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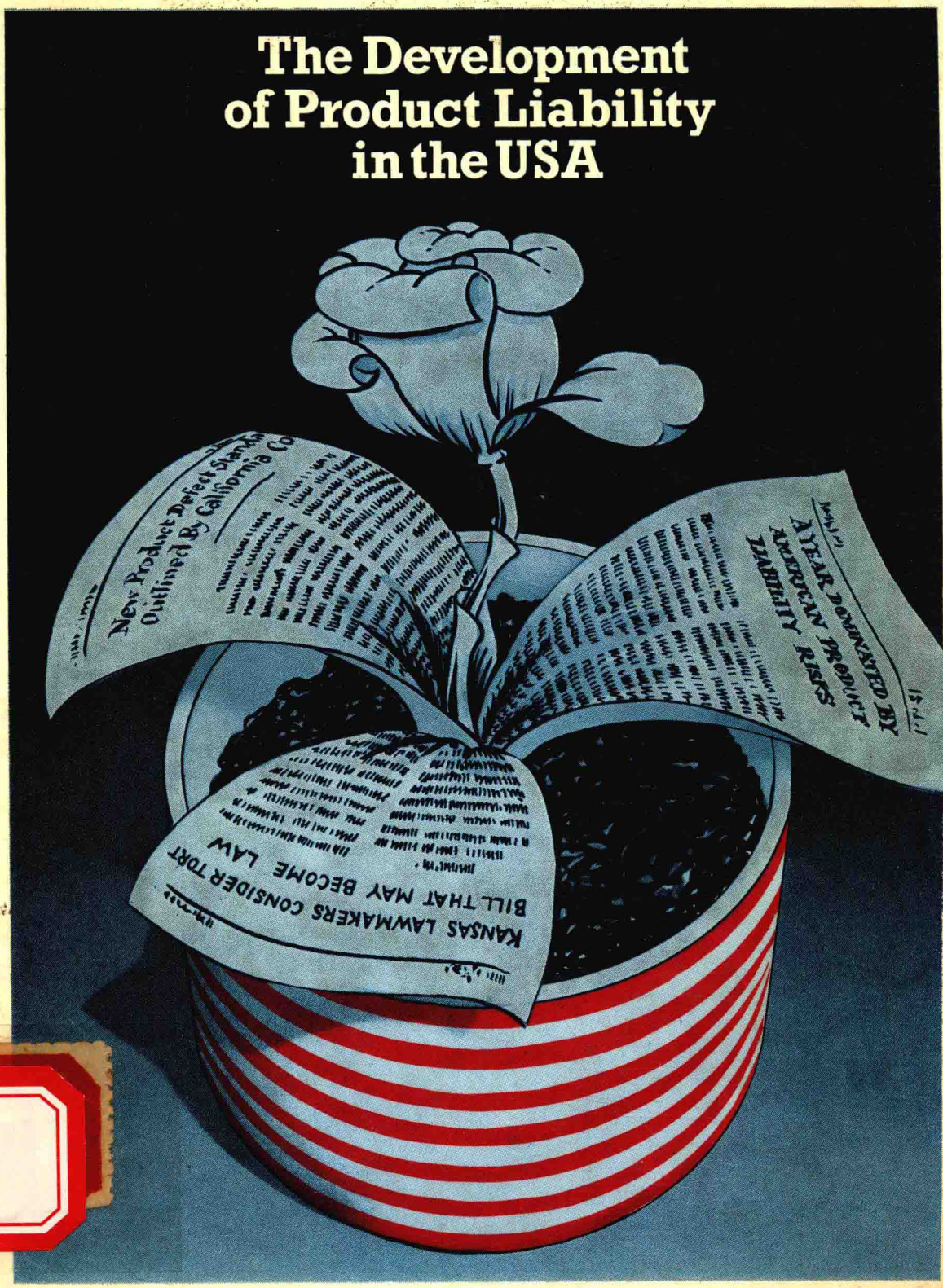
The Development of Product Liability in the USA



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THE DEVELOPMENT OF PRODUCT LIABILITY IN THE UNITED STATES

By

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ACKNOWLEDGMENT

Readers should know that I am indebted to my wife, Margot Owles, for a great amount of work on this book. She did much of the research, and also prepared the typescript for publication. Of course, I cannot escape personal responsibility for errors and omissions.

Derrick Owles

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PREFACE

This book is about the liability of manufacturers and suppliers for injury caused by defective products. It attempts to give a general picture of the law on the subject in the United States of America. Some may ask why a British publisher should put out a book on American law, and there are at least two reasons:

1. Many British firms are operating in America, and are necessarily subject to American law. Some firms may indeed be subject to American law even though they may believe that they are not operating in the United States.
2. English law and American law are not in general all that different. It happens that in the field of product liability American courts have gone further than English courts in defining and establishing the liability, but we may assume that the difference in the law is only temporary. The pressure of the European Economic Community will lead to a similar development in England, and we can say that English law today is probably in the stage that American law had reached at the beginning of 1965, and that the future of English law is to follow the same path which the American courts have followed.

