PRODUCTS LIABILITY

For Corporate Counsels, Controllers, and Product Safety Executives

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Preface

Today's headlines abound with details of Tylenol-caused deaths, Manville asbestos-induced disabilities, Ford automobile-caused injuries, Agent Orange-precipitated disabilities, and literally thousands of products which have allegedly caused personal injury, property damage, and economic loss. Even a defectively designed vitamin tablet allegedly caused comedian David Brenner to be hospitalized, for he could not swallow it! (He commenced suit in the federal district court in New York in February 1983 for pain and suffering!) From the sublime to the ridiculous, consumers have sued at the drop of a hat, seeking compensation from product manufacturers and others in the chain of distribution of the product. There is "an urge to sue" still rampant in the American marketplace.

According to the *New York Times* (Feb. 13, 1983) the Ford Motor Company is paying about $20 million as a result of lawsuits charging that defective automobile and truck transmissions caused deaths and injuries. As early as 1970 Ford was allegedly aware of the defect in millions of cars and light trucks "and could have corrected it for 3¢ a vehicle." The defect in the design of the transmissions caused the cars to jump into reverse after the driver had put the car in neutral. More than 1,000 persons have felt the "urge to sue" Ford. . . and are doing so today.

The Tylenol "scare" of 1982 which resulted in the deaths of seven persons who consumed the product laced with cyanide crystals brought "out of the woodwork" hundreds of "claimants" seeking compensation for alleged injuries. They argued that the packaging of Tylenol was unreasonably dangerous because of a failure to design the capsule, bottle, and box so as to preclude any tampering with the contents. But it will be difficult to persuade a jury to award damages against the product manufacturer where the *criminal* acts of third per-

sons is the critical factor in the Tylenol deaths. Indeed, absolute protection against a determined poisoner is simply beyond reach. In the words of Food and Drug Administration Commissioner Arthur H. Hayes, Jr.: "There is no such thing as a tamperproof drug just the way there is no such thing as a hijackproof airplane."

Still another example of the "urge to sue" is the more than 1,800 products liability lawsuits filed against Pacor Inc., a Philadelphia-based firm which distributes and installs insulation in commercial and industrial settings. Approximately 20 percent of Pacor's annual expenses have been earmarked between 1977 and 1983 for legal expenditures to defend asbestos-caused injuries. Approximately 85 percent of Pacor's lawsuits were filed by former Naval Shipyard employees, and every day two more lawsuits are commenced against Pacor. Even their insurance coverage was cancelled in 1979 because of the asbestos problem! Some asbestos firms have filed for bankruptcy to withstand the onslaught of lawsuits. Another firm, Keene Corporation, estimates that of every dollar spent on asbestos litigation, about 70¢ goes to lawyers, 15¢ to insurance companies, and only 15¢ to those claiming injury. Yet the "urge to sue" continues. . . .

The Consumer Product Safety Commission periodically publishes the NEISS DATA HIGHLIGHTS; in 1980 kitchen drain cleaners were at the top of the list with a mean severity index of 160 involving more than 13,000 cases of injury. Next came liquid fuels, followed by lawn mowers, power saws, and ladders and stools. These five consumer products caused almost 300,000 cases of injury in 1980. The "urge to sue" apparently has solid roots upon which to grow.

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Introduction

Safety is admittedly a relative term, although in theory one should be able to distinguish easily between a product which is safe and a product which is unsafe. But in terms of Products Liability it is the court (and/or jury) which determines, under the law and circumstances of the case, whether the product is safe or unsafe. The task of the Corporate Counsel, Controller, and Product Safety Executive is therefore a difficult one. . . .

This volume is designed to help the Corporate Counsel, Controller, and Product Safety Executive make those important decisions on Safety of Product. The author, a distinguished practicing attorney and scholar in the field of Products Liability, is former Counsel of Bristol-Myers Company, and has devoted more than 25 years to working with corporate officers and executives in solving the intricate problems of allegedly unsafe products.

