SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

APRIL 11, 1977

Meeting called to order at 9:06 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
Senator Bryan
Senator Foote
Senator Gojack
Senator Ashworth
Senator Sheerin

ABSENT: Senator Dodge

AB 342 Relaxes requirements for certificate of permission to perform marriages and repeals county clerk's authority to prescribe additional regulations.

George Flanda of the Wedding Chapels stated that the original bill, as passed in the Assembly, had been amended considerably. So this amendment makes only one simple change in the existing statute. That is reducing the control or prohibition of ministers obtaining their permits to perform marriages from a permanent felony background, to one that would be within a 10 year period. This alteration would put the ministerial prerequisite for the permission more in line with physicians, physical therapists, attorneys, etc. As it was before a felon could not perform this service with a felony record.

Vaughan Smith, Carson City Clerk stated that the 10 year requirement was very palatable and they would agree with the bill as amended, as this still gives them some control over the licensing.

SB 426 Limits civil actions based upon products liability.

Frank Bender, Bender Warehouse Company in Reno stated he had a personal interest in this bill and had requested Senator Gojack to introduce this. The reason he requested this bill was there was a fork truck that was purchased from Clark Equipment Company 30 years ago and this particular truck is now the subject of a product liability suit. The truck itself had been sold 4 or 5 times, the last person to obtain it got it off a junk heap and the thing had actually been cut in half. The guy put it back together and then the truck was the basis of an industrial accident and the guy is now suing Clark Equipment Company. So there has to be a statute of limitations. How can you take a 30 year old truck that has been modified and even begin to have a law suit on the original manufacturer. Also, total premiums for product liability are going out of sight. You can hardly carry insurance anymore and if you are a small manufacturer they

just won't insure because there is no lid on it and no way of knowing what their liability might be. He submitted some written material on liability insurance (see exhibit A).

George Vargas, American Insurance Association stated the the products liability is becoming as critical in the insurance field as was malpractice or automobile insurance. Many clients are either going bare or going out of business because of the lack of availability or high cost of product liability coverage. He feels that there should be an 8 year statute on product liability. He stated that in the bill there is protection if the product is manufactured and designed in accordance with prescribed standards existing at that time, that this is something close to the state of the art situation, and that there is a basic fairness there. In our economy we have a vast number of products which have benefited our way of life, but inevitably those products, when they start out are not the ultimate in sophisticated technology which they might be 50 years later. He feels that most of the bill is a matter of basic common law, but they have been modified by various court decisions to the point that there is a great problem originating today in products liability. So they support this piece of legislation.

Lynlee Manning, Registered Mechanical Engineer stated that he has great sympathy with Mr. Bender's problem but he feels that this particular bill is not the solution. He has served as a expert witness in many product liability suits on both sides and there are a number of provisions in this bill that he does not feel are in the public interest. Because of quite a few successful suits, the manufacturers are going back to better internal policing and higher standards. He believes that the cure is not in legislation but in more responsible design and design prompted by court decisions. He feels that a limit on recovery might be reasonable in some part of some product that was in continuous use and failed by wearing out. However, in a case of that sort even, determination really ought to be made for the exact reason for the failure and judgment reserved until the determination was made. This would help establish liability but would also provide data for future designs and eliminating defects. He doesn't feel that you can put a statutory limitation on it, that each case must be looked at individually to determine who is liable, and if there is any liability involved at all. He also has a problem with the section on codes and standards. Technology is so complicated today that even where codes and standards are applicable they are applicable only to a very limited part of most products. It appears that this bill would not cover if there was a filure in some part of a product that itself was not covered by the code and standard, and some other part was covered. He also believes in section five, where it eliminates punitive damages, is improper. A manufacturer might easily find themselves in a position where it was cheaper to pay occasional damages rather than change

a defective design and put in that position, anyone would have a difficult time making a decision to change. They have an obligation to the stock holders and there is a profit incentive and making a decision that would cut profit is always a difficult thing to do. However, punitive damages put the manufacturer in a position where he is not tempted to allow injuries to continue, because it is cheaper then changing a design. There might also be a revision of the current industrial compensation laws some way, so if there is negligence by an employer he can be held accountable just as anyone else. In many cases he has found negligence and because of the coverage of the NIC law they could not be held accountable. He feels that the place to hold anyone accountable is in the courts and they need fairly wide discretion in order to establish equitable justice, particularly when dealing with complex technology. He feels this bill would limit the freedom of all parties concerned.

Neil Galitz, Las Vegas stated that there is a significant difference between a claim and a lawsuit, and he was in disagreement with the first gentleman. He believes this bill is anti-consumer legislation that will insulate the insurance industry and the manufacturer from fair and legal responsibility and will substantially increase the hazards of the market place. The allegation that insurance is expensive because of legal doctorine has been found to be unfounded by the United States Inter-Agency Task Force on Products Liability. The United States Senate Small Business Committee interim reports there is no geniuine crises in products liability. They found that in all of the areas that we are dealing with, in dealing with insurance there is a total dirth of any responsible realistic information and a limitation is truly a time bomb. All of the long term hidden injury defect cases would be barred under this bill. Also, in the matter of alteration he feels that if the manufacturer knows that the product should not be altered in a certain way, and does not warn people, then certainly should be held responsible, even if he in fact did not do the altering. Standards are minimal or non-existent, the best is not incorporated into the standards, and this is something that the jury should consider and does under present law.

Peter Echeverria, Attorney stated that products liability field is the largest growing body of law in the US today principally because we seem to be on a course of construction of medicines, drugs, equipment, machinery, those things in which we place our life everyday to our total detriment. First, with respect to the statute of limitations, a 6 year statute in a products liability case is totally unreasonable and impossible. Say the neon sign on top of the Riverside Hotel, today, that has been there at least twelve years, were to topple tomorrow and come down upon the people on the sidewalk because of a bracket, toggle bolt or cable that was designed to last more then 50 years, then that would be a products liability case. If you passed this section of the

bill you would grant immunity to the manufacturer of the equipment that hung that sign from the top of the Riverside Hotel. If you pass this statute you are going to encourage every manufacturer of a product that has old goods upon his warehouse shelves to ship them to Nevada because if they are older then 6 years they are immune.

Mr. Gill, Attorney from Las Vegas and a member of the Board of Governors of the State Bar wished only to state they are opposed to this legislation.

Bob Bukalu, Attorney from Las Vegas stated that if it weren't for the product liability suit, we would not have the advancements in safety we have. If we revert to certain standards all we will do is lower the standard of the manufacturer to just what can get by. When you talk about insurance, what does it cost to mend bodies that are destroyed by having the standards lowered, and they will. Lets not take out the punitive damages either, why allow them to do these things under impunity. Lets get the responsibility on the employer.

Richard Meyer, Attorney stated that Mr. Vargas would have you believe that there is nothing new here. There are 6 different provisions in this bill, and only one of them is a codification of the common law. Very few minor injuries occur from defective products, they have the potential to maime and kill. If the people in the insurance industry want releif, they should not limit recovery opportunity for injured people. What they should do is manufactur their products safely. By showing the carrier that there is little reason for a big verdict because their product is safe.

Tom Cochran, Attorney stated that the premise of any liability on the manufacturer in a product is it is defective. So you are not talking about suing a manufacturer for a good product. You are talking about the right of the injured person to recover where the design is defective. So you must decide who you are going to protect, the manufacturer who puts a defective product on the market and maimes or kills a citizen of the State of Nevada, or the citizen himself.

Riley Beckett, General Counsel for NIC wished to state that they are opposed to this bill as it undermines the entire workman's compensation system.

A gentleman from the Independent Insurance Agents stated that he would just like to correct the statement there is no crises. There is very definitely a crises in their market, no matter what the studies say. Rates have increased substantially on products liability. We have had cases where not due to any negligence or bad records, people have lost their market for products liability insurance. So they are in favor of the bill.

Senator Close stated that as they had to adjourn to go into

session they would take AB 267 up at 8:00 a.m. in the morning.

Meeting adjourned at 10:55 a.m.

Respectfully submitted,

Virginia C. Letts, Secretary

APPROVED:

SENATOR MELVIN D. CLOSE, CHAIRMAN

Week of December 27, 1976

business insurance

the national newsmagazine for buyers of employe, property and liability protection and financial services

50¢ a copy; $12 a year

PROD LIA

No nationwide product crisis, reports task force

By PAUL R. MERRION

WASHINGTON—The Interagency Task Force on Product Liability has concluded there is no "nationwide multi-industry product liability crisis" in its draft report submitted to the White House's Economic Policy Board.

After a three-month, crash research effort to get a fix on the product liability insurance situation, the Interagency Task Force filed its report Dec. 15 without making any major legislative or policy recommendations.

Although the study concludes that there is no widespread "crisis," it does acknowledge that "on the other hand it does seem clear that a number of smaller businesses are having a difficult choice as to whether to go without product liability insurance or to purchase it at a sharply increased premium. This situation deserves careful monitoring within the next twelve months."

Overall, the 48-page draft report to the Economic Policy Board concludes that there is a problem of affordability but not availability in product liability insurance. "On the basis of our Industrial Contract Survey and staff work we are only able to identify a limited number of situations where manufacturers are apparently unable to obtain product liability insurance," the draft report said.

"Less than 0.1% of American businesses have a serious affordability-availability problem," the task force staff estimated.

Although the task force found premium increases between 100% and 500%—and in some cases 1,000% or more—for many manufacturers, the draft report stated that most of the increased costs have been successfully passed off to the consumer by slightly increased product prices.

