Product Liability Law Has Come of Age

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Product Liability Law Has Come of Age
Buell Doelle*

Product Liability: A New Tort

What is history but a fable agreed upon?
— Napoleon Bonaparte

A fable become fact of product liability law is being written into the jurisprudence of every state. Product liability law, as it has matured, has become a nationwide judicial compensation system1 which shifts the loss of injury to person or property caused by a defective product to its manufacturer and/or seller.2 Principal reason for this shifting or allocating of losses is the deep pocket of the manufacturing-selling enterprise and its capacity to distribute the burden among all who purchase the product, increasing the price to consumers sufficiently to buy adequate product liability insurance coverage.3 The logic of this system of loss distribution or allocation, which places the burden upon the enterprise with the best opportunity to avoid the distribution of defective products, cannot be questioned, and there is "no legitimate legal barrier to doing so."4

To analyze this first complete judicial system of loss distribution — present-day product liability law — is to see that it achieves its goal in our modern technological complex by the simple expedient of abolishing all legal barriers to permit full adversary confrontation of the parties, with resulting accommodation by jury verdict. Unlike legislative systems of loss distribution regardless of fault,

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1 R. Keeton, 9 Forum 1, 3 (1973).
3 Authorities cited note 2 supra.
4 Giberson v. Ford Motor Co., 504 S.W. 2d 8 (Mo. 1974).
such as workmen's compensation and no-fault automobile injury reparation; and despite its fabled past and eminent commentators, modern product liability law is a new tort, founded solidly upon fault, not liability without fault, nor even absolute liability or strict liability, as commentators still insist.

Consumerism, the Jury, and Encouraged Settlement

Law is the embodiment of the moral sentiment of the people.

—Sir William Blackstone

A rising tide of consumerism has been caused by improved means of communications and greater awareness of the development of science and engineering to provide better product design, testing procedures, quality control, and research. Consumerism represents "the moral sentiment of the people." It is a natural development of a countervailing force to the increasing concentration of power in large, impersonal business organizations with which the lonely, individual consumer often finds himself engaged in unequal legal battle. Since it is the lonely, individual consumer who so often is drawn for jury duty, it would appear that the modern jury is a peculiarly apt instrument to apply product liability law. Heightening the tide of consumerism has been the zeal of Ralph Nader, and the work of watchdog agencies for the consuming public, as well as federal and state legislation regulating the integrity and safety of products. To all of these factors, in combination, must be attributed both the

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5 This legislation, then, is a new departure and creates a new liability, resting upon one class in favor of another, without reference to any negligent conduct of the class upon which the burden is cast. In other words, this legislation is wholly in derogation of the common law. It is legislation which awards compensation for the accidental industrial injuries to be added to the cost of production. Andrejewski v. Wolverine Coal Co., 182 Mich. 298, 310, 148 N.W. 684, 685-86 (1914).


7 E.g. Annot., 13 A.L.R. 3d 1057 (1967). Whether or not "strict liability" and "absolute liability" [used interchangeably by Judge Traynor in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 452, 461, 150 P.2d 436, 440-41 (1944)] should narrow to the more universal term "strict liability" [as used by Dean Prosser, in RESTATEMENT (SECOND) OF TORTS § 402A, comment m at 355 (1965)], it must be recognized that "strict liability" is an unfortunate phrase, misunderstood by the bench and bar alike, which describes a "result." It is neither synonymous with "liability without fault" nor with making a manufacturer or vendor an "absolute" guarantor or insurer. See Bushnell, Defenses to Products Liability Actions, 1966 PROCEEDINGS OF THE PRACTICING LAW INSTITUTE (20 Vesey Street, New York, N.Y.); Piercefield v. Remington Arms Co., 375 Mich. 85, 98, 133 N.W. 2d 129, 135 (1965) wherein it is stated

[S]ome quibbler may allege that this is liability without fault. It is not. As made clear above, a plaintiff relying upon the rule must prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains. When able to do that, then and only then may he recover against the manufacturer of the defective product.
arousal of the natural suspicions of the consuming public, the nurturing of its antagonisms toward the manufacturer-seller of defective products and the increase in product liability claims.\(^8\)

With mounting litigation over claims of injury-causing products, appellate judges began to perceive that while "implied warranty" was an amalgam of tort and contract law, it could never serve as a basis for a change in the substantive law from emphasis on "fault" to that of "defect."\(^9\) To meet this change, a peculiarly appropriate instrument was the consumer-jury, which, in performing its function of determining factual issues of "defect," would further extend the liability of the manufacturer-seller of defective products.\(^10\)

This was not to suggest that the courts were surrendering to "fireside equities"\(^11\) by calling upon the jury and adversary system of Medieval England as a judicial solution for the complex technological problems of the Twentieth Century, but the courts envisioned — and rightly so — that by the simple expedient of forcing litigants into adversary confrontation before a jury, where all claims and defenses were facts to be determined, that the way would be paved to encourage settlements, short of verdict, or a vast majority of product-liability claims. As a matter of statistics, the "fight theory" of adversary confrontation, before a jury, has made it possible for modern court dockets to survive the ever-increasing load of product liability claims.