Liability arises from the use as well as the misuse of a product. This book focuses upon the vulnerabilities of the product in the marketplace, and explains why product claims are increasing and why their defense is so costly. Safety factors are delineated amid new federal and state legislation. Economic issues involved in mergers are enumerated. Settlement techniques are explored. And even international products liability is observed in terms of the lack of uniformity of safety requirements.

The byword is Safety, and the product manufacturer, together with others in the chain of distribution of the product, profit thereby even to the satisfaction of the consuming public.

Contents

Part I
Products Liability: Definitions, Principles, and Dangers to Business

THE URGE TO SUE: THE DEEP POCKET THEORY OF LIABILITY

A child died after drinking from a bottle of furniture polish (clearly labeled as poison) for the parents had neglected to store the bottle in a safe place. A factory worker lost a finger after he tried to increase his production rate by using a rag to tie down the safety mechanism on his machine. A woman is alive today because a certain antibiotic saved her life, *but* she is left without her hearing because her physician or the hospital failed to monitor her condition properly. A 10-year-old boy received minor injuries when he stood on the open door of an oven and the entire electric stove toppled over on him. A drunken automobile driver collided with a tree and was severely injured, but blames the design of the windshield of the automobile for his injuries.

These and other accidents involving products sold in the American marketplace, illustrate the 15 million injuries occurring each year. Although a relatively small number of these accidents have serious and/or long-lasting effects, at least *one million claims* will probably be made against American product manufacturers and/or product sellers this year. Of course, the mere fact that a product is involved in the accident does not necessarily mean that the product CAUSED the

accident. There is the human factor, and indeed, *misuse* of the product may be the proximate cause of the injury; but that fact alone does not discourage the American accident victim from suing the product manufacturer or seller. Americans have an *urge to sue* because there is an excellent chance of a *financial* windfall, merely by filing and/or litigating a claim. Somebody must pay for the injury; someone owes the injured party monetary compensation; and the company which can afford to pay the poor accident victim must do so, for the *poor* victim must not be at the mercy of the *rich* product seller! The urge to sue is at the root of products liability in the United States; . . . "sue the bastards" is the name of the game for this social malaise. And the fact that plaintiffs' attorneys share in this money incentive by virtue of the contingent fee system simply increases the number of litigated matters. Of course, there are wholly justified suits filed on behalf of those severely injured by unsafe products. But the real prospect of monetary gain still encourages precipitant and frivolous actions to be filed by persons with *minor inconveniences* (or no injuries at all) who ask for big dollar judgments or awards!

Unfortunately, the courts in the United States have been most receptive to the claims of accident victims. The child who drank the furniture polish was entitled to compensation, and the product manufacturer was held liable because the bottle label did not *specifically* warn the parents against leaving the furniture polish within the reach of the child! Similarly, the family of the 10-year-old boy who stood on the open oven door won their case in the trial court, even though the state's highest court later reversed, holding that standing on an open oven door was "abnormal and improper use" of the electrical oven! The factory worker who lost a finger also won his case, even though he had intentionally bypassed the machinery's safety device, and by his own act had exposed himself to injury; that court said that the machinery manufacturer should have anticipated such misuse and should have precluded the nonoperation of the safety device. And the deaf woman successfully sued the drug manufacturer because her physician did not follow the official package instructions which accompanied the prescriptive drug product, so that to her, the prescriptive drug was defective! The drunken driver also succeeded in his suit against the automobile manufacturer because negligence in

design of the windshield constituted a product defect, and furthermore, the car manufacturer knew or had reason to know that drunks drive automobiles! Whether a different windshield design would have averted the accident was deemed irrelevant! The automobile manufacturer was an insurer of the driver's safety!

