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PRODUCTS LIABILITY—A CONSOLIDATED TEACHING APPROACH

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Introduction

At a time when the impact of product liability litigation upon the socio-economic structure of the United States is becoming better understood [1] and at a time when the legal profession is realizing to a greater extent the impact of developing doctrine it is sad to note that vast numbers of law colleges offer no specialized course in this subject.[2] The number of litigated, reported cases is rising dramatically as an increasing number of states are adopting more sophisticated and liberal approaches to product suits.[3] Nevertheless, many law students are ill equipped to deal with the problems of a product claim, in large part because traditional teaching methods premised upon a casebook approach, regardless of the teaching method (socratic, adversary, or lecture),

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[1] Alt, *Product Liability Costs Force Machine Builder to Liquidate Company*, Bus. Ins., Oct. 20, 1975, at 1, col. 1; Patton & Butler, *The Consumer Product Safety Act —Its Impact on Manufacturers and on the Relationship Between Seller and Consumer*, 28 Bus.Law. 725 (1973); Speidel, *Products Liability, Economic Loss and the UCC*, 40 Tenn.L.Rev. 309 (1973); *Symposium, Products Liability, Economic Analysis and the Law*, 38 U.Chi.L.Rev. 1 (1970).

[2] A survey of the current catalogs of 40 randomly selected law colleges approved by the A.A.L.S. and the A.B.A. discloses that only 10 (25%) offer specific courses in Products Liability. Furthermore, the A.A.L.S. Directory of Law Teachers does not list teachers of Products Liability and apparently includes them under the general "Torts" heading.

[3] Numerous decisions illustrating the expanding scope of liability in products actions are reported in the C.C.H. Products Liability Reporter. The developments in product law have led to a plethora of law review articles since the early 1960's. Some idea of the developments in this area can be obtained from the following: Bell, *Products Liability in Georgia: Is Change Coming?* 10 Ga.St.B.J. (N.S.) 353 (1974); Cochran, *Emerging Products Liability Under Section 2-318 of the Uniform Commercial Code: A Survey*, 29 Bus.Law. 925 (1974); Heller, *Product Liability Trends: Manufacturers Beware!* 8 Trial 51 (1972); Hodge, *Products Liability: The State of the Law in North Carolina*, 8 Wake For.L.Rev. 481 (1972); Hoenig, *Understanding "Second Collision" Cases in New York*, 20 N.Y.L.F. 29 (1974); Maloney, *Current Trends in Aviation Products Liability Law*, 36 J.Air L. & Com. 514 (1970); Murphy, *New Directions in Products Liability*, 612 Ins.L.J. 40 (1974); Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 Tenn.L.Rev. 1 (1970); Pope, *Design Defect Cases: The Present State of Illinois Products Liability Law*, 8 John Marshall J. 351 (1975); Reitz & Seabolt, *Warranties and Product Liability: Who Can Sue and Where?* 46 Temp.L.Q. 527 (1973); *Seminar: Developments in Absolute and No-Fault Liability in Aviation, Automobiles and Products Liability Cases*, 1971 Proceedings, A.B.A.Sec.Ins.N. & C.L. 445; *An Extension of Joint Liability in Products Liability Law*, 53 B.U.L.Rev. 191 (1973); *The Automobile Manufacturer's Liability to Pedestrians for Exterior Design: New Dimensions in "Crashworthiness,"* 71 Mich.L.Rev. 1654 (1973); *Second Impact Liability in Nebraska*, 54 Neb.L.Rev. 172 (1975); *Products Liability-New Jersey Court Eliminates "Unreasonably Dangerous" Requirement in Strict Tort Liability Action*, 5 Seton Hall L.Rev. 152 (1973); *Products Liability in Missouri: The Keener Complex*, 42 U.M.K.C.L.Rev. 187 (1973).

