Products Liability—A Problem In Jurisprudence

by Charles W. Babcock, Jr.

In a recent speech on products liability, I outlined several false and spurious "issues" which have been seized upon by some observers—"issues" that sap our professional energies and divert our attention from the real issues. The spurious "issues" include preoccupation with the polar term "safe product," and exaggerated fears of products liability that are too extreme and inaccurate to be helpful.

If these issues are false, what then are the genuine questions in products liability law, the ones to which we *should* devote our efforts? They are, first, the question of liability—under what circumstances shall the manufacturer be said to have erred in the creation of his product?—and, second, the question of damages. On one or both of these two questions rational deliberation will take place.

It is not difficult to formulate a general rule calculated to serve the public good. Consider the business leader in his personal role as a consumer, or the claimant attorney thinking upon the rules that should apply to malpractice cases brought against him, or even the consumer advocate brought to think of himself as a defendant. Each of these, it may be thought, would agree, first, that a defendant's innocence should be protected, for innocence by whatever name is that which any humane system of laws is bound to cherish and protect; and, second, that the defendant should be compelled to respond where he is culpable, but in some reasonable way consistent with the best interests of society as a whole.

Product manufacturers today have, I think, these same concerns: first, that costs, both direct and indirect, made necessary by reason of frivolous, technically ill-founded actions be reduced as much as possible; and second, that there be some reasonable imposition of damages where a product found defective pursuant to a jurisprudentially-sound legal system did cause injury.

The Problem of Expertise

In product liability actions, as in medical malpractice cases, it is necessary that the trier of fact acquire sufficient expertise in the relevant scientific discipline before it may rule in a rational way. Thus we come to one of the most difficult subjects in product liability trial practice today. Much of the difficulty fails to appear clearly in published appellate decisions for various reasons, with the result that those outside the specialty—academicians, other members of the bar and the general public—tend to hear vociferous complaints from the defense and corporate side, but little from the plaintiff's bar on this subject.

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The difficulty is perhaps demonstrable, however, in this way. Let us suppose that an attorney who is established in his community and who has specialized in wills and estates for many years is today sued for malpractice. The short complaint states only that in the will he prepared several years ago for a Mrs. Jones (recently deceased), there was a professional error that has resulted in vast losses for the heirs.

Our attorney, much troubled, aggrieved and insulted by all of this, turns to his files and discovers that Mrs. Jones' will was a complex instrument of sixty type-written pages. Finding no apparent mistake in the will, he promptly files interrogatories and in due course receives these responses:

- The lawyers representing the heirs know nothing about wills, and thus they cannot identify even the page upon which the error appears, much less describe it;
- They will hire experts at some future point to assist them, and later they may thus please themselves to point to the mistakes, *or*
- They have hired experts, but no work has yet been performed by them, *or*
- They have hired experts who have gone over the will and are quite sure something is wrong with it, but their work is not complete, *or*
- [In places like New York and Oregon] They have hired experts whose work is complete and who have determined both the page upon which they think the error was and also at least its general nature, but all of this is a secret that only the lawyers for the heirs may know; and finally,
- The experts are not lawyers at all, *or*
- The experts have law degrees but have never practiced, *or*
- The experts are practicing lawyers but are not in the field of wills and estates (none of them has ever prepared a will) *and*
- The selfsame experts regularly testify to attorney malpractice in all specialties from Admiralty to Zoning, but have had no real experience in any of them.

Our attorney, now outraged nearly to senselessness by all of this, promptly appeals to his long-time friend, the local judge before whom the case pends. He receives only these responses, given privately and off the record:

- All the expertise is inside the wills and estates field, so of course "less highly qualified" experts must be employed to give conclusory opinions.
- He, the judge, is much concerned with the possibility of a malpractice action against the lawyers for the heirs, and thus he dare not dismiss, *and*
- He is also concerned that if he does not dignify this action by permitting it to continue in its present posture, plaintiffs, for whom the judicial system exists, after all, will lose, *or*
- Someone might suggest that the lawyers for the claimants are in violation of ethical rules like this one: "A lawyer shall not accept employment . . . if he knows or it is obvious that such person wishes to . . . present a claim . . . that is not warranted under existing law," (American Bar Association, Disciplinary Rule 2-109 (A) (2), *or*
- Dismissal might give rise to an unseemly civil action for wrongful civil proceedings under rules like those in Section 676 of the *Restatement (Second) of Torts*.

Any American practitioner will recognize that it is unlikely in the extreme that our hypothetical attorney malpractice scenario could occur. And yet any corporate counsel with some experience in the products field will recognize the various seemingly absurd points in the hypothetical, as does the author, as practical realities that occur with disturbing regularity in product liability trial practice—including the private utterances from the bench.