This substantiates the importance of the process to the ongoing functioning of the judicial system in automobile injury claims emphasized by Alfred Conard:\(^12\)

\[
\ldots [I]f a trial was obtained by just one out of every nineteen of the serious injury victims who now settle without trial, the number of trials would have to increase by \textit{one}
\]

\(^8\) As public suspicion and antagonism have matured and ripened, product liability lawsuits have been increasing by leaps and bounds. A correlation between the public attitude and products claims is generally accepted. Since lawsuits are filed in only a small percentage of claims made, the numerical impact of claim consciousness on the total volume of product claims is, of course, much greater than on litigated claims only: about four to one. The number of product liability suits grew from 1,000 per year in the early 1960's to about 500,000 in 1971. That level was surpassed in 1972, and some — perhaps the gloomiest forecasters — are predicting the annual volume of products liability suits will exceed 1,000,000 in 1975. What will the annual volume be in 1985? Two million? Three million? See generally Mercer, Product Liability Law in the 1980's — The Insurer's View, PLP-73 167, 168. (PLP-73 is the publication of the Newark College of Engineering, Product Liability Prevention Conference, Aug. 22-24, 1973).

\(^9\) Keeton, \textit{supra} note 1, at 1.


\(^12\) Conard, \textit{The Economic Treatment of Auto Injuries}, 63 Mich. L. Rev. 279, 286 (1964).
hundred per cent. A minute decrease in the settlement rate would deluge the already overcrowded courts with an even more oppressive mass of cases. (Emphasis in the original)

**Product Liability Law and the Golf Cart Case**

*To see what is right, and not do it, is want of courage, or of principle.*

— Confucius

Modern product liability law has found its courageous spokesman in the decision of *Cova v. Harley Davidson Motor Company.*

The opinion of Judge Charles L. Levin evidences painstaking research, diction, clarity, and objectivity. It is not only a review of Michigan product liability law but also of the many decisions of the eminent judges and legal writers who helped to mold the early concepts of torts and contracts into an amalgam of tort liability law.

*Cova,* readily identified as the “golf cart case,” was an appeal from dismissal of a complaint for breach of implied warranty of quality, the trial judge apparently having assumed that a consumer may not maintain an action against a manufacturer for breach of warranty for economic loss (as opposed to personal injury) without privity of contract. Judge Levin remarked that *Spence v. Three Rivers Builders & Masonry Supply, Inc.*

dealing pointedly with economic loss, had forthrightly ruled that it would no longer continue to be “hobbled by such an obsolete rule [of privity] and its swarming progeny of exceptions.” But, Judge Levin said, *Spence* had then “blurred its decision by going on to intimate that the consumer’s remedy was grounded in negligence, not warranty.”

Reviewing the background of strict liability of the manufacturer, in *Cova,* Judge Levin remarked critically that it “does not strike us as particularly sound or useful.” In paraphrasing three concepts of strict liability for examination, he concluded that under Michigan law the “manufacturer’s liability is a strict liability or something akin to it.” But, thereafter he emphasized:

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14 353 Mich. 120, 90 N.W.2d 873 (1958).

15 *Id.* at 128, 90 N.W.2d at 877.

16 The *Spence* opinion was by John D. Voelker, who under the pen name of Robert Traver wrote *ANATOMY OF A MURDER.* Justice Voelker, however, in 1958, recognized the trend of product liability law

... [T]he modern trend in other jurisdictions is to permit recovery by remote vendees against the manufacturer whether the action sounds in negligence or... implied warranty. *Id.* at 132, 90 N.W.2d at 879.

*Spence* was regarded by Dean Prosser as “the real bursting of the dam.” See *W. Prosser, THE LAW OF TORTS,* 654 § 97 (4th ed. 1971).


18 *Id.* at 612, 182 N.W.2d at 806.

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While the Michigan development has paralleled, even preceded the development in other jurisdictions, we see no need to join the parade of states which have adopted the new terminology of "strict liability." To the new generation of lawyers, trained in the new jargon, the meaning of the term "strict liability" may be clear: "a rose by any other name," etc. But for many of the rest of us the concept of a strict liability carries overtones of its former rubric, "absolute" liability.

The manufacturer's liability, although arising even if he has exercised due care, is not the same liability absolutely or strictly imposed on persons who keep dangerous animals or who engage in abnormally dangerous activity.

If we adopt the "strict liability" terminology, lawyers who find it to their clients' advantage can be expected to urge upon us the analogies of the absolute (strict) nonproduct liability cases as being necessarily more pertinent than alternative sources of precedent and reasoning. There is a significant risk that the relabeling of the manufacturer's liability as a "strict liability" may result in the casual adoption of the absolute (strict) liability precedents developed in cases dealing with dangerous animals and abnormally dangerous activities without careful analysis of whether they are truly opposite. Nothing but further confusion is achieved by using the same label to describe both the liability of a manufacturer to a consumer and of a person who harbors dangerous animals or engages in abnormally dangerous activity.19

In a final plea for reference to a manufacturer's liability by the neutral term, "product liability," Judge Levin reasoned:

The fact is that no term is likely to be devised that will accurately communicate all the relevant concepts. This entire field of law, which developed through adaption and analogy to the law of torts and contracts, has been plagued by the labels of these analogies and their appurtenant historical impediments. Indeed, it might be helpful if we abandoned the continued use in this context of our present and misleading terminology of warranty and representation, express and implied, and strict liability in tort, and simply refer to the manufacturer's liability by the neutral term "product liability." We would thereby acknowledge that the consumer's remedy is an amalgam of all those concepts and of

19 Id. at 612-14, 182 N.W.2d at 806-07.
others as well; but also that it is something sufficiently dis-
similar to any of these concepts so that emphasis on either
the tort or contract origin is misleading and confusing.

