Products Liability Law

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Cases, Commentary, and Conundra

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Preface

In a dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311; 52 S.Ct. 371, 386–87 (1932), Justice Louis D. Brandeis famously observed that: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." In no area of the law is this more true than in products liability.

Indeed, the very notion of a new, discrete body of products liability law essentially came about from an "experiment" in California. But "experimentation" in cases of defective products has not ended there. Some states have tried strict liability as the yardstick for all products liability claims, albeit with different explanations as to what that notion entails. Other states have asserted (or re-asserted) various different notions of fault as essential to (some types of) products liability claims; and they have then differed as to whether this should be measured by a "consumer expectations" or "risk-utility" standard, or whether both these tests should be available as alternatives within the same jurisdiction. One state requires that both tests be satisfied, treating the latter as a question of law for the court, and the former as a question of fact for the jury.

Similarly, different states have tried different approaches regarding the circumstances in which substantial remedial measures to a product may be produced as evidence to sustain the claim of a product defect. Even the admissibility or otherwise of expert evidence is judged against different criteria in different states. And scientific uncertainty as to whether, and how, allegedly toxic agents can cause harm has led to a whole series of different approaches to proof of causation of harm, including tests applicable solely to asbestos cases that are not applied elsewhere.

Overlaid on this patchwork of judicial experimentation among the states is a federal blanket of rulings on multi-district litigation, pre-emption, bankruptcy, punitive damages, and the rules of evidence. This blanket shows the extent to which the Supreme Court has been prepared to adopt the rest of Brandeis's view, which has often been overlooked. For he was not, in fact, waxing eloquent in support of unconfined experiments with the law by the judiciary of the various states. On the contrary, the sentences that immediately follow the above quotation from Brandeis's judgment read as follows:

> This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold. (285 U.S. at 311, 52 S.Ct. at 387.)

Above everything else, then, products liability law is really about a struggle for power—and not just about a struggle for power between the parties to specific litigation, but also about struggles for power between one state and another, between the states and the federal government, between judge and jury, and among the judiciary itself. These struggles are often, moreover, less about what kinds of legal submissions may be successful, and more about who gets to decide.

One of the ramifications of this combination of a patchwork of state experimentation, subject to periodic federal intervention, is that the body of law it produces is best conceived not as fixed, black-letter rules that can be learned by rote, but as a body of policy-driven, fact-specific decision-making around a consistent set of themes. Many of these themes are lucidly highlighted by the Restatement (Third) of Torts: Products Liability, to which regular reference is made throughout this book. Yet it frequently remains open to question whether that Restatement's black-letter sections really do represent the law.

Another important consideration to be borne in mind is that, even if the decision-making around these themes varies from one state to another, there are (and have been) discernible trends (often nationwide) as to the direction in which the case law is headed. For this reason, recent cases predominate among those extracted here, while the older cases that are discussed have been chosen to highlight the ways in which the law has changed since they were decided.

One of the consequences of this emphasis on thematic trends is that many of the questions that are posed throughout the book are designed to encourage the reader to identify those trends in the particular area of the law then under discussion. Another is the inclusion of discussions of areas of the law that are not typically covered in books on products liability law, but which have nevertheless become matters of significant importance in products liability litigation. Chapter 16, in particular, is devoted to considering what happens when a manufacturer of defective products enters bankruptcy protection. In these recessionary times, omitting this important topic—and its consequences for the availability of compensation, whether through liability- or self-insurance—would surely amount to a refusal to recognize one of the most important, albeit also most unfortunate, trends of all.

An area of products liability law that could certainly benefit from a new trend and more "experiments" is its rhetoric. Comprehension of the area is currently impeded both by pompous Latinisms that have little connection to the Ancient Romans (though perhaps the worst of all, *syllabi*—which embodies so many linguistic, historical, and etymological errors that it is hard to know where to begin in identifying them all—seems sadly endemic throughout American law) and by wholly misleading terminology expressed in English (such as "implied assumption of risk"). The bizarre tendency to call every legal doctrine a "rule" when it is really no such thing (as in, for example, the "economic loss rule") is another such impediment. Perhaps worst of all is the lazy usage of the phrase "strict liability," which has now become so pervasive that it is impossible to know, without added verbiage, whether the speaker or writer is referring to fault-based or no-fault liability. I would happily laud any bench who resolved to eradicate these linguistic nightmares, especially one who ordered that the terminology of strict liability be once again restricted solely to cases of no-fault liability.

In the continued absence of that particular experiment, products liability lawyers are compelled to work with a lexicon that is neither as sharp nor as granular as it should be. One of the ways in which I have tried to overcome this problem is by supplementing the text with frequent flowcharts and other graphics, which are designed to be particularly

useful to "visual" learners. Sometimes I wish that judgments were set out in such a manner. A picture may paint a thousand words, although it is admittedly unlikely that any diagrams will be as eloquent as Justice Brandeis. They do, however, seldom strive to be pompous.

Tim Kaye
Tampa, FL
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In order to make these extracts easier to follow, internal citations have been omitted without indication. I have adopted the same approach to the case extracts.