are essentially inadequate. Further complicating the problem is that a teacher of product liability must approach the subject with an understanding that related disciplines such as economics, medicine and engineering are an integral facet of the successful product claim.[4] The product litigator must be familiar with these additional disciplines, know how to function within them and must also be versed in the developing substantive law. Finally, such an attorney must be expert in the use of discovery and motion [5] practice as opposed to the theory of such procedural devices. Expertise in any one of these areas is not adequate and traditional teaching approaches necessitate the compartmentalizing of each such area and the omission of the inter or multidisciplinary aspect. What follows is a discussion of the author's efforts to resolve these problems and to create a viable learning experience which will enable the young lawyer to appreciate the subtleties of the field while gaining the practical experiences necessary to succeed. To an extent the author's efforts were simplified by his former association with a New York law firm which handled a considerable amount of product liability litigation.

Course Structure

At the outset the professor should recognize that a typical lecture style course is inappropriate. This subject can best be taught through a small course of no more than 25 students. The next step is to recognize that despite the excellence of the leading texts [6] they are not adequate to the task at hand. Thus a seminar, or as we have at the Cleveland-Marshall College of Law, an Institute [7] setting is essential. The materials for the class must be developed

[4] See generally, Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L.J. 203 (1943). *Economics*: *see*, Symposium, 38 U.Chi.L.Rev. 1, *supra*, note 1. *Medicine*: *see*, standard medical dictionaries; P. Cantor, Traumatic Medicine and Surgery for the Attorney (1959–1963 and service); Gray's Attorneys' Textbook of Medicine (3d ed.); Trauma (Houts, ed., 1959–1975); the Physician's Desk Reference (annual); S. Schweitzer, Cyclopedia of Trial Practice, Proof of Traumatic Injuries (2d ed. 1970); and numerous periodicals including the Journal of the American Medical Association; Medical World News, and the New England Journal of Medicine. *Engineering*: *see*, the Journals, Handbooks and Transactions of the Society of Automotive Engineers; reports of the Cornell Aeronautical Laboratory, Inc.; materials available through the Department of Transportation; the Chemical Engineering Handbook; and monthly publications such as Automotive Engineering, Automotive Industries; Casting Journal; Design News; Foundary; and Plastics Age.

See also, Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 Texas L.Rev. 1303 (1974); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 Duquesne L.Rev. 425 (1974).

[5] W. Glaser, Pretrial Discovery and the Adversary System (1968); D. Louisell & G. Hazard, Cases and Materials on Pleading and Practice, State and Federal, 857–864 (1973); New Federal Civil Discovery Rules Sourcebook, at 34 ff. (P.L.I. Litigation Sourcebook No. 4, W. Treadwell, ed. 1972).

[6] P. Keeton and M. Shapo, Products and the Consumer: Defective and Dangerous Products (1970); Product Safety in Household Goods (F. R. Dickerson, ed. 1968).

[7] An "Institute" is a two quarter (twenty week), four credit hour course which permits successful development of seminar style teaching within the confines of a quarter system. The class meets weekly for a two hour period.

largely through the initiative of the professor.[8] The following is a description of the approach by which I try to meet all of the above goals including a summation of the teaching goals that can be met.

Development of materials is a foundation for all that follows. A suggested approach requires that a complete fact pattern be pre-established in which a person is seriously injured due to an alleged defect in a specified product. The product must be carefully selected in terms of the teacher's expertise, available technical materials and realism. For example, in one class I tried to establish that ingestion of di-ethyl-stilbestrol (DES) by pregnant women resulted in vaginal carcinoma of their female off-spring when the child reached the age of approximately fifteen years. When I selected the problem I had reviewed some medical literature supporting the theory and had ascertained that a gynecologist-obstetrician on the staff of the Case Western Reserve Medical School would be able to assist me at a class meeting. It all looked good until we got into the actual problem which proved insoluble from a legal standpoint, thereby creating massive frustration for all concerned. Simply put, the problem was too new and theoretical for classroom development even though it might have been an excellent case for a skilled medico-legal firm or for a specialist in forensic medicine.

