INTRODUCTION

This book addresses an area of the law that reflects many of the stresses and tensions in the American personality.

PRODUCTS AND SOCIETY

T.J. Wertenbaker captured the intense spiritual emphasis of early New England in his description of Puritan ministers who thundered that congregants “must not substitute Mammon for the true god.” In his book The Puritan Oligarchy, Wertenbaker quoted John Norton’s admonition to listeners to his election sermon in 1675: “It concerneth New England always to remember that originally they are a plantation religious, not a plantation of trade.” This attitude, Wertenbaker wrote, underlay the displeasure of the New England clergy with the “absorption of acquiring worldly riches” of the developing “merchant aristocracy.” Generations of commentators and novelists have expounded on the materialist side of our national life. Vernon Parrington, in a classic work on American intellectual history, recorded that the attitude of the leaders of Massachusetts Bay to “[t]he community of goods that marked the early days of Plymouth” was one of such dislike “as to account it almost sinful.” Depicting the objects of this criticism, Wertenbaker wrote of the gusto with which the port merchants “built handsome residences and filled them with fine furniture and silver.” And in an especially delicious underscoring of the ironies of a later time, John Updike created an automobile salesman who avoids a direct and prolonged spousal effort at sexual intercourse by reading the Consumer Reports entry, “Summer cooling, 1979: air conditioner or fan?” In this episode in Rabbit is Rich, Harry Angstrom tries “to skim the list of advantages and disadvantages peculiar to each (Bulky and heavy to install as opposed to Light and portable, Expensive to run as against Inexpensive to run).” Indeed, the ironies abound. Here are dedicated “environmentalists,” presumably dedicated to the simple life, setting up elaborate candelabra on the lawn at outdoor symphony concerts. Here are collegians, equally convinced of their personal simplicity, who cannot cram into an SUV enough goods to support a dormitory existence. Like it or not, and most of us like it more than sneakily, Americans often define the good by their goods. As one reflects on the foundations of our historical attitudes, one need not adopt the views of Charles Beard, in An Economic Interpretation of the Constitution of the United States, to understand the importance that Americans always have attached to property of various kinds. Today, with an increasing devotion to chattels, and to chattels that have complex innards, we become more disappointed.
than ever when those goods do not work, and we are positively dismayed when their
lack of function contributes to personal injuries.

In a demanding market of more than three hundred million people, every day some
will experience intermittent frustration and even anguish in encounters with products.
The combination of human and legal stories in these episodes makes the study of
products liability law an endlessly fascinating one. The law as it has developed, and the
law that is yet to come, represents society's resolution of disputes involving consumers,
goods, and firms at high points of legal tension.

Our society's response to these situations has been grounded in a blend of morality,
custom, and law. In our tradition, the freedom to sell and to buy ultimately entails the
freedom to sue. While there has been much criticism of expansions of consumer
opportunities to take advantage of that freedom and its associated rights, some
alternatives may be worse. In the words of a commentary on the tort liability system,
"I'll see my lawyer" has a much better ring than "I'll see my bureaucrat."

In playing its role in this area, the law becomes a major reconciling agent of
spirituality and materiality, of prices and images, of realities and dreams. It acts as a
mediator of bargaining and ethics in a culture suffused by mass advertising. This is a
difficult job, involving efforts to deal with the potential of advancing technology, the
psychological effects of affluence and of economic cycles, and the self-conscious
discovery of limits. With all these ingredients at work, it is no wonder that there has
been pressure for legislation to constrain the development of substantive rights.
Promotion of this sort of "law reform" already has proved persuasive, in some degree,
in some state legislatures. And after many years of lobbying, Congress passed a
products liability bill, although it was vetoed.

Continuing developments in judge-made law and legislation have demonstrated the
importance of accurate statement of the law, as well as clear articulation of the
premises on which it rests. There will always be spirited disagreement on premises
clearly stated, but often a precise expression of them will focus the need for more
inquiry into social facts: facts about the incidence of injury, the rate of suit, the
transaction costs of suing and how they compare with the rest of the world of
litigation, the amount of money transferred between distributors and claimants, how
accurately those transfers reflect the true social costs of product injuries, the role of the
insurance mechanism in dealing with these problems, the effects of law on the conduct
of all actors in the drama. Heightening the complexity implied by these factual
questions are the diverse issues of justice that twine around products liability cases.

In various forums, I have indicated my conviction that the courts have done at least
tolerably well in dealing with the legal issues that emerge atop this pile of factual and
philosophical questions. Even as legislation becomes part of the mix of products
liability law, it seems clear that the judiciary will continue to play a major role in
shaping the legal framework that governs disputes over products injuries. This book
focuses principally on that role, describing it, analyzing it, and seeking critically to
explore its significance in our society.
INTRODUCTION

PRODUCTS AND THE LAW

This particularly fascinating branch of the law blends aspects of the two great common law subjects: tort, with its focus on personal injury and vulnerability, and contract, with its fundamental assumptions about marketplace bargaining and pocketbook loss. For a scholar, it presents a remarkable unit for historical investigation. The modern law of products liability has blossomed in the space of just six decades, providing an endless group of lessons about legal institutions, about law and politics, and about law and culture.

