Products Liability: The Gathering Storm

Richard A. Epstein

IN APRIL 1976, Congress authorized the expenditure of $135 million for a mass immunization program against the swine flu. Immediately thereafter, the Department of Health, Education and Welfare (HEW) sought to make contracts with several pharmaceutical firms for the delivery of large quantities of the vaccine by mid-summer. The effort quickly became snagged when the pharmaceutical firms found themselves unable to obtain comprehensive liability insurance. At issue was the threat of lawsuits brought by persons who would claim, not that the vaccine had failed to conform to HEW specifications, but that they had been given the vaccine without being adequately warned of its possible adverse effects and had suffered injury. This threat stalled the program until August when Congress passed special legislation that, in substance, made the United States the sole party defendant in all suits based upon the failure to give adequate warnings. In December 1976 the program was temporarily halted when a statistically high incidence of a paralysis known as Guillain-Barré syndrome was detected in persons who had received the vaccine. The original consent forms prepared by HEW did not mention the Guillain-Barré syndrome, and it is likely they were deficient under current legal standards in several other material respects as well. The swine flu program never did revive.

As of March 31, 1977, over $300 million in claims had been filed against the United States for such diverse losses as common colds, sterility and, of course, paralysis. Responsible estimates suggest that another 1 billion dollars in claims remain to be filed. The total of damage pay-outs and legal fees could well exceed the combined costs of all other phases of the program. The age of products liability is upon us.

The swine flu cases represent the most obvious injection into the public consciousness, to date, of that branch of tort law known as products liability. Tort is generally concerned with setting out the conditions under which one person is entitled to recover damages for harm to his person or property inflicted by another. So defined, tort law reaches out to embrace everyday nuisances, auto accidents, medical malpractice cases, and, of course, products liability suits—the subject of this essay.

Concerned generally with the tortious liability of manufacturers and retailers, whether of candy bars or industrial machinery, the law of products liability has undergone numerous changes—some major, some minor—that have, taken together, profoundly increased the probability that a successful suit for damages will be brought against the maker or seller of a product. The present concern with products liability does not arise so much from the changes in the law as from the news, sometimes exaggerated, of insurance rate increases and business failures stemming from these changes. We have by no means reached a crisis in the law of products liability, but we have been experiencing mounting dissatisfaction. Some common product lines—ladders and machine tools to name but two—have been severely affected, and there is a real possibility that major dislocations could occur. It is worth noting that the greatest concern is heard in states like

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California where the changes in the law have been most dramatic.

We could, of course, concern ourselves with symptoms, but we would be better advised to deal with causes. The underlying questions are, what are the appropriate liability rules in products liability cases? And how, if at all, have the courts departed from them?

Tort or Compensation?

Much of the present confusion in and about tort law can be traced to the failure to identify that law's central purpose. It is commonly said that the purpose is to provide compensation that will make injured persons whole—to the extent that money can. Whatever the intuitive appeal of this proposition, we can see on close examination that it provides an incorrect framework for evaluating particular rules of tort law. The clue to the error lies in the original meaning of the word "tort." Derived from the Norman French, the word means *wrong*. It is one person's wrongful conduct that results in harm to the person or property of another that lies at the foundation of tortious liability.

Compensation may well be needed for self-inflicted harm, or for harm caused by earthquakes or floods, but such things are not within the province of the tort law no matter how grievous the injuries suffered. A need for compensation is relevant only if the plaintiff's cause of action—his claim for relief—is first established as a matter of legal principle. The fact of harm itself should carry no weight in determining whether a tort has been committed. There is no presumptive injustice in the tort law solely because a plaintiff was denied compensation, just as there is no presumptive injustice because compensation is awarded.

But it may be asked, what judicial principles now operate to determine whether compensation is appropriate in any particular case? And where, if at all, has products liability law gone wrong? To answer these two questions, if only in approximate terms, we begin by noting that the responsibility for any particular injury must be attributable to one or more of four types of causes:

(1) the conduct of the defendant,
(2) the conduct of the plaintiff,
(3) the conduct of any third party, and
(4) some natural force or event, often called an act of God.

In the traditional view of the subject, the defendant in a tort case could not be held liable for acts of God or the conduct of third parties. His answer to a suit claiming damages would not be, "You are not hurt," but instead, "I did not do it." Where, however, the defendant's conduct was causally responsible for the plaintiff's injuries, he could not escape liability merely because some natural event or the conduct of some third party combined with his own conduct to bring about the plaintiff's harm.