The "product liability" of the manufacturer, and the
 corresponding right of the consumer, is simply the liability
which in this developing jurisprudence the law imposes on a
manufacturer in favor of a consumer for loss suffered by
reason of a defective product attributable to that manu-
facturer. Elimination of the old terminology would permit
this field to develop sensibly without continuing allegiance to
warranty or tort concepts, whether the question presented
is one of pleadings, procedure, products and defects covered,
disclaimers, abnormal use or misuse by consumer, other
defenses, kinds and measure of damages or some other sub-
stantive issue.

The need to eliminate the old terminology becomes ap-
parent upon examination of the cases, not only in Michigan,
but in other jurisdictions as well . . . 20

Earlier Backdrop of Politics and Unionism

Make a point never so clear, and it is great odds
that a man whose habits, and the bent of whose
mind lie a contrary way shall be unable to compre-
end it; — so weak a thing is reason in competition
with inclination.

— George Berkeley

Clearly, today's product liability law is not a drawing-board
tort. Its many architects who contributed to this amalgam of tort
and contract tried to make their points "never so clear," but those
of different minds were unable to comprehend, "so weak a thing is
reason in competition with inclination." In the developing juris-
prudence of virtually all industrial states, however, there have been
harbingers of the modern tort of product liability law in opinions
of judges who wrestled with old and formidable legal precepts, as
well as the laissez-faire inclinations of their busy colleagues who had
no wish to interfere in the competitive goals of industry and the
market place. Michigan is probably the prototypical industrial state,
where the social and political forces expanding product liability have
been articulated by industrial unions, populist reaction against a
concentration of industrial wealth, and an able, agressive — finan-
cially interested — plaintiff's bar, and all factors have coalesced.

20 Id. at 614-16, 182 N.W.2d at 807-08.

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Professor Llewellyn observes:

The justice-duty works, as has been noted, through the facts. The thrust of fireside equities may be deplored, but who doubts that an appellate court can be open to it? "Hard cases make bad law" reminds us that the thrust may be enough to twist an otherwise good rule out of shape . . . .

Just as modern-day consumerism has been heartened by federal legislation,\(^2\) so independent appellate judges have been heartened by the widespread attractiveness of the theory that deep pockets are best suited to bear the risks of personal and property injuries in our modern industrial society. Dean Burch, Chairman of the Federal Communications Commission, speaking at the American Bar Association Convention, August 7, 1973, at Washington, D.C., remarked pertinently:

The public interest is not some pot of gold sitting up there — just to the left of the rainbow's end — waiting to be discovered by the pure in heart. Sometimes (but all too rarely) it virtually defines itself on the basis of the factual record and leaves no two reasonable men in substantial disagreement. More often, the public interest emerges with painful deliberation and much grief as the end-product of competing records of fact and conflicting points of view. It gets refined, in the context and as a result of the entire process.

Michigan saw the beginning of its product liability law in 1939, when the Michigan Supreme Court decided *Bahlman v. Hudson Motor Car Co.*,\(^2\) a landmark case, too often overlooked, which has apparently frightened zealous copywriters from telling today what were permissible lies about the safety of automobiles, during the 1930's. *Bahlman* can only be properly appreciated in the context of the contemporary struggle in Michigan of the industrial unions — with which a large part of the public identified — for recognition by the automobile manufacturers. From the first sit-down strike at Flint, Michigan, April 1, 1937, involving 17,200 workers at plants of Gen-

\(^{21}\) K. LLEWELLYN, *supra* note 11, at 121.

\(^{22}\) To list a few applicable federal regulatory acts:


eral Motors Corporation, through the union organizing campaigns — with such highlights as the "battle of the overpass" at Gate Four of the Rouge Plant of Ford Motor Company, in 1937 — to final capitation of the Ford Motor Company, April 11, 1941, after an eleven-day strike, one may see "the public interest," or "fireside equities" emerging after painful deliberation and much grief as the end-product of competing records of fact and conflicting points of view, and affecting not just the issues of union recognition but any number of collateral, apparently unrelated issues.

_Bahlman_ was the first of the decisions to approach the facts of an automobile roll-over where an enhanced injury resulted from the design of the interior body. The decision of Mr. Chief Justice Butzel demolished "a Rugged Fortress of Safety", a Hudson advertising accomplishment, in a case involving a traveling shoe salesman who had negligently overturned his "fortress" on the highway, and suffered a gash on the top of his head from a jagged, saw-tooth weld of two pieces of steel from "an improved seamless steel roof", holding that, no matter under what theory, liability "is imposed on the maker of false statements and may be enforced by the ultimate consumer of the product", without bar to recovery by reason of this contributory negligence.

_Bahlman_ facts revolved about the "rugged fortress" claims of a 1936 Hudson automobile — where design was pointed at the elimination of second collision or roll-over injuries — but advertising of that period was replete with similar claims of other manufacturers, as, for example, the claim that the "Turret Tops" on all General Motors' vehicles were comparable to the turrets in battle ships! _Bahlman_ seemed to end this kind of advertising, although its implications continue to haunt the automobile manufacturers even today.