"Our data shows that aside from a number of limited situations in the capital goods industry, product liability insurance accounts for less than 1% of the sales price of a product," the draft report said, although "the figure approaches 3% in some branches of the industrial machinery industry."

Business Insurance obtained a copy of the draft version of the report from Product Safety Letter, a weekly Washington newsletter.

Prof. Victor Schwartz, project director of the interagency task force, told this magazine the final version as submitted to the Economic Policy Board contained "substantial" changes as a result of comments on the draft report from several of the federal agencies. However, he said most of these changes were "matters of emphasis and technical" modifications. He confirmed that the final version still concluded that there is no widespread crisis in product liability insurance.

The task force report is the result of about three months of research by the task force staff and three private contractors. Research Group Inc., Cambridge, compiled a seven-volume report with more than 1,500 pages of background information on product liability case law. McKinsey Inc. of New York reviewed approximately 3,000 underwriting files and interviewed 141 members of the insurance industry to provide data on ratemaking practices.

Gordon Associates Inc., of Washington conducted a telephone survey of 350 small, medium and large businesses, in addition to analyzing product liability surveys by 17 national trade associations and interviewing 20 representatives of specially targeted industries with high risk products. There were problems of "clarity, consistency and depth of analysis in the draft final report" of Gordon Associates, and it was still being revised in mid-December. "Some of their tables didn't add

Continued on page 6

773

EXHIBIT A-1

from:

BUSINESS INSURANCE,
October 4, 1976

Not enough facts for liability crisis

WASHINGTON—Lack of insurance industry statistics makes it impossible to know whether there is a crisis in product liability insurance, the National Assn. of Insurance Commissioners (NAIC) said last month.

Speaking at the first meeting of the Advisory Committee on Product Liability, which was formed in early September by the Commerce Department to help the Interagency Task Force on Product Liability, an NAIC spokesman said: "Definitive statistics and data have not yet been produced by the insurance industry to indicate the existence of an underwriting crisis."

The NAIC is currently collecting state surveys on rates and loss experience, according to the spokesman, Ned Price, who is the senior member of the Texas State Board of Insurance as well as chairman of the Advisory Committee at which he spoke.

At its semi-annual meeting last June in New Orleans, the NAIC postponed making a decision on a proposal that would have required insurance companies to separate product liability data on their annual reports to the insurance association.

Mr. Price said a quick solution to the product liability problem would be unwise until the dimensions of the problem are more clearly defined.

"I would like to emphasize that this is not a simple issue or a problem to be addressed in emergency legislation," Mr. Price said. "To attempt overnight, remedial, undeveloped answers would indeed, create a product liability problem."

The Sept. 20 meeting of the Advisory Committee brought together for the first time nearly all of the 18 representatives of groups affected by availability of product liability insurance, including manufacturers, wholesalers, retailers, the insurance industry, insurance regulators, the legal profession, labor and consumers.

The committee was set up to advise Commerce Undersecretary Edward O. Vetter, chairman of the Interagency Task Force on Product Liability, on solutions to the product liability problem. Mr. Vetter said the advisory committee will review the recommendations of the task force, which are due this December.

Mr. Vetter also took a cautious stance at the meeting, saying that the committee would first decide whether reform of the tort system is desirable and only then would the panel decide how it should be reformed.

"Is there really a product liability crisis? Should manufacturers do better about warning about equipment? How are insurance companies pricing coverage? These issues are still out on the table," the task force chairman said.

Three additional members of the advisory panel—representing labor, consumers and an economist—are yet to be named by Mr. Vetter, but the others include:

W. Thomas York, president, AMF Inc.; Ralph Baldwin, president, Oliver Machinery Co.; Fred C. Secrest, executive vp, Ford Motor Co.; Frederick Juer, president, Worth Bat Co.; Richard D. Wood, chairman of the board, Eli Lilly & Co.; and Joseph McEwen, president, Modern Handling Equipment Co.

Also: William M. Brooks, senior partner, Brooks Burke Surgical Supply Co.; Lloyd Hackler, president, American Retail Federation; John Koch, attorney; Melvin Block, attorney; and Paul Rheingold, attorney.

The insurance industry representatives are Edward J. Noha, chairman of the boards, CNA insurance Cos.; and Robert Clements, senior vp, Marsh and McLennan Inc.

Other representatives include Jack Sheehan, legislative director, United Steelworkers of America; Dr. Clare G. Johnson, physician and attorney; Judy Braiman, Empire State Consumer Assn. Inc.; and Vincent Graham, vp, Sears Roebuck & Co. ■

Senate Panel Hears Arguments

Product Liability Added To Insurance Crises

By LEAH YOUNG
Journal of Commerce Staff

WASHINGTON — The insurance industry and the trial lawyers slugged it out on another congressional battleground Wednesday, adding product liability insurance to no-fault automobile insurance and medical malpractice insurance confrontations.

And, in the style of the earlier battles, both blamed each other for the problems that have threatened to put liability coverage out of reach of the nation's small to medium-sized manufacturing businesses.

American Insurance Association (AIA) Vice President William L. Martin told the Senate Small Business Committee, "Insurers merely respond to the legal system as they find it: Insurance costs are determined by that system. Too often in the past we have attempted to solve burgeoning social problems by tinkering with the insurance system. No amount of tinkering with the insurance system will respond to a disordered legal system. Correct the latter and the former corrects itself."

He told Sen. Jacob Javits, R-N.Y., that the insurance industry is not "washing its hands" of responsibility for the inability of machine tool manufacturers and metal fabricating companies to obtain insurance at reasonable prices. Rather, he said, "We have to charge if we want to stay in business."

But Association of Trial Lawyers of America (ATLA) President Robert G. Begam accused the insurance industry of fomenting crises in automobile reparations, medical malpractice, the swine flu inoculation program, and now product liability, in its efforts to change the laws that protect victims and compensate them when they are wrongfully injured.

He likened the insurance industry to Edgar Bergen and told the committee that "the ventriloquist pulling the strings is always the same. It is the dummy that changes."

Mr. Begam told committee Chairman Gaylord Nelson, D-Wisc. that it is a "fair assumption" that the problems associated with product liability coverage are created by the insurance industry. When he was asked by the chairman, however, why the insurance industry will not provide coverage even at very high premium rates if the problems are all within the industry, Mr. Begam responded "I don't know."

The issue involves the ability of the insurance industry to project losses and charge related premiums for coverage under which courts have ruled that the original manufacturer of equipment is liable when someone is injured, even if the machinery involved is 30 years old and has been retrofited or not been serviced by a series of owners. Premium averaged $10,000 in 1970 in the machine tool industry. They averaged $71,000 in 1976.

John F. O'Sullivan, vice president of Marsh & McLennan Inc., insurance brokers, told the committee on behalf of the National Association of Insurance Brokers that the property casualty insurance business suffered a $2.6 billion underwriting loss in 1974. Last year, he said, "the situation deteriorated to an underwriting loss estimated at $4.2 billion.

This was combined, he added, with stock market losses to create a "disasterous" financial picture for the industry.

He added that in these circumstances, many companies have not wanted to take the time to make a detailed analysis of the risks involved in insuring smaller firms so they either decline coverage or "charge rates based on conservative judgment which allows for a margin of error on the high side.

He admitted that his organization has "the feeling that premiums currently charged small businesses could well prove to be excessive."

The brokers want limitations on attorneys fees.

Mr. O'Sullivan would also like to see the statute of limitations changed so that it runs from the date of faulty design or manufacture, not the date of accident.

James H. Mack, of the Machine Tool Builders' Association told the committee that four claims in nine involve machinery that is 20 years old and 75 per cent involve machinery that is 10 years old.

"What all this adds up to is a situation in which unsafe work practices in unsafe work places, maintained by unsafe employers, are causing working men and women to lose fingers and hands — or worse — and our members are paying for it."

Gayle Smookler, Executive Director
100 North Arlington, Reno, Nevada 89501, Phone [702] 786-1858

April 8, 1977

Senator Mel Close
Nevada State Senate
Legislative Complex Building
Carson City, Nv. 89710

Re: S.B. 426 (Limits Civil Actions Based on Products Liability)

Dear Senator Close:

The Nevada Trial Lawyers Association opposes S.B. 426, a bill which would drastically limit the right of a Nevada victim of a defectively manufactured or designed product, from a just recovery against the manufacturer or distributor of the product.

Salient points which seem inappropriate and unjust are the following:

1. An absolute six year statute of limitations - this means that if a person is sitting watching his color television and it explodes in his face six years and one day from the date of its manufacture or sale, the consumer may not recover.

2. Mf'r would be immune from liability if he complies with federal or state standards of design, testing, labeling, etc. - this is inappropriate because it would allow the industry in question to set its owns standards and escape liability if it complies therewith. This is the general rule in America today: Industry often lobbies for its own standards in Congress and in the federal agencies. These standards are quite often inadequate. For example, in flammable fabrics cases, under the Flammable Fabrics Act which was law in this country for more than 30 years, a fabric met the required federal standards if it burned at a rate which was comparable to toilet paper! Hard to believe, but true. This example can be repeated many times over in many, many industries.

3. Mf'r not liable if there has been alteration or modification of the product - this eliminates the right of the injured consumer to recover for a defective product, where the consumer has foreseeably modified or even foreseeably misused the product. This flies in the face of judicial decisions all over the country, including the Nevada Supreme Court. Cf., Outboard Marine Corp. v. Shupbach, Nevada Supreme Court No. 8374, filed 3/17/77.