On the other hand, successful fact patterns can be developed in many areas, especially those dealing with common products known to be involved in injury producing occurrences, for example automobiles, airplanes, lawn mowers, children's toys and similar products. Thus problems involving air cargo doors on modern aircraft, automobile and other vehicular design or defective parts, lack of power lawn mower safety shields etc., can all be created and utilized as a teaching foundation which will prove satisfactory in terms of available legal theory and law, technical data and resource personnel.[9]

At the present time my class is engaged in the study of an automobile design and defective part problem in which there is an allegation of causation (a defective steering interlock device causing loss of control of the vehicle) and an allegation of second collision injuries (due to a defect in the design of the vehicle dashboard) coupled with a drinking driver and the failure of plaintiff to wear the available seat belt. In this pattern virtually every type of allegation and defense can be established including several exercises in motion practice. Technical materials are readily available in several forms including (1) the engineering library of the university or nearby colleges; (2) a plethora of local engineers within and without the university faculty; and with any kind of luck (3) at least one engineer as a student in the class. In the particular class which is handling this problem we have available (1) library resources,[10] (2) the weekly assistance of a local consulting engineer who is also a recent graduate of the law college,[11] and (3) a videotape which I previously had

[8] Sample Materials will be provided on request at cost; however, the course structure is so individualized as to limit the value of such materials.

[9] The willingness and desire of excellent persons to meet and work with law students is astounding. Furthermore, these persons tend to render their assistance free of charge or at nominal cost. Use of such persons also has beneficial public relations aspects with local community.

[10] See note 4 *supra.*

[11] My thanks to Robert W. McIntyre, J. D. Cleveland State University, Cleveland-Marshall College of Law, 1974.

made of a presentation by Dr. Donald Huelke of the University of Michigan in which he discusses and illustrates causes of automobile trauma and the forensics of accident-trauma reconstruction. To complete the setting the problem selected is a real one in which my local engineer is engaged and the allegedly defective parts are available to the class for inspection. Since the medical aspects of this case are simple and the cause of injury quite easily related to the engineering testimony, no medical assistance is necessary and the students have available to them all of the necessary technical and legal sources plus two teachers to assist them in integrating and understanding [12] the correlation of disciplines inherent in resolution of the problem.

At this point I must reiterate: to succeed there must be a well drawn and conceived fact pattern and there must be adequate technical data in relation to the product selected.

With the initial fact pattern in mind the first class meeting is approached with some degree of trepidation in that normally the student does not expect the type of course he/she is about to embark upon. Furthermore, one always questions the quality of the selected problem until its validity as a teaching device is established during the first several weeks of the course. Nevertheless, the first meeting generally runs the usual first hour pattern of introductions, outlining the course, general discussion of materials to be used, observations concerning tactics and settlement, procedure to be followed and related areas. The fun begins during the second hour in which you start to develop the problem that will be utilized. I find that a good way to do this is through a form of role playing in which I become the client and the class becomes the interviewing attorney. The class is advised, however, that they need not take any interview notes because in due course they will be given a completed fact sheet (or client intake report). In addition, police reports, witnesses' statements and medical summary sheets are distributed and discussed in terms of (a) how to obtain them and (b) their importance. Too often when left to note-taking the students come away with different versions of the working facts causing subsequent problems. By eliminating note-taking students can concentrate on the interview process and the teacher/client can provide facts responsive to the questions while constantly reminding the class of the purpose of a given question or questions, advising of the direction questioning should go, and indicating the effects of the interview upon the client. In an environment stressing greater devotion to legal ethics it is also possible to initiate discussion of the ethical implications of client interviewing as some one is bound to frame a question similar to the old chestnut of the red light and green light wherein the client is asked the color of the light after being told that he can recover a large sum if the light was one color and nothing if it was the other. At the conclusion of the interview process the fact sheet is distributed. Each student is then asked to prepare a Complaint based upon the facts and a short discussion of the general requirements of a Complaint under applicable civil rules ensues. The Complaint is usually due within one week and is commented upon and discussed at the next class meeting.