The amount of the awards and the judgments in products liability situations has rapidly increased too. In 1965 the average award in a products liability suit was about $12,000; in 1973 the amount had risen to $80,000; and in 1983 too many verdicts and judgments range well into six and seven figures! In a growing number of work-related product injury cases, the employee can sue the product manufacturer and even his/her employer under the Dual Capacity doctrine—*after* the insured employee has collected from his/her employer under workman's compensation! Other factors conducive to high awards and judgments include: (1) no limitation on the amount of punitive damages; (2) the state of the art rule operating as of the time of the injury; (3) statutes of limitations commencing from the date of plaintiff's discovery of the injury; (4) the continuing liability of successor companies; and (5) newfangled theories of liability such as the "Market Share" concept which indicts an entire industry for perhaps the wrong of one product manufacturer! Also, children in many states are today entitled to compensation for "Loss of Parental Society" alongside the spouse's claim for Loss of Consortium—when one spouse is injured through the action or inaction of a tortfeasor!

What has happened and what is happening in the United States is the prevalence of the disease of "CONSUMERITIS" which is the coequal of MOTHERHOOD and RIGHTEOUSNESS. "Consumeritis" has three basic "UN-PRINCIPLES" (as in Alice in Wonderland): (1) "Injury begets liability," i.e., once there is an injury, someone other than the victim must pay for it; (2) a trial court is but a conduit to see that consumer juries and not courts decide *all* cases; and (3) the only guideline is the "Robin Hood syndrome" of robbing the rich so that the poor victim will be paid.

The *first* un-principle, that every injury begets liability, brings to mind the story of the little boy who found near his Christmas tree a bucket of defecatory matter; whereupon he jumped for joy and shouted, "Daddy must have bought me a pony for Christmas." Such

illogical *deductive* reasoning explains why some lawyers are so pleased to find a serious personal injury, a substantial property damage, or a severe economic loss.

The *second* un-principle involves weak-kneed judges who conceive their roles as mere conduits to carry the case to the jury. Every question or issue is *factual,* and therefore the jury of consumers must decide. Furthermore, there is no need to expedite the trial of a lawsuit until the plaintiff has exhausted a very prolonged discovery procedure, has served countless and meaningless interrogatories directed to the culpable defendant, or has amended and amended the complaint ad nauseam. The plaintiff is entitled to a full day in court!

The *third* un-principle, or, the "Robin Hood syndrome," is a paternalistic expenditure of another's money. The "deepest pocket" must compensate for pain and suffering as well as for injury, for property damage, and for economic loss, and must willingly participate in a "structured settlement" for the benefit of the victim, regardless of fault or liability. A good example of this un-principle is found in the Texas case of *Rumsey* v. *Freeway Manor Minimax,* (423 SW2d 387, 1968), where an infant ingested some roach poison found in the home. The product was labeled in three places "poison," had a red skull and crossbones, and the labeling read as follows:

> "Give a tablespoon of salt in a glass of warm water and repeat until vomit fluid is clear. Have victim lie down and keep warm. Call a physician immediately! Warning: Cumulative Poison. Absorbed through the skin. Do not get in eyes, on skin or on clothing. Wash thoroughly after handling. Keep children and domestic animals away from baited areas and burn all pests killed."

OBVIOUSLY the parents had not heeded the obvious warning about keeping the product away from children, but nevertheless the guilty parents argued *successfully* that the labeling on the product was inadequate because it did not state that there was no specific antidote for the poisoning! The Texas Court of Civil Appeals agreed that the first aid instructions failed to warn that there was nothing truly effective that could be done once the child ingested the poison. The court reprimanded the product manufacturer for failing "to disclose the extent of the danger . . . and (failing) to disclose measures that may be

