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# Book Reviews: Product Liability

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design. These are but a few of the objections to No-Fault that can and most likely will be made.

*Ending Insult to Injury* recognizes all of the objections your reviewer could conjure up while reading the book and more, and meets them head-on. He even discusses<sup>8</sup> the constitutionality problems his proposal will encounter. There are many who will scoff at the author's explanations, justifications, and rationalizations, but he does not shirk from defending No-Fault from these potential critics.

Professor O'Connell is an evangelist preaching the gospel of No-Fault. He makes no effort to conceal his evangelistic fervor. This may be unfortunate because it causes him to appear to lack perception and objectivity. On the other hand, it may be that a less forceful presentation would not gain the attention he believes No-Fault deserves. No-Fault product liability and malpractice may not be the solution to the evils of our present system, but we cannot be certain without fully exploring and debating Professor O'Connell's proposal. And we cannot explore and debate the proposal without reading. The book and No-Fault should not be dismissed out-of-hand as "pie in the sky." Less than fifty years ago flying to the moon was not only "pie in the sky," it was prima facie evidence of madness. Who knows?

8. Written with James E. Souk.

PRODUCT LIABILITY: Law, Practice, Science. Edited by Paul D. Rheingold† and Sheila L. Birnbaum,†† Practicing Law Institute, New York City, 1975. Pp. 1113. \$25.00. Reviewed by Eugene J. Davidson.‡

Ecclesiastes<sup>1</sup> tells us that "To everything there is a season." The season for product liability litigation is at hand. As Judge Eldridge states in the introductory article to this symposium issue, "Increasingly, the courts and the legislatures have turned their attention to the area of product liability . . ."<sup>2</sup>

The public has cause to question why almost half a century had to elapse before the seeds sown in Judge Cardozo's classic opinion in *McPherson v. Buick Motors, Co.*<sup>3</sup> would begin to mature. Even after this lengthy period there remain many practicing lawyers who are not familiar with the nuances of product liability. Their problem may stem from the dance-like manner in which our common law develops. Two

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1. *Ecclesiastes* 3; 1.

2. P. vii, *supra*.

3. 217 N.Y. 382, 111 N.E. 1060 (1916).

steps forward and a hesitation followed by another step forward and another hesitation. Unless the lawyer is on a constant alert, this routine may pass by him unnoticed. This is particularly true in the product liability area. Lawyers too often do not have—indeed the pressures of time and work load may preclude the opportunity to accumulate—the specialized knowledge needed to represent properly clients in a product liability claim. They, therefore, require a ready reference,—a hand-book—to which they can turn when the occasion arises. This is what *Product Liability, Law, Practice, Science* is all about.

The book, perhaps work is a better term, is not a text and, therefore, is not restrained by the author's perspective. Rather it is a comprehensive compendium of those items in the product liability literature considered by the editors to be the "most valuable to the practitioner" with stress on the "practical article wherever possible." Each of the 11 chapters of the book and each of the articles within the chapters is preceded by an editor's pithy note capsulizing the material to be discussed. These stage-setting notes, commendable for their restraint and avoidance of the too common failing of endeavoring to restate the article's thesis, assist the reader to obtain a more meaningful appreciation of the ensuing article.

The editors' task, to reformulate a phrase from Mr. Gilbert, "was not an easy one." How does one choose between excellent articles on the same topic; between less than excellent articles in those areas wherein little noteworthy material exists? Mr. Rheingold and Ms. Birnbaum have valiantly and with considerable success applied themselves to their self-appointed task.

The selections include such basic discussions as Dean Prosser's *The Fall of the Citadel (Strict Liability to the Consumer)*, an excerpt from Professor Russel K. Weintraub's excellent article entitled *Choice of Law for Product Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflict Analysis*, and four valuable articles by Professor Dix W. Noel. The editors have also reproduced several student articles and notes. In doing so they made difficult decisions, and while there are some who may suggest other selections, this does not fault the choices made by the editors.