[12] The author has no academic background in engineering or mathematics, but has gained a degree of expertise through his former law practice and the demands of this course structure.

By the time class meets again all of the student Complaints have been graded and commented upon and are returned to the students so that a general discussion of what was good and bad in the class performance can take place. Everything from English to strategy and form is discussed at this time. In addition, the class is given a Complaint that will become the Complaint in the problem we are utilizing. This Complaint can be a compilation of the best of the student's work, a good student piece, your own draft premised on the facts or the actual Complaint in the case. I was fortunate enough to be able to use the actual Complaint which, again fortunately, was not very artfully drawn. Discussion then focused on the flaws in the actual pleading while at the same time showing that it would withstand both a motion to dismiss and a motion to make more specific. The class was further advised that in the opinion of the Complaint's drafting attorney products Complaints always need amendment and we were able to discuss the various aspects of such an approach. Following discussion of the Complaints we proceed to discuss the requirements of an Answer and the class is asked to submit draft Answers as their next assignment. The procedures followed regarding the Complaint are repeated in connection with the Answer as the course develops. It is quite possible, however, that discussion of the Answer will not require an entire class period and I have found that the class time must be fully utilized if all goals are to be met. Therefore, at this time we begin to introduce the technical aspects of the case in detail. Lecture, exhibits of allegedly defective parts, questions from the students, etc. are utilized and the class starts to recognize that the product litigator must become versed in things other than the law.

Once the above approach is understood a minor invasion of the engineering library ensues. In the actual case, I had my engineering colleague present some general information and then show the class the actual safety inter-lock device. The following week we shook up the whole building when we brought in the entire dashboard assembly and three boxes of broken plastic. The utilization of actual evidence is rather startling to most students and has an impact which cannot be minimized.

By this point the student has been forced into an increased substantive knowledge by virtue of its being essential to the drafting of good pleadings. The idea of self-learning of the substantive law resembles what happens in practice and at the same time builds on the too frequently limited information the students have received in their basic course in tort law. With this substantive learning as a base it is possible to move into the sophistries of the discovery process as such process is used in a product suit. Various form books [13] are placed on reserve (and the students made aware of this well before we begin discussion) together with samples of interrogatories used by both plaintiffs and defendants prepared, or obtained, by the teacher. The students also receive sets of interrogatories and various affidavits and briefs

[13] There are a multitude of general and local form books and an adequate number must be placed on reserve in the library. Regrettably most such books have little or no material on products liability *per se*, but are still of general assistance. Some of the better known or most apt include:

Am.Jur. Pleading and Practice Forms; Bender's Federal Practice Forms; Blashfield, Automobile Law and Practice (3d ed. 1970); Danner, Pattern Interrogatories: Products Liability (1972); and Moore's Manual.

in opposition to them.[14] The materials distributed are from cases similar to that in which the class is engaged, and are distributed in advance of the scheduled class discussion. Discussion focuses on the types of questions that should be asked, the best manner to frame the questions so as to avoid nonresponsive answers which nevertheless meet the demands of the rules and the various types of objections that can be made as well as the technique of answering.

For purposes of the next assignment and all future assignments the class is now divided into plaintiff-defendant teams. As with the usual practice in litigation, the plaintiff attorney initiates the proceedings and is asked to prepare and serve fifty (50) interrogatories upon the defendants with a copy to the teacher so that his comments can be given. The defendant attorney must then answer, object with all proper motions and supporting materials and must in turn serve interrogatories upon plaintiff whose attorneys go through the same procedure of answer and objection. The students are told to avoid the general introductory type questions and stress the real substance of the case. Careful discussion of what this means ensues and before any final drafting takes place a further technical presentation is made. At the conclusion of this presentation the class presents drafts of a few of their questions and they are analysed in class for the benefit of all. The art of draftsmanship as related to the rules of procedure is thus illustrated. During the next few weeks this process unfolds. Any motions must be argued in class thus increasing awareness of the demands of oral advocacy, enabling instruction in such advocacy, and forcing even further research into both the substantive and procedural rules.