taken to avoid fatal consequences." The court distinguished "first aid treatment" which the label recited, and a "specific" antidote which was not recited on the label: "if ingestion is discovered before absorption, first aid may suffice, but if not, then a specific antidote is necessary." The fact that the product manufacturer had complied with all federal and state marketing and labeling statutes for insecticides was insufficient because, said the court, there is a common law duty to warn the user, which duty transcends specific statutes. Even the infant's mother was found NOT GUILTY OF NEGLIGENCE for her failure to keep the poison beyond the reach of the infant because it did not appear that "she knew or should have known there was no specific antidote." The Texas court explained: "(E)ven though poison is known to the ordinary person to be inherently dangerous, there is a common law duty to warn of the full extent of the danger." AND YET THE COURT SAID NOTHING ABOUT THE NECESSITY FOR A FINDING THAT ADEQUATE WARNING SHOULD HAVE PREVENTED THE INJURY! Did the defendant prove that the INADEQUATE WARNING *CAUSED* THE INJURY? Defendant introduced no evidence to show that a warning of the proper kind would have been heeded by these parents and would have prevented the harm! The "deepest pocket" pays . . . almost regardless of fault.

TOYS and Liability for Injuries also illustrate the social malaise of the "urge to sue"; there are 750,000 injuries each year from the use and misuse of toys, and at least 100,000 lawsuits per annum result. A few examples are striking: a 14-month-old child was playing with a tiny figure in a pull-type vehicular toy when he put the figure into his mouth. The figure lodged in his throat and could not be removed by the child's parents. The toy figure had to be surgically removed at a hospital, but the anoxia which the infant suffered between ingestion and extraction left him permanently and severely brain-damaged. In *Cunningham* v. *Quaker Oats Co.* (Civ. Action #1973-343, U.S. District Court, Western District of New York at Buffalo) the jury on June 19, 1981 found the manufacturer Fisher-Price negligent in the design of the toy, and awarded $3.1 million to the infant and his parents. Plaintiffs had successfully argued that if the figure had been designed differently, perhaps larger, the child would have been unable to swallow it in such a manner. Apparently the jury was not interested in the failure of the parents to guard against such injuries; the "deep

pocket" was the toy industry which in fiscal year 1981 recorded retail sales of $7.35 billion!

The defendant helmet manufacturer admitted that 30 to 40 deaths occur each year from subdural hematomas received while youngsters are playing football; but the particular helmet which allegedly had an indentation at the point of impact when the plaintiff quarterback collided head-to-head with his own teammate during practice, was destroyed after the accident. Nevertheless, the Texas Court of Civil Appeals in *Rawlings Sporting Goods Co.* v. *Daniels* (619 SW2d 435, 1981) affirmed a jury verdict of $1.5 million. The court reasoned that the particular helmet must have been defective! (Apparently no one came forward with any explanation of the injury.)

In January 1970 the Child Protection and Toy Safety Act amended the Federal Hazardous Substances Act by enlarging the definition of "hazardous substance" to include *toys* which present electrical, mechanical, or thermal hazards (Public Law 91-113). There is indeed an overreaching to protect children from the hazards of the marketplace.

The "urge to sue" frequently concerns *Wrong Defendants and Right Plaintiffs;* in *Racer* v. *Utterman,* the Missouri Court of Appeals in 1981 held the manufacturer (Johnson & Johnson) of a surgical drape strictly liable for failure to warn of the drape's flammability without any proof that the surgeon or hospital knew or should have known of the drape's flammability. It seems that during a D & C operation, plaintiff's body was covered by the surgical drape to provide a sterile field and block bacteria from the site of the operation. During surgery, the surgeon's hot cautery accidentally ignited a cotton gauze he was using as a sponge; he threw the smoldering gauze to the floor, but the gauze ignited the hanging end of the surgical drape, thereby inflicting severe burns on the plaintiff-patient. The Missouri Court of Appeals *affirmed* the jury award against Johnson & Johnson in the amount of $382,500 compensatory damages, but *reversed* the $517,500 punitive award. The court found that the surgical drape was an "unavoidable unsafe" product within the meaning of Comment K of Section 402A of the *Restatement of Torts Second* since there is no known method of making the drape fire resistant that does not adversely affect its function as a barrier against infection. *But* such a product is shielded from liability only when it is accompanied by an

adequate warning of the danger, *which was not the case here!* Liability therefore arises out of the introduction of a defective product into commerce, regardless of the manufactuer's knowledge of the defect. (Punitive damages were disallowed because there was no proof that Johnson & Johnson was indifferent or showed callous disregard for the safety of others.) The hospital and the surgeon were the "right" defendants, but the product manufacturer presented the better target!

