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By

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In 1951, when I stepped out of the products liability scene, I thought the subject had been pretty well talked out. But last year I returned to find the talk more vociferous than ever. How come? Why is the risk of products liability apparently expanding?

One reason is the steady increase in the number and complexity of new products like household insecticides and foods containing new additives, not all of which have been fully tested before being put on the market. Not only is there more to go wrong today, but the consumer's relative helplessness in the face of hidden defects is increasing.

A products liability expert stated at a Dallas symposium two weeks ago that in his opinion an equally important factor has been the do-it-yourself craze. Theoretically, the ineptitude of the user does not imply inadequacies in the product itself, however much it may increase the seller's responsibility to educate the consumer through labelling and instructions. Practically, however, the result may be otherwise. If a consumer is blinded by a disintegrating grinding wheel, the defendant manufacturer may find it hard to convince the jury that, instead of a defect in the product itself, the real cause of the accident was improper alignment of the wheel or use of too much pressure.

Moreover, in recent years there have been marked increases in the size of personal injury recoveries. The Research Institute of America recently listed 17 examples of such recoveries, all but two of which were in five or six figures. Some of these may have been due to increased prejudice of juries against large corporations, but many can be attributed to the increased sophistication of plaintiffs' counsel. Twenty years ago, the typical plaintiff's lawyer, in contrast to defendants' counsel, dealt with products liability only sporadically. Today, some plaintiffs' lawyers specialize in products liability and even the novice has the benefit of legal services such as NACCA's Product Liability Exchange.

Still another factor has been the marked general increase in claims consciousness. Some of this is undoubtedly due to the notoriety given to the large personal injury judgments that have been granted in recent years.

Another important factor has been several shifts in legal doctrine. Undoubtedly, the most important example is the continued wearing

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away of the so-called "privity" requirement. In case some of you are familiar with only insurance or medical gobbledygook, let me explain that the privity requirement says that consumer Smith can't sue manufacturer Rogers for breach of a contract (including breach of a warranty) unless the deal was between those two people. In other words, a consumer who has been hurt by a defective product can't sue the manufacturer if he bought it from a retailer.

At one time, the consumer couldn't sue the manufacturer even if the manufacturer had been downright careless. But ever since the case of *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382, 111 N. E. 1050 (1916), the privity requirement has been pretty much a dead letter in negligence suits. Unfortunately, this has been an empty victory for the consumer in many of the cases in which he has been unable to show actual negligence. Although many courts have fudged by allowing the jury to infer negligence merely from the fact that the consumer has traced the defect to the defendant's plant, the "negligence" approach has been so uncertain that consumers would much prefer to sue for breach of warranty. An increasing number of courts is agreeing with them.

The hole in the privity dike first appeared in the food cases, where some wit has remarked, "In matters alimentary, recovery is elementary." This hole is now represented by about 15 states and there is every indication that it will get larger. A similar development has begun for drugs and cosmetics, although the erosion of the privity requirement in those areas has not gone so far.

What about other products? For them, the first crack in the dike occurred in 1932, when a Mr. Sam Baxter successfully sued the Ford Motor Company for loss of an eye on the basis of false statements in Ford pamphlets asserting the shatterproof quality of its windshields (*Baxter* v. *Ford Motor Co.,* 168 Wash. 456, 12 P. 2d 409 (1932). A recent case along the same lines was *Rogers* v. *Toni Home Permanent Co.,* 167 Ohio St. 244, 147 N. E. 2d 612 (1958), an Ohio case in which the plaintiff recovered on the basis of express representations in the manufacturer's advertisements and labels. Both cases were important because in enforcing express warranties they made clear that in today's marketing scheme the consumer and the manufacturer are not so remote from each other as the intervention of a couple of distributors might seem to indicate.

The trouble with these two cases is that, being limited to the enforcement of express warranties, they are of little help in cases not involving definite representations or promises. This is particularly true for food. In fact, I know of only one reported food case in which the plaintiff consumer was able to find an express representation specific enough to enforce (*Lane* v. *C. A. Swanson & Sons,* 130 Cal. App. 2d 210, 278 P. 2d 725 (1955).

Instead of looking for express warranties, some courts have begun to see that, whether or not they constitute express warranties, manufacturers' advertising appeals today are aimed primarily at the consumer, over the heads of any intervening distributors. This either makes the privity requirement a meaningless anachronism or allows you to argue, with good logic, that even if there is still a privity requirement the manufacturer and the consumer comply with it because in effect they deal face to face.

This philosophy is beginning to take hold even in fields far removed from food, drugs, and cosmetics. Of the roughly half-dozen cases that illustrate this trend, probably the most important is *Henningsen v. Bloomfield Motors Inc.*, 161 A. 2d 69 (1960), decided only last May by the New Jersey Supreme Court. Here a husband and wife were badly injured through failure of the steering equipment on their new Plymouth, and they were allowed to recover even as against the manufacturer, with whom neither had dealt. The court's main ground for dispensing with the privity requirement was that such a requirement makes no sense in today's merchandising pattern.

There have also been inroads on the privity requirement from legislative sources. The six states that have enacted the Uniform Commercial Code have expressly done away with it in suits against the retailer brought by guests or members of the buyer's household (section 2-216), and they have omitted from the Code any language, such as that appearing in section 15 of the Uniform Sales Act, that might prevent a court from overthrowing the requirement on its own initiative.

In 1958 Georgia went even farther by enacting a statute that creates in each sale of new goods a manufacturer's warranty of merchantability that extends directly to the consumer (Ga. Code Ann. § 96-307).

From all this it would seem that, although the privity requirement is far from dead, its ultimate demise in most states is only a matter of time.