The plaintiff's conduct raised special complications. Where it was the sole cause of injury, he had—obviously—no one to blame but himself. Where his own conduct and the defendant's combined to cause his harm, the traditional view denied him recovery except under limited circumstances. Finally, where the plaintiff deliberately encountered a known risk, or even a risk that was "open and obvious" to one in his position, the loss was his alone to bear.

Until recently these basic principles were used with little modification to determine liability in products cases. The defendant could be held responsible for harm caused by the ordinary use of his product where some defect in that product created or brought about the harm. To take a classic example, the plaintiff could recover if a Coke bottle exploded in his hand while being opened. Yet this cause of action would be barred if some third party shook or mishandled the bottle so as to make it dangerous or unsafe, or if the plaintiff himself misused the product. To quote Justice Traynor in his 1944 opinion in *Escola* v. *Coca-Cola:* "The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use and should not extend to injuries that cannot be traced to the product as it reached the market."

Thus, in determining liability, the standard tort law took fairly into account the contributions of plaintiff, third parties, and acts of God—with the defendant being held liable, roughly speaking, where his own conduct was causally dominant. As it had developed, this law had already abandoned some unrealistic limitations of earlier days, such as the so-called "privity rule," which at one time provided that a user of a product could sue its manufacturer only if he had directly purchased the product from him. It gave not only subsequent purchasers but even innocent bystanders the right to sue manufacturers for the harms caused by dangerous or defective products. Finally, it had accepted a theory of strict liability whereby a manufacturer or seller could be held responsible for the harm caused by his defective product even if he has exercised all possible care in its preparation or sale.

All this is to say that products liability law as fashioned generally through the late 1960s represented a mature and sophisticated set of judgments about appropriate liability rules. If those rules were still operative today, there would be no popular concern, no expert studies, and no cry for legislative reform.

What Has Changed?

There have been several important shifts in the substantive law of products liability. First, dramatic changes have been made in the treatment of a plaintiff's conduct: the "open-and-obvious-risk" defense has given way to a rule that permits the recovery of damages to be barred only by the plaintiff's "voluntarily and unreasonably proceeding to encounter a known danger," narrowly construed.

One recent California case illustrates the extreme to which it is possible to go. In *Buccery v. General Motors Corp.*, the plaintiff, Buccery, while driving a van manufactured by General Motors, was struck in the rear by another automobile. Upon impact, Buccery's head was thrown back against the rear window of the cab and he was injured. The van was not equipped with a headrest, and none was required by statute at the time. The trial judge directed the jury to enter a verdict in favor of General Motors, saying in effect that its case was too strong for argument. The appellate court reversed that decision and instructed the trial judge to allow the jury to decide whether the van was dangerously defective and, if so, whether Buccery had assumed the risk of injury associated with that defect. The court also held that this assumption-of-risk defense was not established by the open and obvious condition of the van, inasmuch as Buccery did not perceive the "magnitude" of the risk in being hit by a car going five miles faster than his was. A routine rear-end case has been transformed into a major products liability action.

The story has repeated itself in other areas of the law. Whereas once it was impossible for a worker to recover from the manufacturer of a machine tool when he was injured because he deliberately put his hand near a moving part, in many jurisdictions today the jury may consider the reasonableness of that conduct, and the employee is allowed to invoke the demands imposed on him by his employer to show that his conduct vis-à-vis the manufacturer was reasonable. Likewise, the requirement that the product be used in its normal and proper way has yielded to an alternative rule that places upon manufacturers the burden of protecting the users of their products against the "foreseeable misuse" of those products. The plaintiff who neglects a warning or disregards a safety precaution may still be able to recover full tort damages. The passenger who neglects to buckle up may recover from a manufacturer for the very harm his seatbelt could have prevented. In most jurisdictions the plaintiff's own negligence is not a defense in a products liability action, even though in other contexts that negligence might serve to reduce—if not eliminate—recovery. A speeding motorist may recover full damages from an automobile manufacturer for injuries that he himself could have avoided by reasonable care. A plaintiff who is burned by throwing perfume upon a lighted candle can recover from the manufacturer or retailer of the perfume because they did not warn that perfume was flammable.

A dual standard of responsibility has crept into the law. Conduct that would be sufficient to hold a person responsible for injuries inflicted upon another is ignored or overlooked when that person instead injures himself and then seeks compensation from the manufacturer. Defenses based upon the wrongful conduct of the plaintiff are by degrees being eliminated from the law.