4. Eliminates present law that allows introduction into evidence of mf'rs change in design since the accident in question - this would eliminate the dictates of the California Supreme Court in Ault v. International Harvester, 117 Cal. Rptr. 812 (Cal. 1975), a very carefully reasoned opinion by the California Supreme Court setting forth many valid reasons for allowing such design changes to be introduced into evidence.

5. Abolishes Collateral Source Rule and indeed allows mf'r of defective product a set-off for NIC benefits - flies in face of United States Supreme Court and many other federal and state court decisions which have upheld the Collateral Source Rule for many decades, for very valid reasons.

6. Allows mf'r of defective product to sue the victim's employer for indemnity in a products liability case - this is contrary to Shupbach, above, which held that the manufacturer cannot sue the victim's employer; it will also cause a lot of Nevada employers to be sued directly by the manufacturer, every time an employee is injured as a result of a defective product; further, the employer's liability would not be covered by NIC.

In sum, this is an extremely badly designed bill, obviously offered on behalf of the interests of large manufacturers whose products are sold and distributed in the State of Nevada. This bill is being toted in every legislature in this country which is in session today, and promulgated by the AMA (American Manufacturers Association). We have been warned that the AMA would be introducing this bill in our Legislature, as it has done in other Legislatures around the country.

Suffice it to say that this bill is contrary to the interests of Nevada consumers, and would represent, if passed, an extremely harsh set-back in the law of products liability. It would encourage and promote the manufacture of shoddy and defective products, and discourage the manufacturing industry generally from raising its own standards, and discourage it from doing everything possible to produce products which do not maim and injure consumers.

NTLA respectfully requests your consideration in voting "No" on this bill.

Respectfully,

Peter Chase Neumann

Peter Chase Neumann
President, NTLA

PCN:lj

P.S. I enclose herewith a copy of a letter from Consumer Advocate Ralph Nader dated February 10, 1977 to a Kansas legislator setting forth succinct reasons why such legislation should be defeated. The Kansas bill in question is in many ways similar to S.B. 426.

cc: Senator Dick Bryan
Senator Gary Sheerin
Senator Keith Ashworth
Senator Marjorie Foote
Senator Carl Dodge
Senator Cliff Young
Senator Bill Raggio

February 10, 1977

The Honorable Richard E. Brewster
Chairman, House Committee on the Judiciary
The Capitol
Topeka, Kansas 66612

Dear Mr. Brewster:

Kansas HB 2007, the products liability bill now under consideration, is an anticonsumer bill which will insulate some manufacturers of dangerous products from their fair legal responsibilities and thereby increase marketplace hazards.

Manufacturers, insurors and business lawyers support this bill on the grounds that it will provide relief from the cost of products liability insurance. The allegation is that insurance is expensive because of legal doctrines which protect the injured. In contradiction is the Legal Study commissioned by the U.S. Interagency Task Force on Products Liability, which concluded: "No...doctrine, even if changed immediately, could produce a greater availability or a lower cost for insurance."[1] The study concluded that products liability legal doctrines are not directly responsible for any problems in the functioning of the products liability system.[2]

Thus, the provisions of HB 2007, will be ineffective for the businessmen's aims, as well as damaging to the interests of injured consumers and workers who expect products to be safe within the capacity of the manufacturer to make them so.

Section 1 prohibits product liability lawsuits for (a) consumer injuries which appear more than ten years after sale of the product and (b) malpractice suits for injuries which appear more than four years after treatment.

This section would give absolute protection to manufacturers of "time bomb" products such as the cancer-inducing drug DES, whose dangers do not appear until many years after sale. A manufacturer who knows his product will be used many years, such as an elevator manufacturer, could not be sued for an elevator which plummeted 20 floors and killed the riders, even if the manufacturers knew the elevator had a likelihood of collapse after that ten year period and could have foreseen and prevented it.

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[1]Legal Study on Products Liability, under the direction of the U.S. Dept. of Commerce, Vol. II, p. 127.
[2]Vol. II, p. 118.

§4 prohibits lawsuits against the manufacturer of a product where the primary cause of the injury was an alteration of the product by someone else.

This provision prevents the courts from considering the fault of several parties -- such as manufacturer and seller -- and if both are responsible, dividing damages between them. It also could be interpreted to undermine lawsuits based on enhancement of foreseeable injury, such as a spear-head steering column in an auto which impales the driver in a collision by an oncoming car or a football helmet which guillotines the spine of a player in a tackle.

§6 prohibits punitive damages unless the defendant's conduct was proved beyond a reasonable doubt.

This section imposes a burden of proof equal to a criminal conviction, a heavy burden appropriate for criminal cases. But the courts should be able to impose punitive damages on a defendant in a civil case shown by the weight of the evidence to have engaged in particularly offensive conduct, such as falsification of records, because it will help deter future objectionable conduct.

§8(a)(2) provides an absolute defense to a manufacturer if the product conforms to the state-of-the-art (industry custom).

This would have the practical effect of allowing the industry to be the final judge of its own legal safety obligations rather than the courts. Compliance with industry custom is currently an important element in the manufacturer's defense, but courts can now rule that what other manufacturers do is not conclusive, particularly where a proven, low-cost change in the product design would have prevented serious injury.

§8(b) prohibits plaintiff's attorney from showing at the trial evidence of improvements in the design of the product since the manufacturer designed it, or introducing evidence of improvements in the manufacturing process since the product was made.

Under current products liability law, the critical time at which a product is judged is the time of sale. This provision unwisely changes the focus of proof to the time of design -- which may be decades before the product in question was sold. Also, if the manufacturer was proved to have changed the product design the day after the product was sold, this would show that the manufacturer knew about the defect at the time of sale, but the manufacturer would be impregnable anyway because the evidence couldn't be introduced.

These corporate-bred provisions have been promoted in an atmosphere of contrived "crisis" which makes rational consideration difficult. The U.S. Interagency Task Force on Products Liability, Jan. 1, 1977 concluded that there is no products liability "crisis" in the sense that a large sector of industry cannot obtain product liability insurance or that the increased cost of such insurance has made a substantial impact on the price of many products.[1] It found that even among industries most affected by a sharp increase in products liability insurance costs, "that cost has accounted for less than 1% as a percentage of sales," [2] and concluded that its findings "should prevent precipitous legislation." [3]

The cost of products liability insurance has risen in recent years. But the causes have not been officially determined and there is an interesting paucity of industry data on the subject. Stampede pricing increases by insurors operating in less than a competitive market may soon be of interest to the Justice Department's antitrust division, which is presently studying the malpractice insurance price increases.

The Legal Study, additionally, has suggested that these factors may be causes: (a) the fact that insurance companies do not have objective methods for determining rates, with the result that a few inconsistent court decisions or "horror stories" drive rates up; [4] (b) a shortage of cash in insurance companies; several insurance executives have testified that insurance companies have had large financial losses in the stock market, which losses would be covered by raising the cost of insurance premiums; and (c) an increase in the number of consumer claims.[5]

The fault concept has been and will continue to be the basis for product liability, whether fault is couched in the traditional language of negligence or in the newer language of "defective" products. [6] In lieu of this stultifying bill, which will prevent case-by-case determinations of liability in many cases, this committee should develop remedies for the real human tragedies in the field of products liability law: remedies to prevent injuries to consumers by careful design and manufacture of products.

The common law is a great heritage of our country's system of justice. Its growth to discipline the harmful effects of technology and consumer products has provided people with rights well beyond those in Canada or the United Kingdom. Its flexibility and breadth should not be restricted by narrow, myopic

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[1]Briefing Report of the U.S. Interagency Task Force on Products Liability (under the direction of the Commerce Dept.)p.2

[2]p. ii.

[3]p. 40. Continuing footnotes on the next page.

business interests. Those business firms that have been unfairly burdened with unjustifiable premium increases should look for reform in the insurance industry; they should not try to constrict the aggrieved and injured who need their rights protected and advanced.