On one basis or another, removal of this requirement in warranty cases exposes the manufacturer to strict liability; that is, it makes him liable even though he has not been careless. This increases the manufacturer's vulnerability to successful claims. The increase is not as great as it might seem, because many past recoveries in so-called "negligence" suits have rested on little more than a showing of causation, which is in effect strict liability.

The argument for strict liability is not merely that it simplifies the proof of actual cases. It also imposes on the manufacturer a wholesome incentive to improve his product by testing it further or by adopting other precautions designed to intercept defects.

Of greater interest to this audience is the point that strict liability makes possible a sharing of the risk or loss among consumers generally. So far as the manufacturer is induced by civil liability to improve his product and reflect in his prices the costs of improvement, he can be said to be "spreading the risk." So far as such improvements are unsuccessful and he is induced to reflect in his prices the costs of paying injury claims, he can be said to be "spreading the loss." Together, these price increases provide a kind of industry-wide "do it yourself" insurance.

In such a *de facto* insurance policy the consumer is the immediate beneficiary. From his standpoint, the device seems to be working reasonably well.

The significant question is, How well it is working for the seller, whom the law has made an insurer? If he has a large operation, a fairly predictable claim rate, and a sizeable financial cushion, he can without undue strain handle his losses out of a reserve for claims. He can even withstand and amortize an occasional blockbuster.

On the other hand, if he has a small operation, low volume, a sporadic claim rate, and particularly a thin financial cushion, he is like an insurance company that needs reinsurance. This theoretically puts him in the market for a product liability policy, which will make it possible to continue this *de facto* consumer insurance without exposing him to the risk of being financially crippled by a large judgment. Ironically, however, if he is small enough, like the independent corner grocer, he may be financially so unattractive that he needs no protection at all.

If he is in an intermediate position where he has a generally foreseeable claim rate that he can handle out of a modest reserve for claims but is vulnerable to a very large judgment, his best bet is a policy with a fairly high deductible.

With personal injury judgments greatly increasing in size, more and more companies are finding it desirable to buy product liability insurance. The September 1960 issue of the Journal of American Insurance estimates that 70 to 80 percent of all firms now carry this kind of protection. These figures seem much too high for sellers generally but they are probably fairly accurate for large, well-heeled manufacturers.

Is there any flaw in this apparently happy picture? What about the seller's ability to absorb or pass on to the consumer the cost of further improvements, additional precautions, increased recoveries, or product liability insurance?

Where the financial burden is shared by an entire industry, no problem appears to be presented, because even under highly competitive conditions the industry as a whole can adjust its general price level to reflect cost increases. A problem would appear to arise only for a manufacturer whose particular product or method of operations exposes him to risks not shared by others in the same highly competitive industry. A possible example might be carbonated drinks in glass, with its explosion hazard, as against carbonated drinks in tin, with no corresponding hazard. But even here, average costs of this kind would seem to be relatively trivial as compared to cost increments such as wage increases. So far, there is nothing to indicate that the imposition of strict liability has had an adverse effect on any seller who has taken the precaution of covering the worst of his risks with a deductible product liability policy. The big argument against strict liability is that it increases the seller's exposure to fraud. However, I don't think that, on inspection, this argument holds water, because what claimants have been faking is not the seller's fault but causation, that is, the fact or the degree of injury.

Note that consumer protections are not necessarily expensive. One of the most useful devices recently developed for protecting the consumer, on the one hand, and taking the seller off the legal hook, on the other, is the warning. One big retail chain, for example, has been able to develop instructions for using its rotary power mowers that have almost eliminated the possibility of recovery for certain risks, particularly those based on design. (It may still be vulnerable, I suppose, to occasional claims based on imperfect materials or inadequate assembly.) The warning is a relatively new concept in the law and much still needs to to be done to define its proper scope, limitations, and content in relation to particular risks. This is not always easy, because telling the consumer too little, as in a recent carbon tetrachloride case, may fail to discharge the responsibility, whereas telling him too much may bury the essential message. Merely telling him the ingredients may tell him almost nothing.

I am not going to take your time to describe the details of the today's product liability coverage, which you can read about in the Manual of Liability Insurance or the November 1960 revision of the pertinent section of the Fire, Casualty and Surety Bulletin. I will point out, however, that under current Manual rates your premium for a given amount of protection will be articulated to the kinds of risks to which your particular operation exposes you. The premium range here is very wide.

It is more important for you to know that each product liability policy carries a maximum dollar limit for each claim, another for each accident, and a third for the entire policy period. Of these, probably the most important limit is the insurer's maximum dollar obligation for any one accident, since the injury of many persons from a single cause is counted as one accident. This may be important if a slip-up in your plant is likely to affect an entire batch of your product and that batch can injure many persons. A bakery catering a large picnic, for example, can infect a lot of picknickers with staphylococcus. Raising all three substantially won't necessarily be expensive, and you may even want to fix your limit per accident as high as the limit for the entire policy period.

Another legal trend that helps to increase the manufacturer's liability risks is the tendency of the courts to cut down the protections heretofore provided by disclaimer clauses. These have been used with great advantage in the automobile industry, where they have been upheld on the theory that the parties are free to contract as they will. As one Federal court put it: "The buyer is under no compulsion to buy from the seller; the buyer has a choice of accepting the seller's terms or going elsewhere."

On the other hand, the *Henningsen case,* which I mentioned earlier, indicates that this protection is losing some of its effectiveness. In that case the Court struck down the standard industry-wide automobile disclaimer on the ground that the buyer's "capacity for bargaining is so unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker . . . Where can the buyer go to negotiate for better protection?"

This has necessarily been a sketchy account, but it may serve to indicate the general direction in which the law is moving and some of the other reasons why manufacturers and other sellers have to be on their guard as never before.