Ford Motor Company had earlier the same kind of experience with representation, in 1932, that its windshields were of shatterproof glass, with the decision of _Baxter v. Ford Motor Company_,

24 Terminology of "enhanced injury" is probably wholly appropriate to roll-over injuries but, "crashworthiness," "second collision," "second impact" terminology will probably persist with the legal profession, and, certainly, more exactly defines what occurs when two automobiles collide. See Roda, _Products Liability — The "Enhanced Injury Case" Revisited_, 8 FORUM 643 (1973), a most excellent treatise. See also Liability of Manufacturer, Seller or Distributor of Motor Vehicle for Defect Which Merely Enhances Injury from Accident Otherwise Caused, Annot., 42 A.L.R. 3d 560 (1972).

25 Chief Justice Henry M. Butzel, a corporation attorney of eminence before his election to the Michigan Supreme Court, was a liberal Republican, who was a close personal friend of Justice George E. Bushnell, a conservative Democrat, elected in the Spring of 1933, following the 1932 Roosevelt landslide, as the first Democratic Justice of the Supreme Court in the twentieth century; together, the Butzel-Bushnell friendship was responsible for much agreement and some dissent, but always interesting opinions.


27 168 Wash. 456, 12 P.2d 409, _rehearing _______ Wash. _______ , 15 P.2d 1118 (1932). On rehearing the court reversed and granted new trial as to defendant Ford Motor Co. and affirmed as to defendant St. John Motors.
when the Washington Supreme Court held that its representations in catalogues and printed matter were admissible evidence in a case where the windshield did shatter. Not content with this decision, Ford Motor Company appealed a second time and learned that it was immaterial that no better glass was manufactured, since it had a duty to know the truth of its representations.

While Michigan, facing a threat of scuttling its Republican judiciary under an expected avalanche of Democratic votes, had passed a Constitutional Amendment providing for nonpartisan election of Judges, April 3, 1939, it was only nine years later that a Democratic sweep of the state under Governor-Elect G. Mennen Williams, November 2, 1948, opened the way to liberalization of the Michigan Supreme Court by the appointment and election of Democratic liberals who had gained the favor of his constituents, the largest body of which was the membership of the giant industrial unions of the automobile industry. In these industrial unions, however, are the individual members who are employees in automobile plants, and whose inadvertence, negligence, or hurry may create a defective product which, later, may injure him or a member of his family. Thus there is the ambivalence, or play of emotions, in every automobile employee who is both an employee of the manufacturing-selling enterprise and a consumer.

Such ambivalence surrounded the case of Comstock v. General Motors Corporation, where Justice George Edwards, in giving the decision of the court, discovered Bahlman, of twenty years before, and gave the automobile industry its bitterest potion. In Comstock, the "consumer" was to triumph despite the inadvertence of an assistant manager of a repair garage in driving a car with defective brakes against his own mechanic, and causing the amputation of the mechanic's leg. General Motors had notified all of its Buick dealers of the existence of defective brakes in this model but had not notified the individual owners.

Justice Edwards, in giving the opinion of the court, found no superseding negligence on the part of the assistant manager of the garage, as a matter of law, and that the negligence of General Motors could still be found by a jury to be the proximate cause of injury. In the opinion of Justice Edwards, a manufacturer had a continuing duty to warn, after learning of a defect,

28 179 Wash. 123, 35 P.2d 1090 (1934).
30 Originally appointed to the Wayne County Probate Court, the Wayne County Circuit Court, and the Michigan Supreme Court by Governor Williams, Justice Edwards was a "darling" of the electorate, and after re-election to the high Court, he resigned from a then discordant Bench to accept an appointment as Commissioner of the Detroit Police Department, a position in which he accomplished many reforms; from this post, President Kennedy appointed him to serve as Judge of the United States Court of Appeals, Sixth Circuit.
... those into whose hands they had placed this dangerous instrument, and whose lives (along with the lives of others) depended upon defective brakes which might fail without notice.31

And in these words is to be found the persuasion for warning purchasers, and recalling defective vehicles, enacted in the Motor Vehicle and Highway Safety Acts of 1966.32 In concluding this projection of Michigan law before the Cova decision it should be remarked that Judge Levin had clear and ample guidelines to direct and persuade him to a sensible and realistic definition of today's product liability law.

Attorney's Role: Present and Future

We always live prospectively, never restrospectively, and there is no abiding moment.

— Friedrich H. Jacobi

While product liability law may have come of age, it cannot remain static. It must shape itself to a developing jurisprudence, and prepare itself for demands of the 1980's and the twenty-first century.

George Macdonald, the scottish novelist, opined that, "The best preparation for the future, is the present well seen to, and the last duty done." In this sense, product liability law can best prepare for the future by improving its present-day image as the ultimate accommodation between parties in controversy. It must chart a course which will help eliminate or minimize serious product injuries. It must mold its processes to help relieve clogged court dockets. It must inspire technological advancement and still allocate equitably the injuries and damages which such advances may entail.

What in the present can be "well seen to?"
And what can be "the last duty done?"

First, let us examine the role of the attorney in today's product liability law under its fight theory of adversary confrontation with a jury deciding all. With an attorney for the plaintiff representing a seriously injured person — one suffering from quadriplegia, paraplegia, brain damage, traumatic amputation of a member, or crippling disease — and an attorney for the defendant representing a party with deep pockets — a corporate manufacturer or dealer — there is usually only the semblance of a controversy.