Writing a book such as this presents many problems. One, of course, is to decide what the law really is. Another is to decide how much detail to put in. Certainly some entrancing by-ways have had to be ignored, and points of distinction between various jurisdictions have been avoided. Some discerning readers are bound to ask: "Why has this or that been omitted?", and the only answer is that the aim has been to produce a readable survey of the whole topic. The hope is that the reader will be able to say at least: "I know what Product Liability is all about".

Product Liability affects us all. It is not a dull subject, and it is hoped that the readers will not be only lawyers. A certain amount of legal terminology cannot be avoided, but by and large the book should be readily understood even by those who have not enjoyed the benefits of a legal education. On the other hand, it is hoped that lawyers will agree that the treatment of the subject has not been unduly simplified.

INTRODUCTION

The cases mentioned in this book have been heard in either a Federal Court or a State Court. For the benefit of readers who are not familiar with the United States judicial system, an outline of the system of Federal Courts is set out below. The Judges of these courts are all appointed by the President with the approval of Congress, whereas in State Courts the Judges may have been elected by popular vote or appointed by the Governor of the State.

THE FEDERAL COURT SYSTEM

Federal Courts include
The U.S. Supreme Court.
U.S. Courts of Appeals.
U.S. District Courts.

The Supreme Court sits in Washington, D.C., and is in the main an Appeals Court, but it does have some original jurisdiction. It hears at first instance disputes between States and cases involving foreign ambassadors. Almost all of the litigation in Federal Courts starts in a U.S. District Court. There is at least one District Court in each State, usually more than one, and many District Court areas are split up into divisions. The District Courts are grouped into 11 circuits, and each circuit has a Court of Appeals which hears appeals only from the District Courts in its area.

The geographical distribution of the circuits is as follows:—

1st Circuit—Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico.

2nd Circuit—New York, Vermont, Connecticut.

3rd Circuit—Pennsylvania, New Jersey, Delaware.

4th Circuit—West Virginia, Virginia, North Carolina, South Carolina, Maryland.

5th Circuit—Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, Canal Zone.

6th Circuit—Ohio, Kentucky, Tennessee, Michigan.

7th Circuit—Wisconsin, Illinois, Indiana.

8th Circuit—North Dakota, South Dakota, Nebraska, Missouri, Arkansas, Iowa, Minnesota.

9th Circuit—Washington, Oregon, California, Nevada, Arizona, Idaho, Montana, Alaska, Hawaii.

10th Circuit—Wyoming, Utah, Colorado, New Mexico, Kansas, Oklahoma.

11th Circuit—District of Columbia.

Appeals from a Circuit Court of Appeals go to the U.S. Supreme Court, but there is no automatic right of appeal. The pressure of work on the Supreme Court is so great that only a small proportion of appeals can be heard. The note in the Law Reports "cert. dnd." means that a committee of the court has refused to issue the writ of *certiorari* that would bring the matter before the Justices. The Supreme Court has "Justices": other Federal Courts have "Judges". A writ of *certiorari* is a command to the lower court to send up the record for review.

Product liability cases go to a Federal Court whenever there is "diversity of citizenship", i.e. whenever the plaintiff and defendant are from different States. The jurisdiction of the District Court includes such cases whenever the sum claimed is over $10,000, a requirement that is easily met in nearly all product liability claims. When a case is heard in a Federal Court the law to be applied is usually the law of the State in which the court is sitting. Product liability is essentially a matter of State law. Plaintiffs may also choose to sue in a State Court, and each State has its own system of courts. For example, the New Jersey system basically consists of

Supreme Court.

Superior Court.

County Courts.

The names given to the courts vary from State to State, but there is always a Court of First Instance and an Appeals Court, with sometimes an Intermediate Court of Appeals. In general there is no appeal from a State Court to a Federal Court, except that an appeal to the U.S. Supreme Court is allowed when a State statute has been unsuccessfully challenged in the State Court as being in conflict with the U.S. Constitution. It is also allowed when a State Court has declared a Federal statute to be unconstitutional.

CITATIONS

In the early years of the 19th century decisions of Appellate Courts were published privately, usually under the name of the reporter. In the second half of the century reports were published officially, under the name of the State, by the authority of the State legislature. During the 1870s annotated reports were published by commercial publishers, and by 1887 the West Publishing Company had started the National Reporter System, which includes the decisions of State and Federal Courts. It contains 13 units, namely:

(1) Four Federal units,
i.e. Supreme Court Reporter (Sup. Ct.)
Federal Reporter (F.) (mostly Federal Appeals Court decisions)
Federal Supplement (F.Supp.) (mostly Federal District Court decisions)
Federal Rules Decisions (FRD)

(2) Two State units,
i.e. California Reporter
New York Supplement

(3) Seven regional units,
i.e. Northeastern (NE)
Northwestern (NW)
Atlantic (A)
Pacific (P)
Southeastern (SE)
Southern (S)
Southwestern (SW)

Regional units contain the reports of several States, and some States no longer publish individual reports. A number following the letter designating a regional unit indicates the series number, such as A 2d, which means the second series of the Atlantic regional unit. A typical citation is thus

> "*P* v. *D*, 100 P 2d 450" (i.e., the action of P against D is reported at page 450 of volume 100 of the second series in the Pacific region.)