Hand in hand with the contraction of available defenses has gone an expansion in the types of causes of action open to the plaintiff. The concept of defect, never well explained in products liability cases, has now been so interpreted that it is possible to argue that any product which can be made safer, regardless of cost, is a product which the jury can find unsafe. In this connection, two types of cases are of special importance, "design defect" and "duty to warn" cases.

Design defect cases should be placed in sharp opposition to construction defect cases. The latter involve such products as the Coke bottle made with weak glass or sealed under excessive pressure. Design defects, on the other hand, involve such products as the machine tool that is dangerous because an additional guard or safety device could have been installed to protect the worker who ignores the safety devices already in place; or the car whose gas tank arguably could have been repositioned to resist the explosion that occurs when that car is struck by another moving at speeds between 65 and 85 miles per hour.

Perhaps the most graphic illustration of a design defect is a case from the state of Washington, *Doyle* v. *Reid-Strutt Inc.*, where the plaintiff, Doyle, recovered $750,000 for the loss of one leg below the hip. The leg was lost when caught in the gears of a screw auger machine sold and installed by the Reid-Strutt Company. Shortly before the accident, Doyle's fellow employees had removed a panel with sledge hammers and crow bars in order to do repair work on the machine. When finished, they replaced the panel with a single piece of cardboard instead of restoring the equipment to its original condition. Doyle stepped on the cardboard in the course of his work and fell, catching his leg in the moving parts below. The case was sent to the jury to decide whether the injury was caused by defective design, and a verdict was entered for Doyle. The defects in design on which he relied were that the machine was so solidly built that it was difficult to assemble and disassemble, and that it was not equipped with an automatic interlock device that would have prevented it from operation when its panels were not securely in place. By use of such design theories, Doyle was thus able to impose design obligations upon the company to overcome the gross abuse of his fellow workers and his own possible neglect.

The recent expansion of liability in design defect cases marks one of the major transformations of the law. In making a defense in these cases, the manufacturer may be able to persuade the jury of all the delicate tradeoffs that were made in designing a "safe" product (though the question of "how safe is safe enough" is never answered by the courts). But the problems involved in doing so are severe. To collect, the plaintiff need only "redesign" the product after the fact so that the injury he indeed suffered would have been prevented —even though the defendant originally had to design the product to deal with many possible types of accidents, not just the one that in fact occurred. Within this framework it seems only fair that the plaintiff should bear a heavy burden before he can take a case of unsafe design to the jury. Yet today it appears in some jurisdictions to take little more than the unelaborated suggestion of an alternative design from the plaintiff's expert witness for a jury issue to arise. Even where the defense is successful, the costs of major litigation and damage to reputation are left uncompensated.

Sharp limitations on liability are needed in design defect cases. Where the legislature is persuaded after comprehensive study that certain design standards are appropriate, it can pass laws to make them mandatory, and these laws could well permit private causes of action to injured parties. But without legislative action of this sort, a defendant should at least be protected if he has adopted a design in substantial use in his or in a related trade or business.

The fashionable rule today measures the defendant's design choices against a "state of the art" standard determined not by these prevailing practices, but by technological and market *capabilities*. This rule is said to be essential in situations where an entire industry may have "unduly lagged" in adopting appropriate safety standards. The rule has intuitive appeal, although there are to my knowledge few, if any, instances in which backward industries have been adequately identified. But even assuming they exist, the emphasis upon capabilities is beset with major difficulty.

It is much harder to litigate the question of capabilities than the question of current practices. The former has thrust complicated questions of cost into the foreground of litigation. Yet it is difficult to identify which costs are relevant and to measure those that are. The effects of any error in measurement, moreover, are apt to be very severe, because even slight variations in cost estimates may lead to very different conclusions about the need for certain safety precautions. All of these calculations must be made, not as of the date of injury, but as of the time when the product was first placed into the stream of commerce, which could be years before. The best and most progressive firm in any industry is exposed to the dangers of hindsight in determining what was or was not feasible—dangers akin in application and effect to those of retroactive legislation.

Finally, the capabilities standard may in fact reduce personal safety and increase accidents. The firm that makes its product safe enough to withstand all manner of abuses may make it so expensive to acquire and so difficult to use that consumers will shift to more dangerous products which promise greater convenience. A safe ladder is of little use if left unpurchased in a store or unused in a closet while a homeowner is injured climbing on a table—a point universally neglected in design cases.