Thank you,

Ralph Nader

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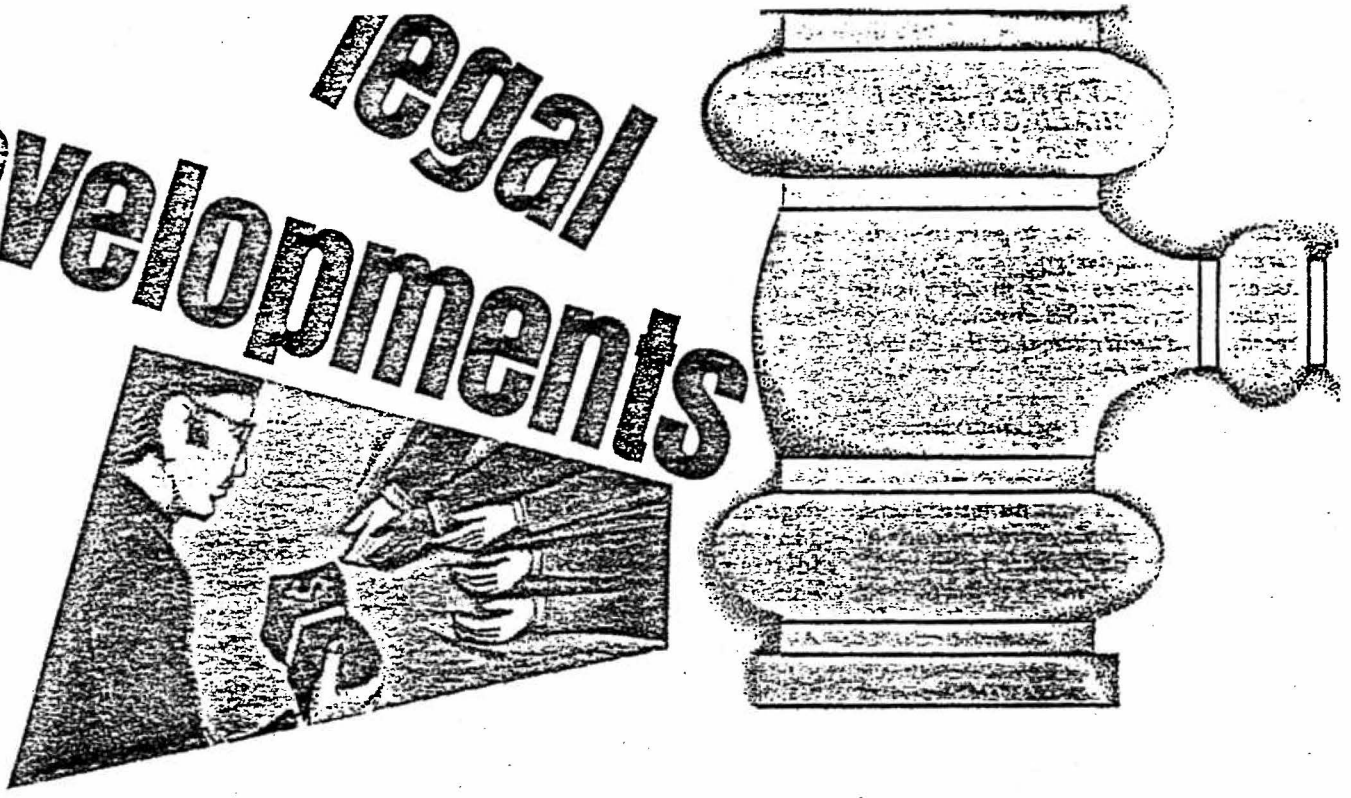
[4]In an atmosphere of subjective ratemaking, small businesses are likely to suffer most because they haven't the power alone to force the insurors to examine the records of the business.

[5]The Legal Report demonstrates that the states with the most pro-consumer products liability doctrines are not experiencing large increases in the number of consumer claims; it is the other states which are.

legal developments



The law applicable to manufacturers has significantly changed and expanded in the last decade. Here are some recent legal developments in the area of product liability litigation. Expansion of the concept of strict tort liability, the importance of adequate testing, inspection, and safety analyses, and the steps a manufacturer can take to restrict or limit potential legal liability are explored.

STANLEY J. LEVY[1]

Product liability litigation has been one of the most dynamic areas of the law. Today, every manufacturer, every engineer, and every supplier must recognize that the scope of his responsibilities has been broadened and he may be subject to legal action if the product he designs, manufactures, or markets causes injury or death. Injury-free products are rarely found and even such seemingly innocuous products as aerosol sprays, kitchen chairs, and lawnmowers have been involved in product liability litigation. Moreover, damage awards in product liability litigation, as in every area of tort litigation, are increasing, and there have been awards in the hundreds of thousands of dollars.

During the legal revolution of the past decade, the old rule of "let the buyer beware" has been buried. The guiding principle of the '70s is that the ultimate user of the product must be able to rely on the designer and manufacturer to produce and market a product which is both able to perform its intended function and to do it safely and without risk of danger to the user. Therefore, everyone involved in the design and marketing of new products must be vitally concerned with developments in this dynamically growing area of the law.

Expanding Law of Product Liability

The concept of fault is the underlying principle in product liability law as in all personal injury law. Simply stated, the rule is—where one person's conduct causes an injury to another, the person who causes the injury is required to fully and fairly compensate the person injured. For the manufacturer, three legal bases for liability exist—negligence, breach of warranty, and the recently developed concept of strict liability in tort.

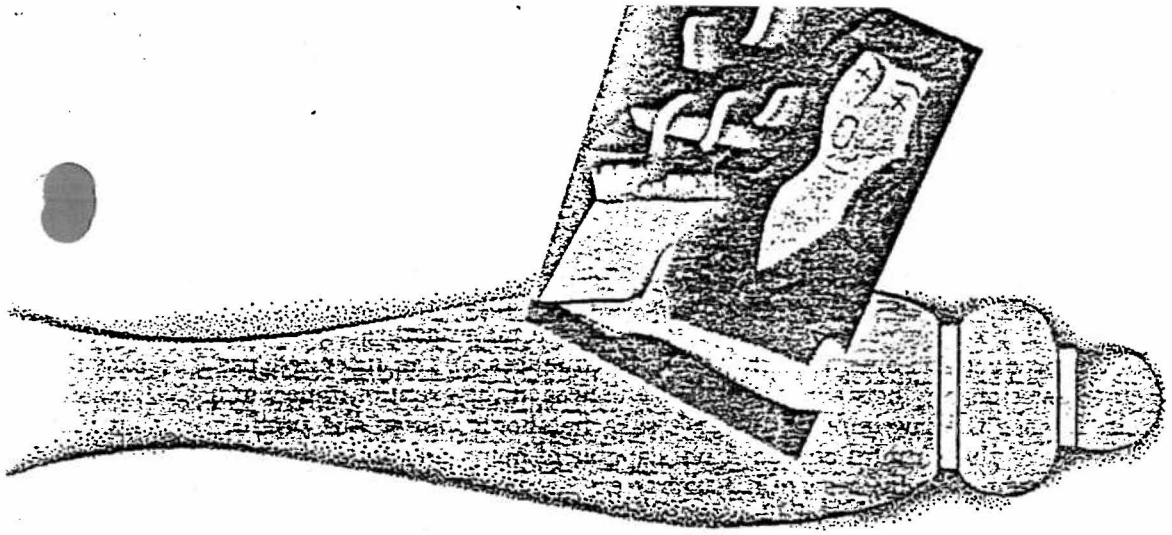
Negligence is the basic method for imposing liability for injury on another. This requires the injured party to establish that the person complained of owed a legal duty to the plaintiff, that he breached his duty to exercise reasonable care to avoid creating an unreasonable risk of harm to others, and that the breach proximately caused the injury. Simply stated, a manufacturer must provide a product that is reasonably safe for its foreseeable use[2] and if the manufacturer violates that duty of care and his conduct, either alone or in concert with others, proximately causes an injury he will be required to compensate the injured victim.

Under the negligence theory of liability there are many traditional and well established grounds for imposing responsibility for injury on the manufacturer. Recoveries generally occur where the plaintiff proves that his injuries were caused by:

- An improperly designed product;

[1] Member of the law firm of Kreindler & Kreindler, New York, N.Y.

[2] *MacPherson* v. *Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916); Rest. Torts 2d §395 (1965).



in product safety

- Improper construction;
- Faulty parts;
- Failure to properly test and inspect the prod-t; and
- Failure to warn of known defects or dangers.

The development of the concept of "crashworthiness" and the "second accident" is a vivid example of how product liability law develops and expands. It had long been accepted that a car manufacturer had a duty to provide a vehicle reasonably safe for its intended purpose, but it had not been the rule that misuse or a collision were foreseeable uses. However, in 1968, in the case of *Larsen* v. *General Motors*[3] the Court held that the possibility of collision was indeed reasonably foreseeable and the manufacturer had a duty under ordinary negligence principles to design a car that was reasonably safe in the event of a crash. In a sense, what the courts were doing was adapting the established tort principle that one can be liable if his conduct enhances or aggravates an injury and applying it to the modern problem of automobile accident responsibility. The view was stated by the highest court in the State of New York:

"Neither sound policy nor reason can be found to justify a distinction between the liability of a manufacturer whose defective item causes the initial accident and that of the manufacturer whose defective product aggravates or enhances the injuries after an intervening impact .... We can perceive no reason why a manufacturer of motor vehicles should be held to a lesser degree of liability." [4]

The second major basis for imposing liability on a manufacturer is based upon breach of warranty, either expressed or implied. The theory is that a user may rely on the manufacturer's express or implied assurances as to the quality, condition, and merchantability of the goods, and that the goods manufactured are safe for their intended use and purpose.

Traditionally, privity or a direct contractual relationship was required between the injured party and the manufacturer in breach of warranty actions, though not in negligence actions. Because there frequently was no direct relationship, breach of warranty claims, while asserted, had not been heavily relied upon. Gradually, the "citadel of privity" crumbled and liability is now generally extended beyond the purchaser to members of his family, to the ultimate user and, now in most states, to innocent bystanders who, while still within the "zone of risk," are not directly in the distribution chain.

The third basis of liability and the one that has caused the revolution in product liability law is the doctrine of strict tort liability. The doctrine of strict tort liability developed because courts recognized that both the negligence and the warranty theories had serious deficiencies. To recover under the negligence theory, the plaintiff was required to prove that some specific act of negligence by the manufacturer was a proximate cause of the accident. All too often, and particularly after a catastrophic accident, it was impossible to obtain specific evidence. The warranty theory, although not requiring proof of specific negligence, was rife with contractual requirements like privity, reliance, notice, and the like. Thus both theories had substantial problems insofar as the injured plaintiff was concerned.

