

The Fault System, The Courts and the Consumer Revolt

JOSEPH KELNER*

America still is a frontier society in its permissive system of product design, manufacturing, testing and warning requirements. Almost anything goes!

This great nation with the trillion dollar economy is being polluted by more than industrial waste, smog, gasoline fumes, oil-soaked shores, and old tin cans. A form of pollution of our society is the almost uncontrolled flow of billions of dollars worth of poorly designed, shoddy and dangerous products which are swamping the public annually.

The philosophy of our producers is that they must rush their products to market, to be first with the most and the cheapest for the biggest profit. In this mad scramble the public is being both cheated and injured.

We have lived with a philosophy of "freedom of enterprise", "individual initiative" and the Horatio Alger concept that profit's the

* Partner, Kelner, Stelljes & Glotzer, New York, N.Y.; Former President, American Trial Lawyers Association; Author SUCCESSFUL LITIGATION TECHNIQUES; J.D., New York University, School of Law.

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thing, and every manufacturer's a king. The king can do no wrong—and after all, don't we have the highest living standard in the world?

Thus far our government has shown little inclination to control—really control—excesses by manufacturers. Our government has been a follower, not a leader, in fighting inferior product pollution. The government still shows little stomach for all-out control measures to protect the American consumer.

Except for the broad public outcry which impelled enactment of the National Highway Safety Act in the field of automobile design, American manufacturers retain their traditional freedom to produce what they please, how they please, for as much as they can get for it. American industry continues to lay countless virulent eggs.

The most effective brake being applied to protect consumers from defective products is the common law of our legal system.

The fine flexibility and capacity for growth of our common law is filling a vacuum left in this field by a permissive government. Negligent producers are subject to lawsuits in which they may be held responsible in negligence, breach of warranty and strict liability for derelictions of duty. The courts are increasingly insisting that producers fulfill their duty:

A. TO RESEARCH AND DESIGN a reasonably safe product. The manufacturer must keep abreast of current advances, developments and knowledge of the state of the art prevailing in his industry.

B. TO MANUFACTURE his product with good materials and workmanship. The shoddy assembly line product which falls apart because of poor workmanship or inferior materials must run the gamut of a wrathful jury conscious of the rights of the consumer.

C. TO TEST AND INSPECT his product carefully before he ships it. This duty probably is the one most frequently abused. Many products are only spot-checked. The exploding soda bottle which blinds the consumer or the blow-out tire which maims and kills are typical of products which roll off assembly lines with less than 1% of them being tested or even visually inspected.

D. TO WARN the consumer of hazards and dangers. Here the manufacturer is caught between Scylla and Charybdis, between his apprehension that warnings will reduce sales and his desire to avoid liability for the injuries inflicted.

The product liability insurance carrier has a great potential role to play as a condition precedent to writing insurance coverage. It

can require the manufacturer to comply with these four general categories of proper care imposed by our courts under common law. Sadly, it is a fact that the liability insurance industry does little or nothing to exercise its dormant powers for the safety of the American consumer. The manufacturer retains *carte blanche* to do what he pleases.

Were the manufacturers to shape up and fly right, the nation's product liability trial lawyers would perforce have to seek other pursuits of livelihood—a most welcome eventuality to them. Alas, this prospect is remote. Only the common law and the nation's courts are forging progress in this area.

Permit me to give you some examples of what is happening in our courts where factual issues came before juries under negligence, breach of warranty and strict liability concepts of law:

1. The first example is the “bomb”, a kitchen steam iron for pressing clothes. The housewife pours water into it. The water is heated by electric coils and becomes steam. The steam passes through a copper tube and emits from the iron onto the clothes which are being pressed. This particular iron blew up in my client's face causing serious injuries. When I visited a repair shop to seek an expert, the manager pointed to a barrel full of similar discarded steam irons, saying “Oh, this is the bomb.” He explained the design defect which caused the explosion. The copper tube designed to lead the steam to the bottom of the iron had such a tiny diameter that when it became clogged with rust or dirt particles the tube would become blocked. The build-up of steam created a perfect bomb which exploded in the lady's face. The case was settled promptly by the product liability insurance carrier. Now, these irons come equipped with larger tubes.

2. The next example of design negligence is the snow blower machine driven by an electric motor. The manufacturer placed a toggle switch in an exposed position at the top of the “T” handlebar. When the machine became clogged with snow it stalled. The dentist who was operating the machine to clear snow off his sidewalk pushed the toggle switch to the “off” position. His jacket sleeve inadvertently moved the exposed toggle switch at the top of the “T” handlebar to the “on” position. When he stuck his fingers into the chute to pull snow out of it to free the blades, the blades began to whirl and amputated two of his fingers. The case was settled

upon trial. Now, the designers have re-designed the machine so that the switch is in a recessed position.

3. Another example: My client worked in a factory producing bottles of medicine. She was cleaning a metal conveyor belt on a bottle capping machine by wiping the metal links of the moving chain belt with a wet rag. The cleaning rag caught in spaces between the links of the moving conveyor belt, pulling her hand into a sprocket wheel and amputating several fingers. The manufacturer of the machine had designed it so as to place a guard over all of the moving parts at the front of the machine but left a 20-inch space uncovered and unguarded at the back of the machine. Upon cross-examination the manufacturer's expert admitted the unguarded space could have been guarded readily if the customer had ordered a metal cover for an additional \$25.00. He testified: "The customer did not order it and we only give them what they pay for." The open space could have been guarded by 10 cents worth of chicken wire! Such manufacturers indulge in the absolute philosophy that "we only give them what they want." This cynical precept parallels Barnum's old platitude that "a sucker is born every minute."