At the conclusion of this discovery process a deposition is taken. Here again role playing takes place as the teacher becomes the attorney for one side, an expert represents the witness and an outside attorney or assisting faculty member represents the other side. To better make this a learning experience the entire procedure is video-taped and replayed at a later time for discussion of technique and substance. Various functions of the expert are explored at this stage and students gain an awareness that they must use their expert well before the discovery process begins if they are to succeed in their discovery efforts. The student is encouraged to see all facets of the potential use of the expert and is also required to learn the qualities an expert witness must possess. As with actual litigation we seek to find an expert with adequate qualifications and expertise, who is experienced in courtroom testimony and depositions, has superior communicative skills, can make a good physical appearance and who has a decent track record. We also explore the fee schedules and related cost factors for exhibits. The importance of locating any prior writings or testimony which might be used to impeach our witness is illustrated. Although we cannot simulate a trial in the course, the class is also advised as to how useful the expert can be during trial in terms of examining the adversary's witnesses. It is brought out that some firms go so far as to have daily transcripts made and reviewed by their experts so that a line of questioning can be developed for the next day. We emphasize that such transcript use, though costly, can be an important tactic.

[14] Since no text is used it is proper to have the students pay for any reproduced materials and the total cost is generally less than five dollars. Materials include interrogatories, various pleadings and motions, briefs and affidavits, and technical materials.

The final steps in the course include the use of motion practice after discovery to limit the issues, preparation of pre-trial orders and a trial memorandum. By the time all of this is completed the students have a substantially increased legal practical knowledge as well as a massive indoctrination into legal writing skills which goes well beyond the normal first year legal writing or brief writing program.

To be successful the teacher and any resource personnel must be available to give advice, to assist in drafting and to locate source materials. In addition, the library has to be advised of the types of material for which there will be a great demand. All written work must be promptly reviewed and commented upon if such work is to have any significant educational value. Obviously this format requires a small class due to the strains on the teacher's time and on limited library materials. The latter can be overcome by utlilization of more than one problem. However, I suggest that this be avoided in that it requires the teacher to be expert in too many areas and because effective class discussion is reduced. In essence, multiple problems are inadvisable due to (1) lack of class time to adequately develop each one, (2) obtaining data and resource personnel becomes oppressive and untenable and (3) the strains on the teacher's expertise become overwhelming as any teacher has his own technical limitations. For example, I am very comfortable in the automotive area but much less so in the drug area as I learned to my dismay with the DES problem.

Conclusion

The approach outlined above is designed to meet specific teaching goals of a varied nature and seems to accomplish them with substantial success. The goals I seek to meet include:

1. Increase of legal research skills;
2. Improvement in legal writing skills;
3. Increased awareness of the potential of the civil rules as a strategic tool;
4. Providing a comprehensive substantive knowledge of product liability law as distinct from, yet related to, tort and contract law;
5. A recognition of the multiple uses of the expert witness and the necessity of such witnesses in this type of action;
6. Awareness of the form requirements of the court system;
7. Increased understanding of litigation and settlement strategy;
8. Development of oral advocacy skills;
9. An awareness of the relationship of the various disciplines involved in a product suit; and
10. At least an initial awareness of the socio-economic aspects of this growing field.

Substantial progress in each of these areas is possible through the type of programmed learning approach outlined above. Finally, though the burden of all concerned is quite heavy, it is correlative with the credit hours and leads to considerable professional rewards for both the teacher and the students.