If there is any relationship between use of the allegedly defective product and plaintiff's injury, very few juries of our modern day, under the system of advocacy as practiced, will send such an injured

person out of the courtroom without an award of money — unless, as does happen, the attorney for the plaintiff is inept or a bungler, and no assistance is given him by the trial judge. In such an encounter, plaintiffs' attorneys and defendants' attorneys, by reason of education, training, and client relationship, have no discernible parity.

Under the rule of "primacy," which requires a plaintiff to preponderate, or tip the scales, to sustain his burden of proof, the plaintiff's attorney is permitted to open and close, both in opening statement to the jury, and in final summation to the jury. That this right of primacy has a telling impact on the jury has been established at the University of Chicago in mock trials by secret ballot, where it was learned that eighty percent of the jurors did not change their opinions on liability after opening statements of both plaintiff's and defendant's attorneys.32

In large populous areas, product liability cases involving serious injuries seem to gravitate — usually by the referral — to only a few offices whose attorneys possess charismatic jury appeal. These trial specialists have mastered the art of soft-sell, or modestly outlining their case, in which they show their sincerity, candor, and preparation in opening statement, a stratagem which "can set the tone for the entire trial."34

In contrast, by reason of his longer career at the bar, and his tendency to value research of the law above factual preparation — a relic of the day when directed verdicts of no cause of action were either the expected or hoped-for result of litigation — the defendant's attorney is often no match for his agile opponent. He downgrades charisma as something (he hopes) juries will resent. He is derisive of the soft-sell, and he responds in opening statement usually by a critical, dogmatic, and often bitter reply to the facts developed by the plaintiff's attorney — patently stemming from his own repressed irritation at the knowledge of the impact which the plaintiff's attorney has made upon the jury.

As a defendant's attorney too, he is not a field general. This is in contrast to the plaintiff's attorney, whose client, invariably, leaves all strategy of trial, and decision as to settlement before jury verdict, to his attorney.

The defendant's attorney, today, however, is usually under the control of representatives of the liability insurance carrier which has referred the case. Either at the local or home office claims level, the file has been evaluated, and a reserve posted. This reserve is sacrosanct. It can only be changed by a major persuasion on the part of the defendant's attorney.

34 Id. at 28.
Liability insurers still evaluate cases on the basis of liability, rather than exposure, and often, despite a defendant's attorney's appraisal of the dangerous factual aspects of the case against the backdrop of the trial ability of the plaintiff's attorney and the plaintiff-orientation of the trial judge, the insurer may still rely upon contrary judgment of its own corporate personnel who, usually, lack any experience in advocacy. Almost without exception, the so-called "box-car" verdicts in excess of one million dollars and up to three and four million dollars, are traceable to the decisions of claims personnel in the local or home office of the liability insurer to disregard recommendations of their supposed "field general." Quite commonly, the authorization for settlement, under the unhappiest of fact situations, and where all aspects of the trial and evidence are adverse to the defendant, is held at a figure of ten to fifteen per cent of the ultimate jury verdict. Also, through its hold on the office of its defense field attorneys, an insurer may reserve the right to dictate assignment of the case to an attorney known to it in the office. This often results in a serious problem in the defense attorney's office, in the utilization of its younger attorneys.

This all-powerful domination by corporate insurers over their field attorneys reached ludicrous ends in the advice by one insurer — whose name shall remain anonymous — that its field attorneys were not to engage in any legal research in preparation for trial without prior authorization in writing from the insurer. Such balderdash, emanating from a modern computerized insurer, could be likened to a request of a brain surgeon, about to operate, that he employ only those surgical skills taught him at medical school. Surely, legal research is often unnecessary in the modern day of product liability law, geared to factual presentations in court before a jury; but, as most defendant's attorneys know, the lack of knowledge of recent appellate decisions — or, at least, unconcern about them — may be the Achilles' heel of the plaintiff's attorney.

What should be guarded against by a defendant's attorney is the painstaking preparation of a dossier of all reported cases on product liability law since MacPherson v. Buick Motor Co.\(^{35}\) or even Winterbottom v. Wright,\(^{36}\) a decision of the English Court of Exchequer, whose concurring opinion of Lord Abinger so fascinated the American appellate courts in their attempt to maintain privity of contract as a defense! The home office of every liability insurer in the land is groaning under just such briefs prepared by their field attorneys, for which, in each case, the insurer paid handsomely and just as repetitiously.

\(^{35}\) 217 N.Y. 382, 111 N.E. 1050 (1916).

Recognized in Spence, and quoted by Mr. Justice Black, giving the opinion of the Court in Dearborn v. Bacila,37 is this quotation from the writings of Mr. Justice Holmes:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.38

Professor Llewellyn so aptly stated:

Now the truth is this: only in times of stagnation or decay does an appellate system even faintly resemble such a picture of detailed dictation by the precedents, and even in times of stagnation and deliberated determination to plant feet flat ‘upon the ancient ways’ movement and change still creep up on the blind side of the stagnators.39

No trial attorney in product liability law, whether for plaintiff or defendant, is serving his client well if he relies, like a computer, upon a venerable digest of precedents.

As a future expediency, however, rules of advocacy should be changed to minimize the role of primacy in the opening and closing by the plaintiff’s attorney. By a rule which already exists in some states, the defendant’s attorney should be permitted the final summation to the jury, to avoid a miscarriage of justice. What has been viewed as mere rebuttal argument has come to be the final argument of the plaintiff’s attorney who packs it with all of the quiet hatred, and open castigation of the defendant which is permissible under rules of argument. Such denunciation is frowned upon in appellate courts, but rarely disturbed on objection by trial judges—who, usually, with smiling admonition to the plaintiff’s attorney, simply suggest to the jury that “so the Court thinks but can’t say”!