Strict liability does not impose absolute liability on a manufacturer or seller simply because an injury occurs. The plaintiff must still prove that the product was defective and that the injury was the result of the defect. If the product is defective, that is, if it is not reasonably safe for the purpose for which it is intend-

[3] 391 F. 2d 495 (8th Cir. 1968); see also *Baumgardner* v. *American Motors Corp.*, 83 Wash. 2d 751, 522 P. 2d 829 (1974).

[4] *Bolm* v. *Triumph Corp.*, 33 N.Y. 2d 151, 350 N.Y. S. 2d 644, 650 (1973).

ed and sold, and if the defect arose out of the design and manufacture of the entire model or while the product was under the manufacturer's control, and the defect proximately caused the harm to the consumer or user, liability exists. The rule may subject the manufacturer to liability for the injuries caused even though he exercised all possible care in the preparation and sale of the product and even though there was no contractual relationship between the seller and the user.[5] In a sense the law imputes to the manufacturer knowledge of the harmful characteristics of his product whether he actually knew of it or not. He is presumed to know. Where strict liability applies:

- Disclaimers have no effect;
- Privity is not a factor;
- There is no requirement to establish prior notice;
- Contributory negligence is not a defense unless it takes the form of the plaintiff voluntarily and knowingly assuming a known risk; and
- Product misuse is not a defense unless the misuse was not reasonably foreseeable.

Strict liability simplifies and makes less expensive the plaintiff's problems of proof during a lawsuit but it does not subject a manufacturer to any greater burdens.

What the Manufacturer Can Do

Design and Material Selection. One of the most critical stages in the industrial process is the design of the product. At this stage the dimensions are fixed, the relationship of various parts to one another are established, and the selection of materials determined. These decisions all involve critical design considerations since a failure caused by improper material selection can be as disastrous as an accident caused by an improper design decision. Once the final design choices are made, it becomes far more difficult and costly to alter or abandon the product if it is discovered that the design is "defective." Therefore, at this stage the manufacturer must act with great care and attention and with the requirements of safety being given consideration at least equal to cost effectiveness and ease of manufacture.

The first and most basic precaution a designer must take is to assure that his product at least fulfills all governmental and industry standards. The failure to comply with a governmental safety standard constitutes negligence *per se*. In lay terms that means that the court *must* instruct the jury that the manufacturer's failure to comply with standards establishes negligence. In effect, this is a judicial directive that the jury must find the manufacturer responsible.

Where there is no written standard, the designer must, at a minimum, meet the "custom" of the industry. He must compare his design to other products on the market to assure that his product is not deficient by comparison. However, industry standards, whether established by code or custom, are not controlling on the court. The standard the manufacturer must satisfy is whether he acted with reasonable care under all circumstances.

Therefore, the prudent manufacturer will perform such additional testing and analysis as is necessary to establish that his design is proper and that there are no defects or unforeseen dangers. It is also becoming evident that a manufacturer must consider not only the consequences of the intended use but also the consequences in the event of improper use. For safety's sake he should design the product so that it is not capable of being used improperly. Plaintiffs and courts are becoming more knowledgable about engineering procedures and will consider whether the manufacturer maintained a separate and independent safety department, and whether it conducted a systems safety analysis including, where appropriate, fault-free and failure mode and effect analyses. Indeed, one appellate court has recently criticized a manufacturer's failure to perform "safety engineering" which involved "the assumption that a system will malfunction".[6]

The problem of the product not being used as intended or being abused is another area of development in the law. More and more courts are recognizing that human errors occur and are insisting that manufacturers attempt to foresee and prevent such possible misuse. In a recent case involving a product recall,[7] the Court, while recognizing that to prevent recall a manufacturer need not design a product that never failed, felt that the manufacturer was obligated to build into his vehicles a margin of safety adequate to withstand reasonably foreseeable abuse and failure to adhere to all manufacturer's instructions. This decision indicates that the scope of foreseeability and the need for human design engineering may also be an expanding area requiring great care and attention.

In this regard, one of the most frequent types of defect is the failure to incorporate a guard, shield, or automatic cut-off device to protect the body from injury. Certainly moving parts should be guarded particularly where the parts are accessible but concealed. But beyond that, appropriate guards should be installed whenever a piece of machinery imposes a high degree of risk and a guard or shield is feasible.

Indeed, in today's legal climate I would suggest that a manufacturer has a duty:

- To explore all reasonable design alternatives;
- To make a meaningful effort to determine the effect of a failure or defect in any component part of its product;
- To determine whether the product may be subject to misuse or abuse as a result of its design;
- To attempt to determine the foreseeability of failure and seriousness of any harm that might occur if care is not exercised; and
- To consider the cost of taking safety precautions because, as a practical matter, if the cost of taking the precaution is small and the risk of harm great if precaution is not taken, then the probability of being held liable not only for compensatory damages, but for punitive damages as well looms large.

[5] Restatement of Torts, §402A.

[6] *Chestnut* v. *Ford Motor Co.*, 445 F. 2d 967 (4th Cir. 1971).

[7] *U.S.A.* v. *General Motors Co.*,___ F. 2d___ (DCC August 4, 1975).

Construction

Defects resulting in making the product unfit for its reasonably foreseeable uses are most likely to occur during the actual manufacturing and assembly stage. Here again there are precautions the manufacturer can take to prevent accidents and liability.

The first and most basic step is to select a manufacturing process that involves the smallest possibility of defects occurring. It is essential that the formation process ensure that all parts are made to the proper size and shape and be scrupulously within the fixed tolerances. Also, efforts must be taken to guard against structural weakness caused either by a fault or defect in the constituent element or poor formation processes which cause cuts, cracks, or flaws.

Proper inspection techniques can detect many manufacturing flaws. The unfinished product should be inspected at various points during the manufacturing process since flaws in component parts may become undetectable once the product is assembled. Frequent testing of component parts and of the finished product is important. To the extent possible, every product completed should be inspected and tested.

Many times the decision will be made to use sample testing. The reason may be a belief that 100-percent testing may be economically impracticable. The decision then will be rationalized by saying that numerically and statistically it can be demonstrated that one will not experience a failure more than once in 3 million times or some similarly large number. From an engineering point of view, this may appear to be a reasonable judgment but from the point of view of the injured user and probably the average lay juror, this appears to be a decision by the manufacturer to gamble on the safety of the users by accepting a certain amount of risk in order to further one's financial interest. Imagine further how the jury will react if the manufacturer knew that a failure of this part could lead to "hazardous" or "catastrophic" result. On this point I suggest that before sample testing or sample inspection is accepted, one should fully examine the reasons for sampling, including a review of the industry practice, and analysis of the likely risk of occurrence of a failure or defect and the harm to users if such failure occurs. Unless one is satisfied that an analysis can withstand a really searching review by a skeptical critic it might be well to insist on 100-percent testing and a zero-defect approach rather than agree to an economically desirable shortcut.

Record keeping is extremely important at all stages of the design and production process. Detailed records contemporaneously prepared may afford the manufacturer the ability to effectively rebut the inference that the defect arose while it was in the manufacturer's control. They can also be used to show the precautions taken to prevent flaws or defects from occurring. All too often, engineers adopt the attitude that the best policy is to have no records to support design decisions. That generally is an error. Good records may provide a basis for defense and should not be ignored, mishandled, or underestimated.

Packaging, Instructions, and Warnings

Completion of manufacture does not end the manufacturer's responsibility to provide a product that is free of defects.

Frequently, a defect can arise as a result of improper packaging. Any packaging must itself be safe and not cause harm to the user or a bystander. The most common example of a potentially dangerous package is an exploding bottle cap or a can that opens leaving a sharp jagged edge. The package should not conceal any dangerous or hazardous aspect of the product itself. Finally, the package must protect the product from harm. Unless the package accomplishes all three results, it may be legally defective.

Packaging should be treated with the same care as is given to the design and manufacture of the product itself. All governmental and industry standards must be satisfied and exceeded. Testing should be undertaken where necessary and every reasonable effort should be made (and documented) to foresee all situations where packaging could be harmful and to take corrective action even where the likelihood of danger is thought remote or unlikely.

Even a product that is carefully designed and manufactured may be dangerous if not used in a specified way or if inherent defects are not called to the attention of potential users. In such situations, the manufacturer has a duty to provide adequate instructions and warnings and if he fails in this respect he may be liable for the resulting harm.

Essentially, there are three types of dangers that the prudent manufacturer must warn against. First, there is the type of danger that is inherently a part of the use of the product. The best example of this is a drug that has certain dangerous characteristics that simply cannot be eliminated. In this situation, the manufacturer should provide a warning that clearly states the nature and extent of the danger. Second is the type of danger that can be avoided provided specified precautions are taken. In this category are chemicals that are poisonous, flammable, or explosive. Third are products where danger can be avoided if instructions are followed. Here one might consider an electric power tool where a manual or set of instructions sets forth the procedures to be followed.

In preparing the warnings, instructions, and labeling, all governmental and industry standards must be met. In this area, manufacturers must also look to state law since many states have explicit and detailed labeling standards in addition to those set up by the federal government. The labels and warnings must be conspicious, complete, and unambiguous. It is no longer adequate to conceal an ambiguous warning by putting it in small language and locating it in a place that the user is not likely to see. Moreover, if a product is likely to be used by people with limited education, simple language and appropriate symbols should be used to assure that the warning is effective. The burden of full and effective disclosure is on the manufacturer. The more likely the risk and the greater the danger, the more conspicuous the warning should be in terms of position, size, illustrations, and

contrasting color. No information that conceivably could prevent misuse or minimize injury should be omitted. In this regard, flashpoint temperatures and fire-extinguishing procedures for flammable products and drug antidotes for chemicals should be included. Warnings against replacement with unauthorized parts and explicit procedures for safe maintenance procedures should also be included. Warnings and instructions should be clear and precise, and detailed unambiguous instructions must be given regarding safe operations in all foreseeable circumstances.

