PRODUCTS LIABILITY

Problems and Process

Second Edition

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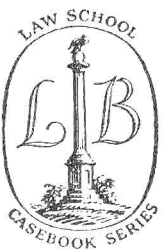

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Preface to the Second Edition

Upon rereading the Preface to the First Edition of this casebook we find that all that we said therein is still essentially true. The question arises what is the warrant for a second edition. In part the answer is the traditional one. New cases have been decided over the past five years that deserve the student's attention. But, there is an even more compelling reason that led us to revisit the materials. The field of products liability has become more sophisticated and more complex since the first edition was published in 1987.

Examples abound. Courts are examining the role of statistics and epidemiology in tort litigation. They are questioning basic premises concerning the differing roles of science and law and whether the standards used for making judgments in one discipline should govern the other. After years of dancing around the issue, courts are beginning to realize that totally unstructured tests for defining defect in cases based on defective design and inadequate warning simply won't do. What we are seeing are decisions with far greater sophistication. At the same time some courts have sensed that traditional doctrine can be stretched to raise the possibility of recovery against entire product categories. These forays must be clearly understood and subjected to careful scrutiny.

As we go to press we have learned that the American Law Institute has undertaken a project to revise the bible of American products liability law, Section 402A. How that project turns out will have a lot to say as to how products law is structured over the next two decades. Nothing short of a highly sophisticated understanding of the materials will suffice to make the student capable of critically reviewing the various proposals for revising Section 402A.

Finally, we have added materials dealing with the international implications of products litigation. Increasingly the United States is part of a global economy, and it is crucial that the student come to understand the sensitive interplay between jurisdiction and choice of law in international products liability practice.

We confess that we remain addicted to the subject matter of this course. Ultimately, products liability asks what are the appropriate interactions between a free market economy and the law of torts. At every turn we are

faced with the tensions between tort and contract law. If we have fairly presented the problems to you we will consider our job well done.

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Preface to the First Edition

This is a book about products liability; but it would not have been inaccurate if we had titled the book "Advanced Torts." Products liability litigation presents the student with problems that demand careful examination of postulates that were taken more or less for granted when dealing with run-of-the-mill tort cases. Is the Learned Hand test for negligence truly a test based on efficiency norms? Is it to be literally applied to the marketing of products in the American economy? What should be the role of contract in limiting highly creative tort doctrine? How do contractual arrangements among parties in the distributive chain affect litigation strategies and thus the fortunes of those who are strangers to the contracts? Does product litigation that implicates the design of tens of thousands of product units in the market (and thus departs from the more limited, one-on-one, plaintiff versus defendant lawsuit) require a more restrictive view of recovery for economic loss, mental suffering, and punitive damages?

We have found these and similar questions fascinating. It is evident that we believe that the problem method is the most effective vehicle for teaching these materials. The problems not only test the principles of the case law and statutory material in the litigation setting, but also expose the underlying theoretical tensions in a telling fashion. We have learned (and continue to learn) from them. The problems are set in the hypothetical state of New California, U.S.A. Many of the problems were adapted from or suggested by the facts of real cases, with names and facts in some instances altered for educational purposes. For each problem the student is referred to relevant materials in the book, most often judicial opinions that the student is to take as those of the Supreme Court of New California. Most instructors will not cover all of the problems in this course. The book is designed so that no problem is essential to the substantive area to which it relates; any section of the book may be covered by traditional case analysis. In addition to the problems as vehicles for achieving an understanding of the legal processes of tort law, the book also contains textual material specifically designed to accomplish that objective.

Products liability law has spawned at least part of the "insurance liability crisis." It has become a focal point for serious legislative proposals to alter the common law. We have sought to integrate the legislative developments, including proposed federal statutes, into our basic discussion of the materi-

als. The shift to Democratic control of the Senate following the November 1986 elections may decrease the prospect of significant statutory reform at the federal level during the next few years, but state legislation proceeds apace. The more far-reaching and more radical proposals for change have been dealt with separately in Chapter Fourteen. We urge the student to keep a watchful eye for the statutory materials. The statute you disregard may be your very own.

A word is in order with regard to gender-based references in the text. We have used male pronouns throughout the book solely for the sake of readability, and not from any intent to exclude women. In the problems we have endeavored to present a balance of men and women as parties and in professional roles.

Finally, we would like to share with the student a deep, dark secret. Although this book has been backbreaking work, we had a ball doing it. The book also answers the age-old question: "Can an Orthodox Hassidic rabbi from Brooklyn (who happens to also be a products liability nut) find happiness co-authoring a casebook with a 275-pound Scotchman from Ithaca?" (Don't hold your breath. The answer is "yes.")

James A. Henderson, Jr.
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A Few Words about the Organization of This Book

This book is organized on the basis of the different types of defects for which products liability is imposed. Manufacturers and suppliers are liable for three basic types of product defects: manufacturing defects, design defects, and defects in marketing. The first (sometimes referred to as construction defects, production defects, or flaws) are features in a few product units that make those units dangerously different from the vast majority of units in the same product line. Manufacturing defects cause the defective product units to fail in use and cause injury. Design defects, in contrast, are shared by each and every unit in the product line, causing the product to be generically dangerous and defective. Defects in marketing, which also produce generic defectiveness, include failures to instruct regarding proper product use and failures to warn of hidden dangers.

In Part I, in order to focus on the various legal doctrines supporting liability and the current problems of greatest concern, we shall hold constant the concept of defect. Because manufacturing defects present few conceptual difficulties (in sharp contrast to defects in design and marketing), most of the cases and problems in Part I involve manufacturing defects. Familiar examples of manufacturing defects include a hairline crack in a soda bottle that causes the bottle to explode unexpectedly, or a built-in weakness in an automobile tire that causes it to fail suddenly during normal use. The characteristic that makes these sorts of defects attractive for inclusion in Part I—their conceptual simplicity—stems from the fact that such defects cause the products to fail to perform adequately even from the manufacturers' perspectives. Manufacturing defects are "self-defeating" in the most straightforward sense of the term. The legal implications that flow from a finding of defect are often complex and difficult, as the materials in Part I will attest. And proving the existence of a manufacturing defect can be very difficult. But the basic idea of what makes a manufacturing defect legally defective is intuitively obvious in most cases.

In sharp contrast to manufacturing defects, design and marketing defects present conceptual difficulties of significant magnitude. Unlike manufacturing defects, they are not self-defeating and thus require an external, objective standard against which a defendant's design and marketing deci-

sions may be measured. We consider these problems in Part II of the book, after we have wrestled with many of the underlying doctrinal, procedural, and policy questions raised in Part I.

Summary of Contents