A skilled plaintiff’s attorney is aware that big verdicts usually rest upon hatred which he can engender toward the defendant in argument; or, in lieu of this, develop from the errors which a defendant’s attorney may make in the admission of a damaging piece of evidence which backfires: the offering of too many witnesses (with innumerable chances for damaging cross-examination), or some flip, humorous, or impromptu observation which changes the entire character of the litigation. Trial courts and appellate courts alike have an obligation in the new area of adversary confrontation in product

38 Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897), in O. W. Holmes, Collected Legal Papers 187 (1921).
39 K. Llewellyn, supra note 11, at 62.
liability law to overhaul the rules of battle, and to insure that the
"fight" theory also promises a fair battle. Finally, adversaries must
be more carefully chosen among attorneys for the plaintiff and de-
fendant. Just as a championship boxing or wrestling exhibition finds
a careful matching of talents, so an adversary confrontation of
parties in a product liability case should find opposing attorneys well
matched.

A plaintiff's attorney has time to read, study, attend seminars, and
to "think." His colleagues in the office collectively confer with
him on a factual approach in every piece of litigation; the facts are
stressed from the first contact with the client; and the entire in-
vestigation and essential discovery are directed toward full accumu-
lation of all facts upon which any of several theories of liability
might be chosen.

A defendant's attorney, contrarily — working in an office where
precedent is the controlling idea, where seniority rather than capa-
bility may govern advancement — handles the case from beginning
to end as part of an individual docket of cases ranging from 100 to
150. His busy colleagues have no part as a think-tank in his prepara-
tion of any but the biggest of his cases. His discovery depositions are
usually farmed out to junior office attorneys, and a memorandum of
what occurred is furnished to him for guidance. As he is approach-
ing the trial date, he does a crash program of preparation, which
usually brings him to the threshold of trial in a state of nervous
exhaustion from sustained reading of depositions, interviewing of
expert witnesses, and planning his trial strategy. A last minute con-
ference with his liability insurer reveals no disposition to increase
the settlement figure, and he goes to court bowed but not broken, still
valiant, capable, determined, and proud, ever alert to find a toe-hold
to fashion a factual defense.40

A plaintiff's attorney is taught his art in the seminars of the
American Trial Lawyers Association.41 Each member of the associa-
tion has expertly-written handbooks which describe a personal injury

40 Trained in trial work in lower courts, defendant's attorneys survive a toruous ordeal to
reach the plateaus of senior attorneys or partners. Their usual reward is a burdensome
docket of "big" cases. Trial teams are a rarity simply because the minimal fee schedule
allowed by liability insurers does not permit employment of more than one attorney on a
case. Most senior trial attorneys are members of The International Association of
Insurance Counsel.

41 No counterpart is offered to defense attorneys. While the Defense Research Institute, Inc.,
gets into the field of brief banks, printing monographs of law, a monthly bulletin, FOR
THE DEFENSE, and periodic warnings as to new strategy of plaintiffs' attorneys, the organiz-
ation is doing virtually nothing in the field of advocacy, due, perhaps, as one member
stated, to the fear of its insurer members that attorneys might take over and assert some
independence, or, at least, demand fees commensurate with their own skills and of the
plaintiffs' bar. Local defense groups, with no guidance other than claims representatives of
insurers, avoid advocacy seminars, preferring, rather, to preserve legalistic speeches on
video tape which can be sent about the country to field attorneys in the interest of saving
briefing costs.
lawsuit from the time an injured person walks into the office until the "knock-at-the-door" signal of the jury foreman. Mock trials attract the finest talent of the plaintiffs' bar, and fact situations are carefully prepared, and carried into dramatic presentations by witnesses, including experts, of the highest talent. Here, emphasis is upon low-key presentation, and how to acquaint the jurors with their role.

Despite broad discovery rules, a skillful plaintiff's attorney will nourish carefully — and even secretly from his own colleagues — the element of surprise. Such an attorney will artfully evade the full impact of discovery. Often, a defendant's attorney will be alerted to the real theory of the plaintiff's claim only in the opening statement of the plaintiff's attorney. 42

In retrospect, it must be added that not all plaintiffs' attorneys possess the Midas touch, and that many charismatic defense attorneys surface from their less romantic backgrounds. Drab though the defense attorney's role appears to be, they are usually more consistent in ability and advocacy.

Trial attorneys for plaintiffs are more noticeably graded, with a vast disparity existing between the top drawer and the humdrum plaintiff's attorney. The latter, without experience in product liability advocacy, usually enters the courtroom without adequate discovery or preparation, with only a cursory knowledge of the law, and with a buoyant hope that a plaintiff-oriented trial judge, or a sympathetic jury, will rescue him from his plight. Usually, his only burning zeal is to find his name in print as the attorney who recovered a large jury verdict.

Defense attorneys, defending insurance companies and the insured, are often faced with a potential conflict of interest which is particularly a problem in product liability cases. Since ad damnum clauses are rarely within policy limits of insured defendants, and judgments are increasingly in excess of those limits, this circumstance presents the archetypical conflict of interest situation. 43

While the obligation of an attorney to an insurer cannot be ignored, it should be emphasized that he has real duties to the insured, and, based upon the insurance contract, for which the insured has paid a premium, the insured, not the insurance company, is the client. 44 All too few defense attorneys are aware of this legal and ethical problem.