The work's organization is ideal for the busy practitioner who requires assistance with minimal research. The opening three chapters deal respectively with the bases for imposing liability—strict liability, negligence and statutory liability. The articles cover three areas of negligence; to wit, duty to warn, test, and design with the duty to use care being, as the editors state, generally subsumed under these three theories. Chapter Four contains three articles, one of which is Dix W. Noel's discussion of *Abnormal Use, Contributory Negligence and Assumption of Risk*. Chapter Five considers the rights of what are termed "Special Parties," including minors, bystanders and users, and the potential liability of those who operate in the real estate field. This latter article should be a must reading for lawyers who represent small

builders and real estate operators—a group which is seemingly somewhat unsophisticated in the product liability area. Chapter Six is concerned with “Special Products,” Chapter Eight with Damages and the remaining Chapters Seven, Nine, Ten and Eleven deal with litigation aspects of a case.

A special word should be said concerning the chapters dealing with litigation. A leading and highly successful defendant’s counsel recently informed your reviewer that the principal “blinder” worn by the novice in product liability litigation is a predisposition to treat and to prepare his case in the same manner as he prepares an automobile collision case. Those knowledgeable in the product liability area will not take issue with Judge Eldridge’s statement that “As recent Maryland cases suggest much of modern Product Liability is old law in a new hat.”<sup>4</sup> But it is precisely this new “hat” which makes it imperative for the lawyer to recognize and take into account the nuances somewhat peculiar to the trial of a product liability case.

For example, it is axiomatic that in product liability litigation, plaintiff must establish (a) a defect and (b) a causative relationship. Frequently, establishing them is easier said than done. As co-editor Rheingold observes in his article, *Proof of Defect in Product Liability Cases*, “probably more product liability cases are lost by plaintiff, at trial or on appeal, on the basis that the defect has not been proved or has not been connected with the eventual injury, than any other single basis.”<sup>5</sup>

The difficulty in most cases is that direct proof of these factors is lacking so that counsel must rely on circumstantial evidence. Unfortunately for him and his client, the circumstantial evidence too often addresses itself to the question of “could” and not “did” the alleged defect cause the accident. Mr. Rheingold’s exploration of the matter and its ramifications should be of great assistance to counsel facing this predicament.

An article which demonstrates how to obtain the evidence through the imaginative use of pre-trial techniques is *Value of Discovery in a Product Liability Case* by Albert F. Hofeld.<sup>6</sup>

Mr. Hofeld discusses a case in which plaintiff suffered severe burns when gasoline was emitted from his farm tractor. Plaintiff’s expert suspected the existence of a defect in the fuel gauge filler cap which permitted a pressure build up in the fuel tank. Acting on this suspicion, plaintiff’s counsel issued interrogatories designed to disclose the extent to which the defendant (the tractor manufacturer) participated in the cap’s manufacture. These answers disclosed that the defendant supplied

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4. P. viii, *supra*.

5. Pp. 808-23 at 808. Reprinted from 38 TENN. L. REV. 325 (1971). Mr. Rheingold divides proof of defect into six basic categories: nature of the product; pattern of the accident; life history of the product; similar products and uses; elimination of alternative causes and happening of the accident.

6. Pp. 883-902. Reprinted from 14 TRIAL LAW GUIDE 2 (1970).

components to a subcontractor for use in assembling the cap. This led to further inquiries which disclosed that although the defendant purchased these components from other concerns, the components were made in conformity with defendant's blueprints. Armed with this knowledge, plaintiff's counsel called for and examined the blueprints, thereby learning they had been revised to add a cautioning note regarding the maintenance of a breather hole. Additional demands produced documents showing the defendant's employees were aware of defects in the placement of the breather holes; that the stocks at the manufacturing plants were ordered reworked to correct this defect, but stocks in the field were ordered used without reworking. These documents also enabled plaintiff's experts to establish that the cap on his tractor had not been manufactured to the blueprint specifications so that it did not have a properly functioning breather hole and was easier to loosen than it should have been.

The foregoing obviously required painstaking and persistent efforts which paid off in the production of evidence permitting plaintiff's counsel to frame the necessary hypothetical question as to the cause of the accident. These are just two tidbits from the book's large collection of interesting and informative articles.

In summary, this book does not seek to develop new theories—it only collects existing materials on the law, practice and science of product liability. Perhaps one may inquire, why then is there a need for the book? The answer should be obvious. It saves the practitioner the time necessary to collect the materials and it makes choices in the existing literature which many practitioners, including the experts, may find it difficult to make. It represents a most substantial effort and its almost 1,000 pages of text are well worth the modest price.