While warnings and instructions are essential, they do not relieve the manufacturer of the duty to design a safe product and to attempt to avoid possible misuse. The human factors must be considered and guarded against since it is an accepted engineering fact of life that mistakes are made even by highly trained professionals. The former head of the Commission which drafted the Consumer Product Safety Act has said that "Until manufacturers begin to understand that man cannot be redesigned as tools and machines can; until safety is given preference over price, style, and packaging; and until industry embarks on a course of field testing, human factors analysis, over-stress evaluation, and anticipatory consumer misuse, the product liability lawsuit will continue to perform an important regulatory function in the market."

Put directly, the law will not permit a manufacturer to knowingly market a product with a danger that could have been eliminated and evade liability because he puts a warning on the product. Misuse must be designed against.

The manufacturer's duty does not end when the product is sold. There is a continuing duty to monitor performance of the product; to report any discrepancies and recurring problems to the appropriate governmental authorities and known users; to make improvements based on improved and model technology; to make repair information available to owners and users; and where necessary, to recall and repair any defects that may occur even after the product has been delivered to the user. Legislation such as the Consumer Product Safety Act highlights the expansion of this continuing duty.

The Future of Product Liability Law

The past decade has seen a virtual revolution in the field of product liability litigation. It seems safe to predict that dynamic changes will continue to occur.

One likely development is that artificial geographical boundaries and sham transactions sometimes used to protect a manufacturer from suit in distant states will no longer be effective. The device of sale to an intermediary for redistribution will be disregarded by courts and manufacturers will be subject to jurisdiction wherever their products are sold, distributed, and used.

The strict liability approach will continue to spread to jurisdictions where it has not yet been adopted, and innocent bystanders will be covered by it where that has not yet been done. This will be the result of courts and legislatures accepting the social decision that the manufacturer who puts the product into the stream of commerce for commercial exploitation rather than the innocent user should bear the burden and risk of the loss caused by a defect in his product. After all, the manufacturer is in the best position to discover the defects and dangers inherent in his product and to guard against them through appropriate design safeguards, inspection warnings, and safety analyses. Moreover, the manufacturer is in a better position to distribute the loss caused by product defects than is the innocent user.

The duty of care and diligence will certainly not lessen. However, there may be a more sympathetic hearing given to certain defenses. In particular, it is foreseeable that where a manufacturer can prove by carefully documented proof that he performed to the highest standard using all available and known analytical techniques and technical knowledge, the courts may be more reluctant to impose liability. Additionally, as governmental regulation, governmental certification, and the imposition of governmental standards become more prevalent, the courts may become more inclined to follow the lead of the regulatory standards. However, that will be done only so long as the courts believe that the standards are impartially established, that they in fact provide adequate safeguards, and that the agency is enforcing the standards diligently.

Despite the small signs of some hesitancy, it seems clear that product liability law will continue to impose stringent requirements with respect to design and engineering practice. Systems safety audits and analyses and independent safety engineers will become virtually a mandatory part of every new design at all points in the production process. New product development will require as much stress placed on product safety as on economic feasibility. The physical appearance of the product and its saleability will not be permitted to overshadow the requirements of safety. This development will result since the cost of producing a defective product will become extremely expensive as recoveries increase. Before long, it will become more economical to design a safe product than an unsafe one and this will be a great benefit to the consuming public.

The extension of these attitudes, coupled with the cost of error, should lead the prudent and responsible manufacturer to take greater care before putting his product into the stream of commerce. The greater stress of safety may, indeed, increase the cost of the product. In some cases the increase may force marginally safe manufacturers from the market. But the loss of a marginal manufacturer who is willing to gamble with the public's safety is not one which society as a whole will find particularly disturbing or shocking.

In short, recent legal developments have extended, and probably will continue to extend, the boundary of a manufacturer's legal responsibility. But in doing so, these developments have resulted, and will continue to result, in greater safety for consumers.

Based on a paper presented at the 1976 Annual Reliability and Maintainability Symposium, at Las Vegas, Nev.

Product liability — now

If you don't believe it, ask you equipment supplier what percentage of the purchase price covers the cost of his product liability protection. And that's only the beginning!

For some time, now, materials handling people have brushed off the product liability problem as someone else's headache. After all, product design and marketing are not materials handling functions.

What's been forgotten is that materials handling people *do* buy and use other companies' products—materials handling and packaging equipment and supplies. And it is here that a most serious problem is suddenly becoming critical.

At a recent meeting of The Material Handling Institute, George Raymond, president of the The Raymond Corp., dropped a statistical bombshell, "When you buy an industrial truck today you are paying an extra 4 to 10%, depending on the price of the truck, to cover the cost of the manufacturer's product liability insurance or other protection!"

He also stated that product liability suits now outstanding against industrial truck manufacturers, represent a dollar figure—some say as much as $500,000,000—that is greater than the net worth of the entire industrial truck industry!

A crane manufacturer has said that the claims against his company amount to more than a year's sales.

This experience is not unusual. Such reports are coming from every industry. You hear of premiums for 1976 being raised from 200 to 1400%, even though the companies may never have had a claim against them. Other companies are required to take huge deductibles—$250,000 to $1 million—which means tying up capital. Many smaller companies don't have the capital to tie up.

The chief effect, for buyers of equipment, will be higher prices. Richard Lee, president of Econocorp and chairman of the Packaging Machinery Manufacturers Institute's product safety committee, said recently, "If we are buying packaging machinery for in-plant use, we must be aware that unreasonable insurance costs will be reflected in the pricing of such equipment."

The problem, of course, is vastly broader than materials handling. What we are talking about has become a national crisis affecting every product from every industry in the nation. An American automobile, right now, includes about $200 in its price to cover the product liability exposure. It may be $600 next year.

As the problem is studied—and the numbers are beginning to roll in—frightening conclusions are being reached. For example, the latest projections show that by 1980 product liability costs, borne by manufacturers, will add 10 to 20% to the price of everything we buy, unless something happens to halt the trend.

For materials handling users, the problem is a lot more than higher prices. There are further problems.

Unnecessary add-ons: equipment manufacturers will insist on including "safety" features not required by OSHA but which will look better in court as evidence of extreme safety-mindedness.

Reduction of equipment sources: many smaller companies may be forced out of business by high insurance cost or, if uninsured, by major courtroom losses.

Slow-down in innovation: this will take two forms. Manufacturers will be reluctant to introduce sharply innovative new approaches to equipment. They will also be reluctant to improve existing models, especially for safety. In many courtrooms, product improvement is interpreted as an admission that the previous models were unsafe. Only four states have statutes of limitations on product liability, so most manufacturers are vulnerable here.

Suits against the user: strange as it sounds, your company may be sued by your own materials handling equipment supplier to recover his losses arising out of a product liability suit from one of your employees. Today, this is unlikely. Once your injured employee has been paid by Workmen's Compensation, your company is usually immune from suit, under the law.

There are now several proposals before the Congress to change this system, to allow the equipment manufacturer to sue the employer. A witness before a Senate committee decided that this idea must have been dreamed-up by a lawyer since it creates *two lawsuits* where there was only one before.

No matter what form the solution may take—and many have been proposed—we have a very serious problem at hand. And it is no longer "just the vendor's problem." It is now being passed along to the user.

How many product liability suits are justifiable?

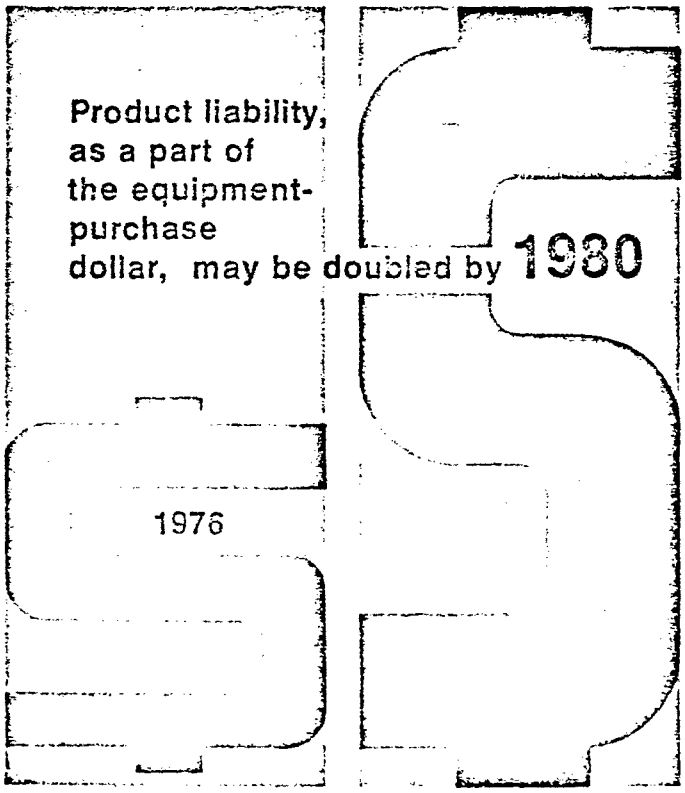
No one has suggested that a legitimate product liability suit be inhibited in any way. A manufacturer *should* do everything in his power to produce safe equipment. And if a worker is hurt as a direct result of defective equipment, he *should* be able to sue.