For the practicing lawyer, the civil action for product injury takes many forms. Sometimes it may be a suit for misrepresentation. On other occasions the doctrinal basis for litigation will be express warranty, implied warranty, negligence, or strict liability. The typical case profile includes a manufacturer who produces on a mass basis, a consumer attracted by various forms of product promotion, and a complex scheme of distribution. In many cases involving products shown to cause large numbers of injuries, the legal background will include a scheme of government regulation of design, manufacture, or advertising. This book focuses on decisive legal elements of fact and law related to the processes of buying and using products, as well as relevant aspects of production, advertising, and distribution. It reviews intensively the theories of liability over which lawyers do battle, examining the function of those doctrines as vehicles for the policy considerations that lie close to the surface of all legal regulation of product injuries.

The social rationales invoked by the courts in products liability cases are quite various and indeed sometimes prove to be at odds with one another. An important theoretical basis of this area of law is a model of individuals freely contracting for the allocation of particular risks. The theory is that the price of a product in the marketplace will reflect the value that consumers place on that good, including the bundle of advantages and risks they perceive in the product as an integrated unit. The ideas of efficiency inherent in that model give one meaning to the concept of deterrence, embodied in the idea that the law should aim to achieve an economically optimal level of accidents. A rather different, moralizing approach to deterrence eschews technical economic concepts and emphasizes the reduction of accidents as an independent goal. Judges taking this view exhort product sellers in terms urging “maximum protection” against injury risks. Whichever deterrence theory attracts courts, the decisions are replete with the notion that liability rules can affect conduct, pushing entrepreneurs toward safer design and greater care in the processes of production and sale. At the same time, people intuitively understand that deterrence is not an absolute concept. Since all life is risky, including that part of life associated with product use, the law seeks to achieve a reasonable balance between safety and utility, and does not try to provide complete protection from hazard.

Also drawing judicial attention is the goal of loss spreading, which emphasizes the apportionment over the general consumer population of the costs of injuries that have great impact on relatively small numbers of persons. This goal may conflict with that of economic optimization in many applications, while harmonizing with a moralizing kind of deterrence. For example, one could choose a rule of liability that achieved safer
manufacturer conduct than the impersonal market "wanted" in order to cushion the burden of large losses upon particular individuals.

This brief summary of rationales and goals of the law does not exhaust the complex and sometimes conflicting ambitions of products liability jurisprudence. Courts also concern themselves with the delicate balance between legislature and judiciary in a society increasingly controlled by public regulation, with promoting economic stability, and, occasionally, with achieving results in particular cases that appeal to general notions of individualized justice. But perhaps the major areas of tension in this developing legal territory are those that arise from the complex relationships among the goals of economic efficiency based on freedom of choice by informed consumers, accident prevention as an independent value, and loss spreading. Efforts by state legislatures to codify products liability law have responded to a range of these concerns, in some cases readjusting their relative weight in the social calculus.

Like all common law in this country, products liability law has been primarily a product of the state courts. However, a social problem whose dimensions are seldom cabin'd by state lines has produced a nationalizing trend, into which have been woven the doctrinal changes associated with the expansion of strict liability for product injuries. Indeed, the products liability revolution inspired a federal court to assume for the basis of a lengthy memorandum "the existence of a national body of state tort law." The court refers in that opinion to "[a] growing consensus on the substantive law in this country."2

***

The appearance of several products liability cases in the United States Supreme Court provides an illustration of the power of this body of law as both a legal barometer and a cultural mirror.3

- The Court's Daubert decision, arising from the sympathetic framework of claimants’ attributions of birth defects to a prescription drug, set general parameters of scientific proof both within and beyond the boundaries of products liability, elaborated on in subsequent decisions of the Court.4
- A series of preemption decisions has explored the nuances of the relationship between Congress and state courts in the context of the intricacies of regulatory

---

4 §23.04[A][1]. Footnotes to this part usually refer to sections containing discussions of the text generalizations, rather than to concrete cases.
schemes in particular product areas: cigarettes,5 prescription drugs,6 medical
devices,7 agricultural chemicals,8 motor vehicle safety restraints,9 and motorboat
equipment.10 The majority in one case, and pluralities in the others, pinned their
reasoning to the specifics of the different statutory schemes.