In this book State citations have not been used when the regional citation is available, since the West Regional Reports are more widely available. Also cited are occasional references to the American Law Reports (ALR), a commercial series of reports that contain valuable annotations on important topics. There is also a Federal series in the American Law Reports (ALR Fed.).

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PART I THE DEFECTIVE PRODUCT

We take as a starting point the principle that a manufacturer or distributor of a product is liable to compensate a person injured by a defective product. This principle requires that we are able to recognise a defective product, because there can be no liability if a product is without blemish. The difficulty we face is that a blemish may appear in various forms. There may be some defect arising out of the manufacture of the article. The article has not turned out as it was intended. Or, the original design is defective. It creates a danger that would not be present if the design had been different. Lastly, there is the product that is made as was intended, according to a design that could not have been improved, but which has some characteristic that may in some circumstances cause harm. If this dangerous characteristic is not brought to the notice of those who will use the product, there has been a failure to warn. A failure to warn is a defect in product liability law.

Each of these aspects of defect is to be discussed in this Part of the book, and in order to understand the discussions we have also to know that there are various theories of recovery. The basis for liability may be either one of the old-established principles of tort or contract, or the modern principle known as strict liability in tort. Part II deals in some detail with these theories of recovery, and at this stage we need only know that a claim for compensation may be based on negligence, breach of warranty, or strict liability in tort. Often a plaintiff, in fact, does not depend on one theory alone, but bases his case on two or maybe all three of the theories of recovery.

CHAPTER 1

THE NATURE OF THE DEFECT

We know that there is a legal liability for defects in a product, but we do not have before us a definition of "defect" suitable for all the circumstances in which this liability occurs. If we look through cases we shall not find a judicial definition, and if we read the voluminous writings on the subject we shall only find suggestions, all of which tend to be introduced by such words as "confusion" and "controversy". There certainly is confusion and controversy, but before we try to see why and how this should be so, we must note that the absence of a definition has not prevented a great many courts from coming to a conclusion in individual cases. Claims have been settled by the courts as and when they arose, and in general the lack of definition seems to have been a matter more of theoretical than of practical concern.

The difficulty is that there are different bases on which liability is established, and we are looking at the facts in a somewhat different way according to the basis. Firstly, there is a claim under warranty. Here the wording of the Uniform Commercial Code is what counts, because all the plaintiff has to do is to establish the fact that the goods do not conform to the warranty. If there is an express warranty, we ask what it is, and the "defect" consists of the failure to conform to the warranty. If there is an implied warranty, the claim will most likely be that the goods are not merchantable, which implies the claim that the goods are not "fit for the ordinary purpose for which such goods are used". Alternatively, the claim may be that the goods are not fit for a particular purpose. Such a claim requires proof that the defendant knew, or had reason to know of the particular purpose and also proof that the buyer relied on the seller's skill or judgment.

Secondly, there is the claim under strict liability. Here we have two sources of confusion. One is that in *Greenman* v. *Yuba* Traynor, J. (who was to become Chief Justice of California) said there was liability when a product "proves to have a defect that causes injury", whereas in section 402A of the Restatement of the Law of Torts, Second, liability is said to arise when the product is "in a defective condition unreasonably dangerous". It is the words "unreasonably dangerous" that have caused controversy. They have been explained in Comment (i) to section 402A of the Restatement of the Law of Torts, Second, as follows:

"The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics".

Writings and lectures on product liability frequently refer to the "Restatement" in general, and to "Section 402A" in particular. We must therefore always keep in mind that there are Restatements for many areas of the law. They are drafted by the American Law Institute, which consists of Judges, practising lawyers and law professors. A Restatement does not have the force of law, but does, of course, include many statements of principle that have previously been laid down by the courts or by statute. However, the principles laid down in a Restatement carry considerable weight with courts.

The Restatement of the Law of Torts was first published in 1938, and a second edition was issued in 1965. The Restatement, Second, contained an addition, the much-quoted section 402A, which lays down the accepted principle of strict liability:

§ **402A.** Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

There is also section 402B:

§ **402B.** Misrepresentation by Seller of Chattels to Consumer

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

Other sections of the Restatement of the Law of Torts, Second, are relevant to product liability such as:

§ **302B.** Risk of Intentional or Criminal Conduct

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

§ **388.** Chattel Known to be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

§ **395.** Negligent Manufacture of Chattel Dangerous Unless Carefully Made

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

§ **397.** Chattel Made Under Secret Formula

A manufacturer of a chattel which is compounded under a secret formula or under a formula which although disclosed should be recognized as unlikely to be understood by those whom he should expect to use it lawfully, is subject to liability for physical harm caused to them and persons whom he should expect to be endangered by its probable use by his failure to exercise reasonable care to adopt such a formula and to bring to the knowledge of those who are to use the chattel such directions as will make it reasonably safe for the use for which it is supplied.