4. My client was a TV repairman in a small town in Ohio. He was called to repair a TV set having a snowy picture. He diagnosed the problem as being a dirty tuner which needed cleaning. He attempted to remove the tuner by depressing a retainer wire spring, a piece of wire about 2 inches long, with a screwdriver. The spring flew out of the machine into his eye.

The manufacturer of the tuner had sold it to the TV manufacturer. Neither company used any foresight to warn service repairmen that the design of the previous models had been changed. The previous design had a loop on one end of the wire which hooked it onto a metal hook. The new model spring was so designed as to eliminate the loop and place it in an inaccessible position. It was a straight piece of wire whose unlooped ends were invisible to the serviceman. Predictably, when he tried to remove the spring it flew into his eye and blinded him.

The manufacturer's expert witness admitted, upon cross-examination that cost was a factor in changing the design, and that less than one cent per TV tuner was saved by eliminating the safer loop-end design. When the expert was asked to state the criteria of a good design, he replied that a good design is one which has "good producibility and acceptability." He explained that "producibility" refers to efficiency of mass production of the product—a cost factor which redounds to the benefit of the manufacturer and that "ac-

ceptability" of a product means that it is readily salable. Safety was crowded out by "productibility and acceptability." Safety is a minor factor in this cynical philosophy.

My last example is the recent case tried against General Motors and one of its Oldsmobile dealers who sold a 1965 Oldsmobile. Within a few days after its purchase, the customer noticed and complained that when he stepped on the brake pedal, his new acquisition swerved to one side. The dealer courteously brushed him off with the suggestion that he should wait for the 1,000 mile checkup. A few days later the inevitable occurred. He stepped on the brake pedal, the car swerved to the left out of control and seriously injured two young men riding in another car.

Upon trial plaintiff's expert opined that the brakes were defective, that it was a manufacturing defect, that grease apparently leaked onto the brake lining during the assembly of the hydraulic brakes because of a defective sealer or gasket, and that a simple road test at the factory would have disclosed the presence of the defect.

Upon cross-examination the General Motors expert made some startling admissions strongly relevant to some root causes of our highway carnage which last year killed 56,000 Americans and maimed hundreds of thousands.

He admitted that new automobiles received no road test whatsoever. His verbatim testimony upon cross-examination ran as follows:

- Q. Then the car (Oldsmobile) is assembled, and it rolls off the assembly line, and from there it would be driven to the staging area?
- A. That is correct.
- Q. And the staging area is where they load it on these trailer trucks to carry the cars to the dealers; is that right?
- A. That is correct.
- Q. How far is it driven from the end of the assembly line to the point where they stick it on a truck? I think you said, it might be just feet; is that what you said?
- A. No, sir; I was asked how far from the end of the assembly line to the staging area, and I said it might be a number of feet.
- Q. Well, don't you remember now, where the staging area was with regard to distance from the end of the assembly line?
- A. Sir, if the end of the line were here, (the witness stand) and the door leading out of the building is where the staging area began, it is a matter of feet; if you want precise measurement—
- Q. My question is: from the time this car was assembled, until it

is loaded on a truck in that staging area, did General Motors ever give it to any one to road test it for as little as a mile before they load it on a truck, yes or no?

A. No.

Thus were more than 500,000 1965 Oldsmobiles sent winging on their way to unsuspecting American consumers! And the witness testified that this was in conformity with prevailing inspection practices of other American automobile producers—Chrysler, Ford, and American Motors!

Our benevolent common law enables a jury of 12 average citizens to set fair standards of fair play to which the American consumer is entitled. Understandably, the jury verdict in this case was for the full sum of damages demanded in the complaint. Juries are conscious of the hosing being given to consumers.

American auto manufacturers serenely depend on dealers to road test their shiny new products. Probably, any real road testing being done today is almost exclusively by the customer-consumer after he buys the car!

In 1969 56,000 Americans died on our highways—an all time high. What was the role played by the philosophy of high pressure, careless mass productionism? The manufacturer willing to risk the outcome of the occasional lawsuit is certain to acquire a new slant after publicity of an adverse jury verdict spotlights the inferiority of his wares. Perhaps the demise of the late and lamented Corvair and certain discontinued drug products are eloquent straws in the wind.

The lawyers who try product cases are a hard-working, dedicated group who ferret out the causes of accidents. They find the dust under the rug, the engineering skeletons in the factory closets, and the bugs in the products to put the blame where it belongs—on the one at fault, the negligent producer.

No government agency is equipped to match the courtroom as a forum laboratory for taking a product apart to see what makes it tick. From these legal cockpits come the cleansing, salutary benefits derived by the public when a jury verdict spotlighted the shoddy product which has killed or crippled the unwary consumer.

Let those who would abandon the fault system know that this would be a regressive step; a sell-out of the consumer and his right to hold the manufacturer fully responsible for his product. The present fault system is the best and only protection the American consumer has to fix the blame and to force improvement or abandonment of faulty products.

The deterrent power of a jury verdict under our fault system is a priceless public benefit. It is closing the generation gap between the rights of the modern consumer and the obsolete caveat emptor system.

The consumer revolt is evident in our courts. We challenge American manufacturers, for the welfare of the American people, to put product liability trial lawyers out of business by producing safe products worthy of the public trust. We hope they try!