42 Claims representatives constantly upbraid their field attorneys for not obtaining information about plaintiff's theories in advance, despite the fact that these are not discoverable, and, usually, appear in advance of trial only during bona fide settlement negotiations.


44 Id. at 112.
Plaintiffs' attorneys are usually well financed from substantial contingent attorneys' fees earned in prior cases. They command, and choose\textsuperscript{49} top-flight expert witnesses who have forensic skills, are personable, and are tuned to the key of the plaintiff's attorney who will examine them in court. Rarely is the "top-drawer" plaintiff's attorney without assistance in the courtroom. If he is alone, for appearance sake, he has colleagues in his law office who stand ready to assist him in solving evidentiary questions, or in legal research, as his telephone message might request. Law clerks stand ready to research voluminous expert literature of the defendant's expert — if he has written extensively — and this is the destructive material which is used to cross examine the defendant's expert.

While a number of the less important product liability cases result in defense verdicts,\textsuperscript{46} it is almost axiomatic that no trial attorney — whether for the injured claimant or the defendant — really enjoys "rolling the dice." A few roisterers remain who try to acquire permanent insurance liability accounts by insisting that "you have to teach these lying plaintiffs a lesson by verdicts of no cause of action." These same attorneys, however, are just as sensitive to the wisdom of a favorable settlement as the next, when they see nothing but big money at the end of the plaintiff's rainbow.

It is not uncommon to see a plaintiff's attorney, representing a seriously injured person, who has been negotiating in good faith during trial, and has been rebuffed by the defendant, go before the jury in his final argument with actual tears in his eyes. His responsibility weighs so heavily upon him that he only regains his composure by conscious effort.

A defendant's attorney, similarly, is not interested in filling his personal scrapbook with adverse million dollar verdicts, and only if the insured defendant is insisting that the insurer's defense attorney "teach this plaintiff's lawyer a lesson" — which is so often true in the case of litigious automobile manufacturers where design of the vehicle or its components is under attack — will the defendant's attorney philosophically abide a large plaintiff's verdict.

Any seasoned and perspicacious trial attorney knows the weaknesses of his case, as well as its strengths, and he feels a natural apprehension which tends to highlight the weakness of his case and minimize the overall strength. Attorneys thus are usually willing

\textsuperscript{49} Most liability insurers engage an expert at the time of learning about a product liability claim, and, in consequence, a defendant's attorney must utilize this expert, whether or not he possesses forensic skills, or else the plaintiff's attorney, learning about him on discovery, will almost surely call him as one of his own.

\textsuperscript{46} Coccia, Observations on "No Fault" Products Liability, 14 FOR THE DEFENSE, at 53 et seq. (No. 5, May 1973).
and able to negotiate a settlement, and prefer to do so rather than risk an adverse verdict, and invite one or two possible appeals, and the final lackluster result, a new trial.

Without negotiated settlements short of a jury verdict, product liability law in its present adversary concept may not survive. As Mr. Coccia has so trenchantly observed,

Some "reformers" of our adversary system have long been enamored of such strained concepts as: "We must reduce the backlog"; "the injured must have immediate and complete redress"; and "the present judicial system is archaic and cannot do the job." It is regrettable that their inventive minds have never led them to investigate the criminal calendars in the trial and appellate courts of both our state and federal systems. Had they done so, they might have gained better understanding of what causes backlogs, and delays, if such exists. . . .47

Opponents of the adversary system, described by Mr. Coccia as "reformers," are not aware, perhaps, that it is the actual trial of criminal cases and their consequent appeals which is clogging trial and appellate court dockets in all of the urban areas. Civil cases — product liability litigation — are definitely second class docket numbers.

In this framework, then, if product liability law is to survive into the 1980's and the twenty-first century, it is essential that the adversary system be utilized, not for the vainglory of its participants, but as the chief incentive for a final negotiated accommodation between the manufacturer of a defective product and one who suffers serious injury. Such a settlement, in fact, should be finalized as soon as all of the evidence is made known to the parties and their attorneys.

No-Fault; or, Refinement of the Adversary System

As we enter the computer age we are still far from solving the massive accident problems that began with the industrial revolution. These cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing. There is a wealth of analogy yet to be developed from the exploding bottles of yesteryear, from lathes on the loose, and capricious safety valves, and drugs with offside effects. There are meanings for tomorrow to be drawn from their exceptional behavior.

— Hon. Roger J. Traynor48

47 Id. at 53.

48 Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 376 (Spring 1965). Former Justice Traynor is probably the most respected judicial authority on products liability law.
It is significant that former Chief Justice Traynor believes that,

"If in time the accident problem is solved through some compensation scheme that covers the basic economic losses of accident victims, it will remain to be seen whether the law of negligence as we know it today in this area (of product liability) will atrophy or will survive in a diminished role to afford additional compensation to victims whose injuries are caused by actual fault on the part of others."\(^{49}\)

"Only if reasonably adequate compensation is assured can the law justify closing traditional avenues of tort recovery," he added, which must be the test of feasibility of "any system of enterprise liability or social insurance designed to replace existing tort law."\(^{50}\)

Under the present "fight" theory of adversary confrontation can the plight of the manufacturer improve? One might urge the equivocation that things are bound to be better because they cannot be worse! For the manufacturer, however, his future holds an improvement in his image as the public is made aware of the rigid policing of products by federal and state agencies, and the prompt discipline of the character of the manufacturing industry is bound to have greater persuasion with a jury of consumers when they are made fully aware, as citizens, of what their government is doing to protect them. Here, again, lay jurors, testing the manufacturer by the measure of the reasonable man, will be more appreciative and aware of the defense of the manufacturer, that the injured consumer did not use the product as that same a reasonable man would have. Product liability law, in its modern dress, asks only for "reasonable" products, and "reasonable" users, and a jury, where a case is well presented, it is to be hoped, will observe this evidence in finding its verdict.