Similar caution and restraint are needed in duty-to-warn cases. Here too there is a danger that juries will find any warning "inadequate"—either because it says too little or because it says too much—and will hold defendants responsible for injuries caused in large measure by the conduct of the plaintiff or a third party. Should a manufacturer be held responsible because he has not issued a general warning that moving blades on farm equipment could become sharper with use? Or that steaming hot water inside a vaporizer could scald a small child? And do not the swine flu cases illustrate the potential power of the new duty-to-warn cause of action?

Duty-to-warn cases raise in a somewhat different context the problems that plague the design defect area: expensive litigation, retroactive standards, and the recurrent danger of reducing personal safety while insulating firms from liability. A person bombarded with warnings about the trivial and obvious may ignore the few important warnings that come along.

The continued expansion of design defect and duty-to-warn cases could, in the end, eliminate the tort from tort law. If defendants are required to warn against—and guard against—any and all hazards, the result will be that all accidents will in the eyes of the court have but one possible cause, the defendant's conduct.

Why Is It All Done?

Cost Internalization. First, as argued by Justice Traynor in the famous case of *Greenman* v. *Yuba Power Company,* it is often said that "the purpose of such [strict] liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves." The point is quite sensible when applied to construction defects: it works well with Coke bottles having cracked sides. But the argument contains its own limitations. An auto passenger is not powerless to fasten his seatbelt; a teenage girl is not powerless to abstain from throwing perfume on lighted candles. And all cases of product misuse and modification involve harm that a manufacturer may well be "powerless to protect against," whereas users and others in the distribution chain can protect against it with but little difficulty.

Incentives. A closely related argument is that the expansion of products liability was necessary to give producers the proper incentives for developing safe products. Yet this argument too contains its own implicit limitations. In many situations, incentives belong elsewhere in the chain of distribution. A manufacturer of machine tools cannot compel purchasers to keep them in proper maintenance and repair; he cannot prevent the removal of safety guards and warnings; and he cannot compel individual workers to observe all the required safety precautions. Yet manufacturers, as we have noted, have been held fully liable for damages in precisely these situations. Employers are often in a better position than the original manufacturer to prevent work-site accidents by controlling the work environment or by giving individual employees warnings and instructions about a product's hazards and proper use. General Motors may have billions in assets, but it cannot prevent drunks from speeding or incompetents from rebuilding its car engines. Consideration of incentive effects does not irresistibly lead to a liability rule that ignores the contributions of plaintiffs and third parties. Even if we believed that individuals (as plaintiffs) and firms (as third parties) did not respond to legal incentives, we should not be overhasty to endorse any elimination or contraction of the available products defenses. The destruction of these important defenses, at the very least, may impose perverse incentives upon the defendant whose conduct the law does not seek to regulate. Moreover, it creates the possibility that the good and sensible firm will be dealt with as harshly as the backward and incompetent one, when the very purpose of the law should be to distinguish between them.

Spreading the Loss. Last, it is argued that the expansion of products liability will spread throughout society the cost of compensating individual accident victims. As an initial point, the spreading argument is so powerful that it can eliminate not only the need to show negligence, not only defenses based upon the plaintiff's conduct, but the entire tort law. If the welfare of the injured party becomes the paramount goal, there is no reason why the law should retain the requirements of causation and of product defect.

There are other difficulties as well. Indeed, the full implications of the loss-spreading arguments are rarely confronted. One question is why there is any need at all for a tort system of third party liability, with its cumbrous and expensive machinery of private litigation. A comprehensive system of first party insurance that compensates each person in accordance with the severity of injury seems clearly preferable if "needs" alone are to be taken into account. Under such a scheme, compensation should not be limited to those who are "lucky" enough to be injured by some chance contact with a defective product: the victims of crime, illness, earthquakes and, indeed, self-inflicted harms should be entitled to precisely the same level of protection because they have precisely the same needs.

A second question concerns the level of benefits that should be paid under the scheme. Here the courts have implicitly assumed that each individual claimant should receive generous damages of the kind awarded under the tort system. Yet other systems that have individual compensation as their primary objective have moved sharply away from these high benefit levels. There are, for example, substantial limits upon recovery for pain and suffering and economic loss in no-fault automobile insurance and in most workmen's compensation plans. Likewise, various medical and disability programs provide much more restricted forms of coverage. Why are such limitations inappropriate under a system in which need is the major source of social entitlement?