788

it's your problem, too!

"Despite a good claims record, our product liability insurance premiums were doubled this year. We are fearful that, in the future we will not be able to get insurance, at all."—*Jervis C. Webb, President, Jervis B. Webb Co.*

"Product liability claims, now outstanding against industrial truck manufacturers, amount to more than the net worth of all the companies in the industrial truck industry."—*George Raymond, President, The Raymond Corp.*



Insurance protection costs, alone, account for the 5 to 10% you pay extra for the manufacturer's product liability, today. By 1930, the trends indicate that courtroom losses and other factors of product liability will add 10 to 20% to the equipment price, depending on the total amounts

What can you do about the product liability problem?

There are four courses of action you can take which will help both immediately and over the long haul.

1. Intensify your safety efforts in your own plant. This, of course, strikes at the heart of the problem: each lawsuit is based on an accident. The trade associations, serving materials handling and packaging—including MHEDA—are putting together special materials to add impact to users' in-plant programs. This is above and beyond the excellent materials already available from manufacturers.

2. Help get legislative action. Senators and representatives in state houses as well as the Congress are fast becoming aware of the product liability problem. But the complaints are coming from manufacturers, and many legislators aren't too sympathetic. When they start hearing from the manufacturers' customers—the users—as well, an entirely different impact can be made. Write your senators and representatives in Washington and your state capital. Also write to the Select Committee on Small Business, U.S. Senate.

3. Work with trade associations and technical societies. Offer your inputs as a user to the trade associations to which your suppliers belong. If your own technical society does not yet concern itself with this problem, explain why it should and help to get something started.

4. Join RETORT. This is a national organization dedicated to getting reason and equity into liability law. It's a non-profit business league that uses company memberships to finance its programs. Write to Patricia Maxwell, Vice President, RETORT, INC., P.O. Box 131 Franklin, Mass., 02038.

Why they're starting to panic on the Potomac

The concern, on Capitol Hill, for the product liability problem is on the rise. The Senate has been holding hearings, an Inter-Agency Task Force on Product Liability has brought many federal agencies into the picture, and the White House has followed the subject closely.

And, as the evidence rolls in, as to the future impact of the problem, new worries are surfacing. At first, this was largely seen as a small-business problem. And it is that. Now, however, Washington is beginning to realize that there is also a frightening inflationary impact from product liability.

There are two major cost areas, in the problem, which ultimately must be passed along to the consumer in higher prices: the cost of insurance and other protection, and the cost of courtroom losses. Insurance cost impact is hard to measure at present, although the 4 to 10% effect on industrial truck prices can be clearly added up. But its impact on the retail consumer is not really known yet.

The cost of courtroom losses is another story. There are three trends, with measurable factors, which CAN be projected on a straight-line basis to a scary conclusion.

The number of product liability suits, according to the Defense Research Institute (legal, not military defense), rose from 100,000 in 1965 to 500,000 in 1971. Projected a straight line for 10 years, we can expect 1,200,000 suits.

Average awards to the plaintiff soared upwards from $11,644 in 1965 to $79,940 in 1973, according to Jury Verdict Research, Inc. Projected to 1980, that's $139,000 per award.

Percentage of juries finding for the plaintiffs also increasing, from 43% in 1965 to 54% in 1973. Projected to 1980, that's 61%.

Now for the horror story. Unless something is done to alter the trend, the cumulative projection of these figures points to a drain on the nation's economy of $100 billion, at least! That's in 1980, less than four years away!

Some experts feel that this projection is too conservative. They believe the greed element, motivation and opportunity for self-enrichment will accelerate the trends on considerably more than a straight-line basis.

In any event, the projected total is over 10% of our current Gross National Product! And it covers only courtroom losses, NOT out-of-court settlements, small company bankruptcies, Workmen's Compensation payments to the plaintiffs, insurance premiums, or cost of tying up capital for insurance deductibles or self-insurance. All of these add to the total, and will affect consumer prices to the tune of 10 to 20% of every product manufactured on the United States from toothpicks to sea-going ships.

Unless something is done, the product liability factor alone will guarantee double-digit inflation by 1980!

The manufacturers' position really boils down to two factors. In a high percentage of the cases today, the amounts being awarded seem excessive. And the basis, on which many are brought, seems to violate the rules of fairness. Too often, true negligence, or fault, doesn't seem to matter.

It is certainly true that the number of suits brought against manufacturers is wildly out of proportion to the number of accidents caused by defective equipment.

Studies of industrial accidents over the years have shown with remarkable consistency that 90% or more of the accidents are caused by something the operator, or a co-worker, does or fails to do.

The next commonest cause of injury is the employer. Under his responsibility fall: equipment misapplication, poor maintenance, improper equipment modification, poor supervision, and inadequate training.

Less than 1% of industrial accidents are caused by defective equipment! On the basis of this, product liability suits against equipment manufacturers should be rare. Successful ones should be rarer yet. But the record shows an enormous number of such suits with a high percentage of successful plaintiffs.

Let's look at a typical case. It's a real case, but some details have been disguised for obvious reasons. If you have not been studying the product liability problem, this case may seem a little far-fetched to you. It isn't. It's really typical, unfortunately.

An inspector, whose station was served by a belt conveyor bringing skidboards to him, loaded with piles of electrical switches, lost half of his middle finger on his left hand, trying to fix the power chain in the conveyor drive. It had jumped off the sprocket.

The employer's Workmen's Compensation insurance carrier paid the inspector $2500, which covered the medical costs and wage loss.

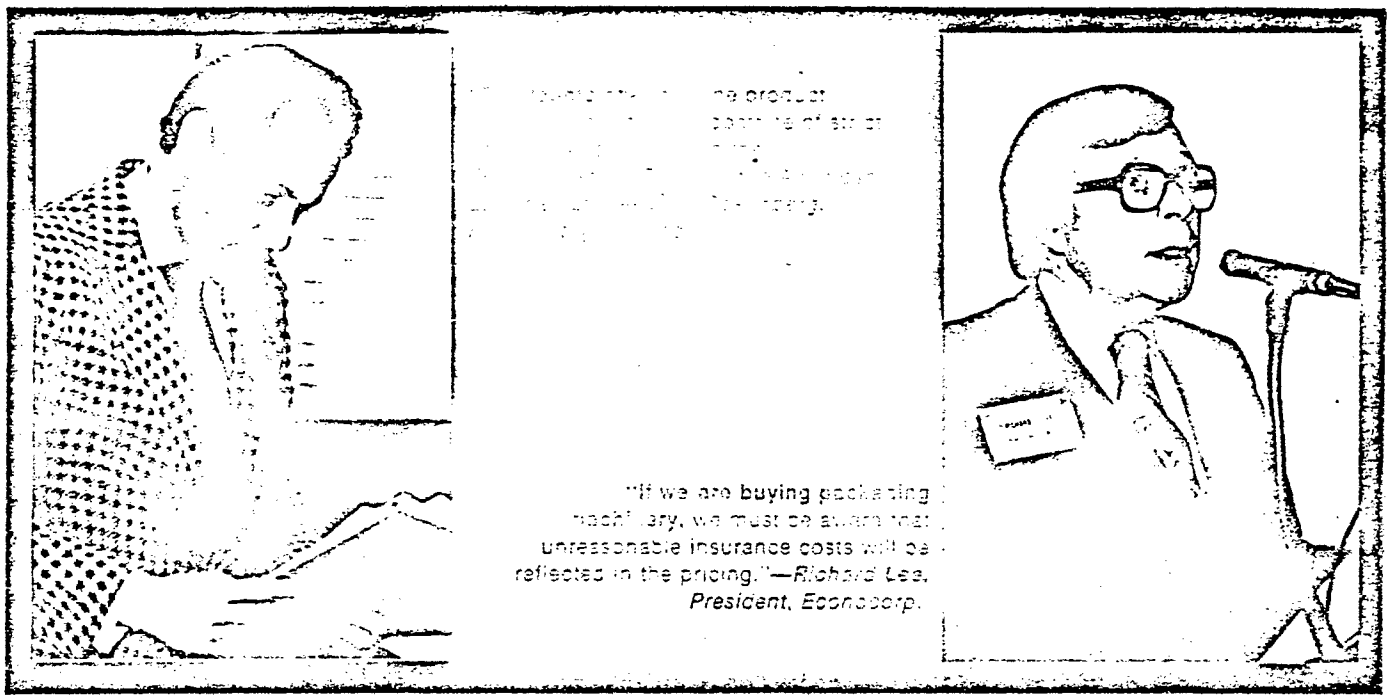
The inspector then sued the conveyor manufacturer with the help of the Workmen's Compensation insurance carrier, a third-party suit. The jury awarded him $40,000 for his pain and suffering.

Now consider this.

The conveyor was 22 years old! The employer was its third owner. It was originally designed to use a v-belt drive, not a chain. One of the two previous owners had modified it without the knowledge of the manufacturer. Its rated capacity was substantially below the application at the time of the accident.

The inspector was not authorized to repair or adjust the conveyor. Repair was the responsibility of maintenance, and the chain had jumped off the sprocket many times before the day of the accident.

By any sane definition of fairness, you could not assign any fault to the conveyor manufacturer. He was not negligent. The equipment was not defective when



he sold it. And it was not being used as he intended

Why, then, was he sued? Two things made it possible: the "deep pocket" principle and the doctrine of strict liability in tort. The deep-pocket principle enables a plaintiff to look up and down the line of companies involved in the life cycle of the equipment and pick one that seems to have a "deep pocket" (money). The questions of negligence and fault are often irrelevant in this approach.