- The Court’s holding in the East River case, refusing tort liability for economic
loss in the maritime setting, has produced a cottage industry of decisionmaking
in general products liability law. Although this decision has captured the
approval of many state courts, other courts have emphasized distinctions
grounded on “safety concerns” and the risk of injury to human beings.11
- The Court’s closely divided judgment in Boyle v. United Technologies Corp.
defined a line beyond which military considerations require a government-like
immunity for product contractors.12
- In a line of cases concerning products—one involving injuries in the rollover of
an all-terrain vehicle, another arising from a failure to reveal the repainting of
parts of a slightly damaged car, and still another focusing on cigarette-caused
illness—the Court has struggled to develop a jurisprudence of punitive dam-
ages.13

***

A handful of decisions from other tribunals will serve further to illustrate the breadth
of the area spanned by products liability law, in its human dimensions as well as its
legal sweep.

- In a legal world where the pervasive importance of the representation is not
always evident in the decisions, a New York case indicates that the background
provided by TV cartoons may influence liability for children’s toys.14
- Products law has had to deal with a family tragedy that grew out of something as
uncomplicated as a parlor game, and its effect on the psyche of a teenager. A
mother sues the maker of the game “Dungeons and Dragons” on the theory that
her son fatally shot himself after developing an obsession with the game. The
Sixth Circuit aligns itself with judicial refusals “to recognize suicide as a
proximate consequence of a defendant’s wrongful act.”15
- HIV-infected blood generated a series of products decisions. An initial judicial
focus was on the definition of negligence at a moment of fast expanding medical

5 §11.03[G][3].
6 §11.03[G][4].
7 §11.03[G][6].
8 §11.03[G][8].
9 §11.03[G][1][b].
10 §11.03[G][14].
11 §27.05[G].
12 §12.12[B][1].
13 §29.10[D][1].
14 §1.01[B].
15 §32.06.
knowledge. Another emphasis was on society’s “need for an affordable, adequate blood supply.”

**

The chapters on defect suggest ways to put philosophic notions on a commonsense plane.

- One section introduces the idea that products have a metaphysical character. Perhaps the Greek philosophers would have agreed with us on the function of a “knife,” and, introduced to our more rudimentary household tools, they would have asserted that there is a core meaning to the idea of a “saw,” at least a hand saw. Things do get more complicated when we move to power tools, motor vehicles, and aircraft. Yet, the relative complexity of goods does not change the fact that each product comes to the consumer with a meaning: a meaning derived from a variety of sources and a context that includes sales literature, distributional channels, and the use to which most consumers put the product.

- Another angle on defect views the problem as one involving continuums of products. A focal case in the text involves a relatively simple product that is a creature of modern crime and modern police work: the bullet-resistant vest. The plaintiff’s decedent, a state trooper, was wearing “one of several different styles” of vest. This vest balanced a relative lack of confinement for the wearer, flexibility, and heat dissipation against vulnerability in parts of the body not protected by that model that were covered by another model. Several bullets hit the trooper where the vest did not protect him, and he died. In denying recovery in keeping with a continuum analysis, the court declares that “[a] manufacturer is not obliged to market only one version of a product, that being the very safest design possible.”

- The human equation in the law of products liability appears prominently in opinions discussing assumption of risk. The plaintiff who has had long familiarity with the hazards of a product is not likely to fare well nor is the worker who does not use a readily available safety device. The defense becomes more porous, however, when the plaintiff does not know of a particular characteristic of a product.

- Asbestos cases, significant generators of substantive products liability jurisprudence, have been important sources of law on the “discovery rule” under statutes of limitations. Issues of this sort also abound in other product areas, including intrauterine devices (IUDs), cigarettes, oral contraceptives, breast implants—even a dishwasher.

---

16 §5.04[D]; §5.08[G][2][b].
17 §12.16[A][2][a].
18 §8.05[K].
19 §9.11.
20 §20.03[H][2][a].
21 §20.03[J][1].
22 §30.06.

Marshall S. Shapo - 9781786433718
Downloaded from Elgar Online at 12/01/2018 03:03:27PM
via free access
INTRODUCTION

- Suits continue to arise against manufacturers whose goods were involved in crimes. The decisions have run principally in favor of gun makers.²³
- In the area of product tampering, a reported opinion on a Tylenol murder declared that the court could not “begin to imagine the havoc” that a liability rule “would wreak in the marketplace and the mischief it would engender.” In quite a different context, the Tenth Circuit made clear in the tragic framework of the Oklahoma City bombing that the makers of the ammonium nitrate in the bombs were not responsible for the actions of the bombers.²⁴

Each of these decisions, like individual tiles in a mosaic, presents us with a fragment of our culture. When we take these precedents as a group, ranging from pronouncements of the Supreme Court to the rulings of state tribunals, we derive a picture of our society. That mosaic gives us a rather accurate sense of our views about the limitations of various governmental institutions, as well as of law itself. It informs us about the metaphysics of the things we buy. When we seek scientific methods for deciphering the failures of those things, our quest reflects our desire—and our struggle—to solve problems rationally. Perhaps most dramatically, this jurisprudence captures our beliefs about individual responsibility and about the boundaries across which the law must stare helplessly at tragedy.

²³ §8.06[G].
²⁴ §32.08[B].