A third question concerns the source of the contributions to the general compensation scheme. If the purpose of the legal system is to give the citizen a sufficient cushion against major disaster, we are faced not with questions of corrective justice in the individual case, but of basic taxing policy, as in the case of social security. These questions, like other taxing questions, should be addressed by the legislature, where the interdependence and coordination of the many distinct benefit programs can receive comprehensive scrutiny. Only in a collective setting can we make a prudent weighing of the overall costs and benefits of any particular compensation scheme.

Conclusions

The transformation of the tort law in products liability cases has been great indeed, and in my view it represents a clear instance of a misguided judicial approach to public policy questions. Torts has always been divided into two general parts. The first is a pure form of public regulation, designed to protect individuals from the aggressions of strangers. The second is an extended form of private agreements, designed to allocate the loss between persons bound by a web of social understandings. In fleshing out the unstated obligations of these relationships, judges at one time were anxious to make their rules conform, insofar as possible, to the implicit shared expectations of all the parties. Today, by a conscious adoption of judicial regulation, most courts seem less interested in mirroring shared expectations and more intent upon revolutionizing them.

I do not wish to argue that all such judicial regulation is unwise in products liability actions, as it is clear to me that private contracts between manufacturers and users are of limited utility in these situations, given the number of times a product may change hands once it is beyond the manufacturer's control. Yet before we make the obligations of manufacturers too onerous, we should bear in mind the perils of such expansion. There is the risk of standardless litigation. There is the risk of making manufacturers and sellers bear the risk of loss when others in the chain of distribution, including the injured party, are better able to prevent the harm in question. There is the risk of high administrative costs. There is, finally, the risk of ignoring first-party mechanisms for insurance that may better provide minimum protection for injured parties.

There is, in short, the great danger that, as a society, we will ask too much from the manufacturers and suppliers of goods, and too much from an expanded tort system itself. Should that day come—and it may—then what today is a troublesome problem for certain firms and certain industries could well become a major social crisis. ■

An Ambiguous Beginning

Will Carter Put Out the Fire?

David R. Gergen

AT A SEMINAR in Washington this summer, a young lady arose to challenge the attorney general of the United States. "If you believe in free markets, as you say, Mr. Attorney General, how can you justify the fact that the government now regulates so much of our society and intervenes so heavily in our personal lives?"

"Well," replied Griffin Bell, "the President and I both like to answer that by recalling what a man said after he had been charged with public drunkenness and setting his bed on fire. 'Your honor,' he said, 'I plead guilty to being drunk the other night, but the bed was on fire when I got into it.' "[1]

Bell had a telling point. For those who believe that the government excessively interferes in private decision-making, the problem flared up long before the Carter team came to Washington, and no one in the new crowd can reasonably be expected to bear the blame.

Yet, six months after its arrival, there is mounting evidence that the Carter administration is having considerable difficulty of its own in damping the fires of governmental regulation. It has hauled out all the engine companies with a great clanging of bells, and in some areas it has indeed made progress. But in others it only seems to be fanning the flames.

Just as the Ford administration learned to its chagrin, the Carter administration is also coming hard up against the fact that regulatory growth has achieved a momentum of its own that even the most ardent anti-regulators have trouble in stemming. Because of statutes already on the books and the mentality that seizes federal agencies, government regulations have become like government expenditures: many of them are now "uncontrollable." As one of the leaders in regulatory reform under the Ford administration puts it: "We've reached the point where it is unrealistic to think that a President can simply roll back the tide of regulations that has swept over us. The most we can hope for now is to prevent a surge of new ones, and even that is going to take extremely dedicated, persistent leadership from the White House."[2]

Jimmy Carter never tried to convert regulatory reform into a major campaign issue in the same way as Gerald Ford, but since coming into office, he has often spoken of his commitment to reducing regulations. In a message to Congress on March 4, for instance, Carter said: "One of my Administration's major goals is to free the American people from the burden of overregulation. We must look, industry by industry, at what effect regulation has—whether it protects the public interest or whether it simply blunts the healthy forces of competition, inflates prices and discourages business innovation. Whenever it seems likely that the free market would better serve the public, we will eliminate government regulation."

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[1]Statement made at a private seminar in Washington, D.C., this summer.

[2]This quotation and others where the speaker is not identified come from officials who wished to remain anonymous.