Where expertise is presented, it is all too often facile and conclusionary. Michael Hoenig has written that "our system has degenerated to the stage that a strict products liability case on a complicated question of product performance is often submitted to the jury upon little more than the conclusory opinion of a marginally qualified expert that the product was defective or unsafe or that it could have been made safer." *Products Liability: Trial by Ambush II, NYLJ page 1* (Sept 28, 1978).

Rather than to insist upon a competent inquiry into the relevant discipline, it doubtless would be easier for any overworked trial judge simply to "get the case to the jury" by giving his court over to those willing to give facile, conclusory opinions. As Professor Henderson has noted in the context of design cases, "the judicial tendency in recent years has been increasingly to rely upon conclusory expert testimony in sending design cases to the jury." *Manufacturer's Liability for Defective Product Design*, 56 NC L Rev 625, 626 (1978).

There are few *genuine* timesaving devices in the common law; to permit shoddy, conclusionary testimony from a self-declared "expert" in every field of science assuredly is not one of them. The Advisory Committee Note following Rule 706 of the Federal Rules of Evidence clearly warns the profession of the dangers that lie here: "The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in

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litigation, have been matters of deep concern."

What then is the answer to this? Shall defense and corporate counsel merely rail that marginal experts are liars and thieves, as though a Mark Twain were writing the script? Shall only those in the employ of manufacturers be permitted to testify? Shall the problems be resolved by the drafting of some necessarily broad and unwieldy statute? Clearly none of these is effective or helpful. The best answer lies in the judicial process itself. It is not a welcome answer, for it requires hard work, and it promises no instant gratification whatever. It requires that plaintiffs' and defendants' counsel seek the best witnesses available for presentation to the court, as a nation seeks its best expertise in wartime, in order that the most accurate technology known to mankind may enter the forum and be revealed.

It requires of judges—the admittedly overworked descendants of Solomon and all the jurists of the ages — that they honor their calling and our professional heritage by moving quickly to the merits of a cause and compel the parties to marshal the best expertise available, that genuine issues may emerge.

The sooner we in the law come to admit that there are no facile shortcuts to true knowledge and few if any one-cent solutions to million-dollar problems, the sooner shall we bring this disheveled teenager, product liability, into the great mainstream of the common law of the ages.

The expert problem is not hopeless and overwhelming, as some may think. The finest technological distinctions need not be made. It is one thing perfectly to inquire into the closest questions in the surgical treatment of *angina pectoris*; it is quite another to be able to distinguish a qualified cardiovascular surgeon from a ubiquitous, self-declared, universal "expert" with no medical experience at all.

Obviously, we cannot make the qualifications of experts a mechanical, routine thing; as Wigmore pointed out years ago, that would be too easy, too facile. *"There are no fixed classes of expert persons* . . . A person may be sufficiently skilled upon one question, and totally unskilled upon the next . . . . Since experiential capacity is always relative to the matter in hand, the witness may, from question to question, enter or leave the class of persons fitted to answer, and the distinction depends on the kind of subject primarily, not on the kind of person." 2 Wigmore on Evidence §555 at 634 (1940 ed.) (emphasis in original).

In each scientific inquiry—for that is what a product liability case is—the bench and bar must resist the temptation to throw up their hands in despair and view the discipline in question as so much black magic. Let the court in each case begin calmly and rationally with Sir Isaac Newton, who wrote in 1687: We are to admit no more causes of natural things than such as are both true and sufficient to explain their appearances [and] to the same natural effects we must, as far as possible, assign the same causes . . . As [for example, to] the descent of stones in Europe and in America; the light of our culinary fire and of the sun; the reflection of lights on the earth, and in the planets. ("Rules of Reasoning in Philosophy" in *The Mathematical Principles of Natural Philosophy* 398, Rules I and II (1st ed London 1729).

Testing, experience and knowledge: on these firm bases competent expertise is and must be grounded.

We must forthwith correct the present abuses in the expert witness area, not because the manufacturers want that or because the insurers want it but because it is right, and consistent with our best traditions. As we correct the abuses we shall as soon move away from the arbitrary and the capricious.

There is another reason for action: reform of some sort is inevitable. The people are much more astute than some think. So soon as they learn that cursory proceedings with conclusory experts of no qualification are resulting in windfall judgments and large attorney fees—costs they ultimately shall surely pay—reform will not be far behind, and it is most likely to be in the form of hasty, unwieldy legislative reaction.

As Professor Henderson has warned us, in slightly different context: "Amid all the current discussion . . . an important point is apt to be overlooked: there is more at stake than can be measured in dollars and cents. Indeed, the integrity of the judicial process may hang in the balance." (Henderson, supra at 625)

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