will serve further to illustrate the breadth of the area spanned by products liability law, in its human dimensions as well as its legal sweep.

- In a legal world where the pervasive importance of the representation is not always evident in the decisions, a New York case indicates that the background provided by TV cartoons may influence liability for children's toys.¹⁴
- Products law has had to deal with a family tragedy that grew out of something as uncomplicated as a parlor game, and its effect on the psyche of a teenager. A mother sues the maker of the game "Dungeons and Dragons" on the theory that her son fatally shot himself after developing an obsession with the game. The Sixth Circuit aligns itself with judicial refusals "to recognize suicide as a proximate consequence of a defendant's wrongful act."¹⁵
- HIV-infected blood generated a series of products decisions. An initial judicial focus was on the definition of negligence at a moment of fast expanding medical knowledge.¹⁶ Another emphasis was on society's "need for an affordable, adequate blood supply."¹⁷

The chapters on defect suggest ways to put philosophic notions on a commonsense plane.

- One section introduces the idea that products have a metaphysical character. Perhaps the Greek philosophers would have agreed with us on the function of a "knife," and, introduced to our more rudimentary household tools, they would have asserted that there is a core meaning to the idea of a "saw," at least a hand saw. Things do get more complicated when we move to power tools, motor vehicles, and aircraft. Yet, the relative complexity of goods does not change the fact that each product comes to the consumer with a meaning: a meaning derived from a variety

¹³ § 29.10[D][1].

¹⁴ § 1.01[B].

¹⁵ § 32.06.

¹⁶ § 5.04[D]; § 5.08[G][2][b].

¹⁷ § 12.16[A][2][a].

of sources and a context that includes sales literature, distributional channels, and the use to which most consumers put the product.¹⁸

- Another angle on defect views the problem as one involving continuums of products. A focal case in the text involves a relatively simple product that is a creature of modern crime and modern police work: the bullet-resistant vest. The plaintiff's decedent, a state trooper, was wearing "one of several different styles" of vest. This vest balanced a relative lack of confinement for the wearer, flexibility, and heat dissipation against vulnerability in parts of the body not protected by that model that were covered by another model. Several bullets hit the trooper where the vest did not protect him, and he died. In denying recovery in keeping with a continuum analysis, the court declares that "[a] manufacturer is not obliged to market only one version of a product, that being the very safest design imaginable."¹⁹
- The human equation in the law of products liability appears prominently in opinions discussing assumption of risk. The plaintiff who has had long familiarity with the hazards of a product is not likely to fare well²⁰ nor is the worker who does not use a readily available safety device. The defense becomes more porous, however, when the plaintiff does not know of a particular characteristic of a product.²¹
- Asbestos cases, significant generators of substantive products liability jurisprudence, have been important sources of law on the "discovery rule" under statutes of limitations. Issues of this sort also abound in other product areas, including IUDs, cigarettes, oral contraceptives, breast implants—even a dishwasher.²²
- Suits continue to arise against product makers whose goods were involved in crimes. The decisions have run principally in favor of gun makers.²³
- In the area of product tampering, a reported opinion on a Tylenol murder expostulated that the court could not "begin to imagine the havoc" that a liability rule "would wreak in the marketplace and the mischief it would engender." Moreover, the Tenth Circuit made clear in the tragic framework of the Oklahoma City bombing that the makers of the ammonium

¹⁸ § 8.05[K].

¹⁹ § 9.11.

²⁰ § 20.03[H][2][a].

²¹ § 20.03[J][1].

²² § 30.06[G].

²³ § 8.06[G].

nitrate in the bombs were not responsible for the actions of the bombers.²⁴

Each of these decisions, like a tile in a mosaic, presents us with a fragment of our culture. When we take these precedents as a group, ranging from pronouncements of the Supreme Court to the rulings of state tribunals, we derive a picture of our society. That mosaic gives us a rather accurate sense of our views about the limitations of various governmental institutions, as well as of law itself. It informs us about the metaphysics of the things we buy. When we think about scientific methods for deciphering the failures of those things, it reflects our desire—and our struggle—to solve problems rationally. Perhaps most dramatically, it captures our beliefs about individual responsibility and about the boundaries across which the law must stare helplessly at tragedy.

²⁴ § 32.08[B].

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