WHY PLAINTIFFS ARE FAVORED AND FLAVORED OVER DEFENDANTS

1. The Disappointed Consumer. The attitude of consumers toward products that they buy has changed. More and more people are dissatisfied with the goods and services they purchase. One reason is the higher expectation for proper product performance as a result of the Consumer movement. Another reason is that products are becoming more complex and technically sophisticated, so that consumers always expect the best. Also, more and more products are being introduced each year, greatly increasing the exposure of manufacturers and distributors. Furthermore, the American public has become accustomed to product defects by the recalls of millions of automobiles in recent years, and the large amount of publicity given other consumer product defect cases. The end result has been to create a mood in which the unsatisfied customer seeks to punish the product manufacturer as well as obtain compensation for any injury or loss suffered. Public awareness and antagonism toward business is also reflected in class action legislation, making it easier for dissatisfied customers to band together to file common lawsuits alleging defective products or fradulent selling practices.

The disappointed consumer of goods and services has pushed courts and legislatures into frantic activity since 1960 with self-serving phrases like "consumer protection" and "strict liability." It is a disturbing perception for consumers to portray a product as "evil," and this is a factor inviting courts to come to the aid of the plaintiff-consumer, not only to compensate for injury, damage, or loss, but to reimburse for disappointments in the performance of the product.

2. The Doctrine of Strict Liability, Favors and Flavors Plaintiffs. The popular vehicle for executing the paternalistic doctrine of the

"deep pocket," i.e., giving credence to deductive reasoning that injury begets liability, and approving the conduct of weak-kneed judges who merely serve as conduits for the jury, is the doctrine of Strict Products Liability. Twenty-three years ago in the state of New Jersey, *Henningsen* v. *Bloomfield Motors,* (161 A2d 69) made the 1960 headlines by creating an illegitimate marriage between tort and contract. An automobile collision prompted suit not against the negligent driver but against the automobile manufacturer who *must* have produced a defective steering wheel because when the vehicle veers suddenly off the road into a tree, there must be something badly wrong with the steering mechanism of the car! (This same form of deductive reasoning promised a pony for the little boy at Christmas!) The doctrine of Strict Products Liability obviated the necessity of proving Fault or a finding of Negligence, and at the same time did away with the defenses of misuse and mishandling of the product. The automobile was deemed an unreasonably dangerous instrumentality, and therefore that automobile was "defective." The logic is that the injured user is entitled to compensation from the defective product manufacturer! The *Henningsen* case was indeed a radical departure from the tradition in law that Fault begets Liability! Here No-Fault was the basis for liability!

3. Impact of Legislation Benefitting Plaintiffs. The rising volume of claims has been nourished by new federal legislation (and regulations thereunder) such as the Occupational Safety and Health Act of 1970 (called "OSHA") and the Consumer Product Safety Act of 1972. OSHA focuses upon safety in the workplace, including materials, tools and equipment, and environment for the protection of employees. The CPSA covers products for use at home, in schools, for recreation, and for personal use or consumption. There is an inherent belief that something must be wrong with a given product!

4. Definitions and Other Considerations. "Liability" establishes a right of action for a civil wrong or tort by one party against another. The wronged party has the right to sue for injuries or damages or loss. Traditionally, liability was predicated upon fault. But today liability may not involve fault, for the compensatory system entitles any person who suffers injury, damage, or loss to compensation regardless of responsibility or negligence. The burden and cost of a no-fault compensatory system, in the final analysis, falls upon society as a whole.