If, as Justice Traynor envisions, product liability cases in the future may be decided under "a compensation scheme," it might be interesting to speculate as to the nature of such a plan. Under the Occupational Safety and Health Act of 1970,\(^{51}\) decisions of the administrative Review Commission, particularly as to the interpretation of the meaning and scope of the general duty clause, have already become a respectable body of law.\(^{52}\)

Under amendatory congressional legislation, similarly, the Consumer Product Safety Act\(^ {53}\) could augment the jurisdiction of its

\(^{49}\) Id. at 376.

\(^{50}\) Id.


Consumer Product Safety Commission\textsuperscript{54} to hear and determine injury-producing product cases, and award schedule damages in all except “fault” cases, which, in turn, could still be decided in the trial courts under the existing system of adversary confrontation.

Such product-injury jurisdiction on a national basis could be augmented to embrace a compensation system similar to that of the Longshoremen’s and Harbor Workers’ Compensation Act,\textsuperscript{55} which assures coverage for those engaged in maritime work on vessels and drydocks who could not constitutionally be covered by state workmen’s compensation acts.\textsuperscript{56} Under this maritime act, a Deputy Commissioner is the Hearing Officer as a representative of the Secretary of Labor who administers the act.\textsuperscript{57} Hearings upon proper notice to the parties are public hearings, and the testimony and other evidence are made a matter of record.\textsuperscript{58} Procedure is based upon due process as provided by the Administrative Procedure Act.\textsuperscript{59}

In the same pattern, however, schedule loss payments for injuries from defective products, based upon a federal program, would appear to have little persuasion for the liability insurance industry. Such a plan would seem to be a trifling venture indeed compared to the present-day liability coverage where the spreading of the risk (the life of insurance) has been reduced to a profitable venture.

Forrest C. Mercer, of the Employers Mutual Companies, of Des Moines, Iowa, speaking before the Product Liability Prevention Conference, at Newark College of Engineering, August 22-24, 1973, at Newark, N. J., emphasized that, “Defense of claims in the next decade has already begun.”\textsuperscript{60}

H. “Mike” Inglish, of the Nationwide Insurance Company, of Columbus, Ohio, speaking before the same group, in describing the rate makeup of Nationwide, pointed out that of each premium dollar, $.47 was paid out in losses and expense costs; $.45 was the expense factor, including allowances for agents, all salaries, buildings, equipment, forms, inspections, other acquisition costs, claims handling, taxes, etc., while $.08 was the underwriting gain, or net profit.

With this picture, when investment income is added to underwriting profits, insurers would not seem to be suffering from expanded product liability and ever-inflated verdicts, which only lead, quite naturally, to higher premiums.

\textsuperscript{56} 33 U.S.C. § 903 (1970); \textit{see, e.g.,} Southern Pacific Co. \textit{v.} Jensen, 244 U.S. 205 (1917).
\textsuperscript{60} Mercer, supra note 8, at 170.
Thus, recognizing that liability insurers are enjoying a profit in writing product liability coverage under the present concept of fault and adversary confrontation, it is probable that they will not launch a campaign for no-fault product liability. The argument for "no-fault" automobile injury reparation was that insurers were paying out to plaintiffs' and defendants' attorneys $.52 of every premium dollar, and, perhaps, elimination of attorneys under this program might have been justified. In the case of product liability coverage, however, if Nationwide can make a profit, it is certain that other insurers are not far behind. And profitable business is not readily modified to embrace unknown factors, such as the totality of federal administration and compensation of injured consumers.

What looms large in the present-day picture is that liability insurers are not making use of the talent of their field attorneys. Rather than establishing rapport, the insurers look upon their field attorneys as some kind of appendage — necessary, but not to be wholly trusted. Yet, in truth, there is not a defense attorney of any competence who would permit his insurer-client to be victimized by an unconscionable verdict of a jury, if he were only authorized to enter into good faith settlement negotiations in a case where he was left with no plausible defense. Moreover, a defendant's attorney should be paid at a higher rate for expert evaluation of the facts of a case, than for an actual trial. The first role, indeed, calls for greater talent. Under the present concept of adversary confrontation, finally, it is certain that defendant's attorneys and plaintiff's attorneys can make the system work if given the opportunity. That is the ultimate that can be accomplished for the future — fair and adequate settlement of bona fide injury claims.

Some quibblers may suggest that "under-the-gun" settlements in product liability cases are only bartering, or trading one commodity for another, and they are quite right. Stripped of its historical facade — its adaptation and analogy to the law of torts and contracts — and skeletonized as modern product liability law, a wholly factual controversy, it is bartering, which was well recognized in the law merchant — and, perhaps, that is where product liability law should have been catalogued in the first instance!