The doctrine of strict liability presumably spells out the responsibility of a manufacturer for defective equipment in which the defect is the "proximate" cause of the injury. But in practice it goes much farther than that, becoming a principle of social justice, loss distribution, and a trial lawyer's gold mine.

The lawyer in this case got $12,000, or 30% of the award. The Workmen's Compensation insurance carrier got his $2500 back on a first-dollar basis. The plaintiff got $26,500, which is an unusually high share of the total. Jeffrey O'Connell of the University of Illinois, a top authority in liability law, says that the average plaintiff gets only 35 to 37%.

But what really happened in the courtroom is what the majority of the manufacturers complain about. The facts of the case—who was at fault—were never an issue. The jury was presented with two contestants: a human being who had been hurt and a "rich" company that could afford to pay. In a sense, the only question was the size of the award.

It is quite common in such cases, even where no negligence exists or is claimed, for the plaintiff's lawyer to ask for, and get, punitive damages as well!

At the root of the problem

We are talking about a situation in which everyone started out with the best of intentions. But the basic system changed. Incentives to self-enrichment were built in. These created a great opportunity and the temptation to exploit the supposed wealth of business without regard to a ripple effect on society.

The cumulative effect has become a nation-wide disaster. Basically, six forces have combined to bring it about.

1. A changing attitude in the general public. Although Workmen's Compensation usually compensates an injured worker for both medical costs and wage loss, more and more workers are coming to realize that a substantial windfall can be obtained through a lawsuit in addition. Sometimes they feel that the Workmen's Compensation payments are too small, which may be true. Sometimes they feel entitled to added compensation for "pain and suffering".

2. Robbing Peter...the Workmen's Compensation insurance carriers, who pay the worker in the first place, frequently seek to re-coup their losses by third-party lawsuits. They encourage the injured worker to sue a product manufacturer. If the worker collects, the insurance carrier gets his money back on a first-dollar basis.

3. Contingency fees. Lawyers are encouraged to stimulate the frequency of product liability suits by two factors. The first is the contingency fee which permits the lawyer to take a large portion of any settlement or award. The second is that numerous sources of litigation work, such as automobile accidents, are

drying up. Product liability is one of the few green pastures left. Advertisements in trial lawyer magazines often make this point.

4. **Insurance industry panic.** According to Richard Underwood, American Insurance Assn., speaking at a seminar of the Risk and Insurance Management Society, the insurance industry was caught unaware by the product liability problem. In recent years, claims have hit them so hard they have had to dig deeply into policy-holder surpluses, which are normally held for society's unpredictable losses. The industry was paying out between $1.35 and $2.00 in claims for every $1.00 collected in premiums. Obviously, that can't continue.

Their solution, short-term, has been to raise the premiums, in a very erratic fashion, anywhere from 200% to 1400%, or to deny insurance outright to some companies. Senator John Culver of Iowa, opening the product liability hearings for the select committee on small business, spoke of premiums raised as much as 900% for companies which have never had a product liability suit against them.

Many people feel that the insurance industry is overreacting. And the industry, itself, admits that a lack of data on claims and losses is a problem. Things have simply moved too fast for detailed measurement.

The net result is that many companies, especially smaller ones, cannot afford the insurance. And self-insurance ties up capital.

5. **Economic ignorance in the courtroom.** The degradation of the original concepts of fault and negligence in law, has led to an increasing number of situations where the jury's emotional reaction is the key factor in its decision. In more than half of the states, negligence, in the true sense of the word, need not be proved, and the word "defective" has been broadened to the point where it is practically meaningless.

This puts the focus on the economic aspect, which opens a Pandora's Box. Most jurors do not realize that each award becomes a force to drive prices up directly and to cause insurance premiums to be adjusted upward, which drives product prices up indirectly.

Nor do they realize that, in their desire to bring justice to a plaintiff they may be creating injustice for many others, specifically other workers. A small manufacturer of wood-working machinery, hit by an award of $500,000, put it this way. "I managed to save the company, but I had to put 32 people on the street in the process."

6. **Social activism in the law.** There has been a steady series of changes in liability law, starting roughly around World War I. As shown in the table, a chain of bench decisions altered the concepts of fault and negligence leading to a culmination in 1965 when the "Restatement of Torts (Second)" was issued.

This publication, analagous to an industry standard, spelled out the doctrine of strict liability and gave the philosophy for it. About 40 states have legalized the doctrine to some extent.

Simply stated, strict liability means that a manufacturer has responsibility for accidents far beyond any fault or negligence. The philosophy is that someone ought to pay for an injury, regardless of fault, and that the company who markets the product is best able to pay, as a cost of doing business.

Elliott Rosenberg, president of Thomson National Press Co., and president of RETORT, Inc., an organization working to get reason and equity in tort law, feels that the strict liability section in the Restatement is the fountainhead of the problem.

Solutions that have been proposed

Roughly 25 solutions have been proposed for the consideration of Congress, state legislatures, and the American Law Institute. For the most part, they deal with three objectives: reducing incentives to sue, establishing true responsibility for injuries, and spreading the cost burden.

1. **Reducing incentives to sue.** These proposals include eliminating or modifying contingency fees, third-party suits, suits for specific amounts, and punitive damages, where there is no negligence. Also proposed are that: unsuccessful plaintiffs pay costs; ceilings be placed on jury awards, or a schedule of benefits; "pain and suffering" awards be limited; Workmen's Compensation be upgraded to reflect the cost of living; industrial cases, where Workmen's Compensation applies, be recognized as different from consumer product cases; trials be split (liability first, then damages); annuity payments be set up for disabled workers; or a no-fault approach be taken.

2. **Establishing true responsibility** for injuries might be accomplished by: eliminating or modifying the doctrine of strict liability (a new restatement of torts); statutes of limitation; liability based on the state of the art at the time of manufacture; eliminating product improvement as proof that previous models were unsafe; requiring employers to give accident records to defendants; allowing contributory negligence as a defense; permitting the use of performance standards as a basis for determining a manufacturer's obligations and liability; using review boards, with technically-trained hearing officers, to hear and screen cases; and exempting the seller from liability where equipment has been modified, altered, mis-used, or poorly maintained.

3. **Spreading the burden.** One proposal, now before Congress, is that a manufacturer be allowed, when he is sued, to turn around and sue the employer of the injured worker on the basis of the employer's negligence.

How it came to be—evolution of the product liability problem

Before 1916	[illegible] PRIVITY"	**The injured worker had to prove:** (1) Privity, a direct buyer-seller relationship between himself and the company sued, (2) Negligence, or failure of defendant to use reasonable care to ensure a safe product, or (3) a direct relationship, or causal connection between the defect and the injury.
1916	[illegible] PRODUCT [illegible] INJURY [illegible]	Justice Benjamin Cardozo (McPherson vs. Buick): a ruling that absence of privity was not a valid defense, that the number of middlemen between maker and user was not a factor.
1944	[illegible] [illegible] NEGLIGENCE	Justice Roger Traynor (Escola vs. Coca Cola Bottling Co.): "I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover." Traynor also laid groundwork for the "deep pocket" principle.
1960	[illegible] [illegible] THE [illegible] POCKET"	Justice John Francis (Henningson vs. Bloomfield Motors): when a manufacturer markets a product, an implied warranty that it is reasonably safe accompanies the product to the ultimate consumer. Francis also ruled that losses should be borne by those in a position to control the danger or "...make an equitable distribution of loss."
1963	[illegible] LIABILITY	Justice Traynor (Greenman vs. Yuba Power Products): a ruling that even in the absence of negligence, the manufacturer is **strictly liable** for injuries caused by a defect in a product being used in the manner intended.
	[illegible] OF [illegible] LIABILITY	**Further court decisions** made manufacturer liable even if he could prove that a supplier's component caused the injury, and that retailers and middlemen could be held liable even if the product was never unpackaged while in their hands.
1965	[illegible] SUMS UP [illegible]	Dean William Prosser, an expert in tort (personal injury law), authored the "Restatement of Torts (2nd)" which was adopted and promulgated by the American Law Institute as a kind of standard for lawmakers. A key section deals with strict liability. It says that anyone who sells a product "in a defective condition unreasonably dangerous to the user or consumer" is liable for any harm caused despite the fact that **"the seller has exercised all possible care in the preparation and sale of his product"** and the user or consumer has not bought the product from or entered into any contractual relationship with the seller. **A comment included states: "Public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who manufacture the products."**
1965 to present	[illegible]	About 40 states have adopted strict liability, in some form, in their laws, and any manufacturer selling or distributing to those states is vulnerable.
	[illegible]	But the law is not the only problem. The tendency to sue, even after receiving Workmen's Compensation, is increased by common knowledge of substantial windfalls gained. Contingency fees—illegal in many industrial nations—give the worker's lawyer high incentive to encourage suits and seek unreasonably high damages. Third-party suits add to the problem as Workmen's Compensation insurance carriers urge workers to sue, and help them. Their motivation: to recover on a first-dollar basis the amount they have already paid the worker. And juries, assuming defendant companies to be "rich", give increasingly high awards.
	[illegible]	A New York judge has ruled that a plaintiff can sell shares in his lawsuit to finance it. The "Journal of Commerce" quotes the lawyer who won the ruling as saying, "...the sale of shares in a meritorious lawsuit as a speculative venture purely to make money holds out a distinct promise."