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Some Observations About Products Liability Litigation

James A. Dooley*

Products liability is almost a world unto itself. This effort will be limited to some concepts of the pragmatic.

A decade ago when a farm hand who lost an arm in a combine consulted counsel, the immediate query of the lawyer would be: “Is there a cause of action against the employer?” Today, the farm hand himself would ask: “Was the combine defective?” He well might be able to point out those flaws in design which made it defective so as to be unreasonably dangerous to the user. This is the era of the consumer. The man on the street has an awareness of the liability of manufacturers and sellers for injuries caused by defective products.

Persistence of Old Forms

Unfortunately, old forms persist. Courts and lawyers still cling to negligence standards,¹ and the departure from the fictitious reasonable

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¹ The history of law is fraught with a reluctance to accident changes. In 1939, Congress amended the Federal Employer's Liability Act to abolish assumptions of risk and bring within the Act all employees any part of whose work was in the furtherance of interstate commerce. Yet it required a 1943 Supreme Court opinion, Bailey v. Central Vermont, 315 U.S. 54, 64, to tell the courts that all cases under the Act were to be handled as though the doctrine of assumption of risk never existed. It was not until 1956, in the case of Southern Pacific Co. v. Gileo, 351 U.S. 493, that this 1939 amendment concerning interstate commerce was implemented, notwithstanding the clear language of Congress.
man of negligence law is not easily accomplished. Illustrative is the *Lunt* case.\(^2\) There, the trial court, in enumerating the propositions the plaintiff was required to prove, stated:

1. That the machine was unreasonably dangerous in that it created an unreasonable risk of harm to others, that is, that it failed to guard against dangers reasonably to be foreseen, and was thus defective;

The reviewing court reversed, since it injected the seller's conduct into the case, stating:

We believe this portion of the instruction is prejudicially erroneous. It focuses on the conduct of the seller rather than on the product.

Continuing, the Court observed:

The *Restatement* clearly makes the vendor liable although he has "exercised all possible care in preparation and sale of his product." It does not matter that the seller has done "the best he can" if the product is defective and unreasonably dangerous.

So also in a strict liability action against an automobile rental agency, in which the plaintiff alleged that the brakes were defective, defendant cross-examined plaintiff and introduced evidence concerning the speed limit in the particular vicinity, notwithstanding that the vehicle was designed to stop at far higher speeds.\(^3\)

In the doctrine of strict liability, the character of the product rather than conduct is the prime issue.\(^4\)

As one court aptly observed:

In contradistinction to the law of negligence, the law of warranty assigns liability on the basis of the product's lack of fitness. When machinery "malfunctions," it obviously lacks fitness regardless of the cause of the malfunction. Under the theory of warranty, the "sin" is the lack of fitness as evidenced by the malfunction itself rather than some specific dereliction by the manufacturer in constructing or designing the machinery.


\(^3\) *Knapp v. The Hertz Corporation*, No. 63 C 29283, Circuit Court of Cook County, Illinois; *Williams v. Brown Manufacturing Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970). (The original opinion in the Williams case ruled that contributory negligence was a defense, but the court reversed itself on rehearing.)

As the substance of strict liability in tort is akin to that of the law of warranty, the evidentiary requirements to establish breach of warranty rather than those to prove negligence should prevail in an action in strict liability in tort.\(^5\)

But what of the deep-rooted confusion between contributory negligence and assumption of risk. Contributory negligence is not a defense to an action in strict liability in tort, but assumption of risk may be asserted.\(^6\) Each of these doctrines is entirely different. However, no concepts in torts have been more commingled than contributory negligence and assumption of risk.

The two have wholly different meanings:\(^7\)

Where a person has knowledge of and fully appreciates a danger, and under such circumstances, without any special exigency compelling him, he exposes himself to such danger or peril, his act in the premises may be deemed to have been voluntary. Contributory negligence in such a case cannot properly be said to be an element therein, for certainly the voluntary act of a party in exposing himself to a known and appreciated danger is wholly incompatible with an act of negligence or carelessness, for it must be manifest that carelessness in regard to a matter is not the same as the exercise of a deliberate choice in respect thereto. . . It is evident that contributory negligence and incurring risk of a known and appreciated danger are two independent and separate defenses, which should not be confused with each other.

And, as another court has stated:\(^8\)

A clear distinction should be made between the doctrine of contributory negligence which operates as a defense when a party knows or by the exercise of ordinary care should have known a particular fact or circumstance, and assumption of risk, which operates only when the party actually knows the full scope and magnitude of the danger and thereafter voluntarily exposes himself to it.

Probably, careless use of the two phrases by courts in negligence actions is responsible for the confusion.

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In products cases, recognition of the difference between contributory negligence and assumption of risk is vital to the implementation of strict liability. Contributory negligence has an objective basis; it deals in terms of the reasonable man. Assumption of risk is subjective. Did the particular person know of the particular condition? That is the query here. This is well summed up by the following instruction: 9

On that issue (assumption of risk) the jury was charged as follows:

Assumption of risk is walking into a dangerous situation with your eyes open, not inadvertently and testing a known danger.

For example, in my view—and this of course is not binding on you—but in this case, if Mr. Dorsey had consciously put his hand into the machine, you might find that he assumed the risk.

But if you believe the testimony here that he put his hand on the copper simply to feed it into the machine and then it was picked up by a splinter and taken into the machine, I do not believe that you could find him guilty of assumption of risk, because there is no evidence that he had consciously assumed the risk of injury.

Nor does plaintiff assume the risk of injury involved in a defect unless he realized its existence and voluntarily exposed himself to it.

Wherever the defense of assumption of risk is asserted, defendant usually cross-examines plaintiff in great detail about his conduct as if the issue were his due care. It would seem that before plaintiff's conduct could be inquired into on cross-examination, the defendant must make a showing or a bona fide representation that there will be evidence of plaintiff's knowledge of the defect and his voluntary exposure to it. We appreciate that the injured's denial of either his realization or his voluntary conduct or both is not conclusive. 10 But, bearing in mind that the test is a subjective one, there must be some evidence creating at least a strong inference that he both realized the existence of the defect and nonetheless voluntarily exposed himself to it.

It must be remembered that the risk of injury involved is the risk from the defect, 11 not the risk of the work itself. Plaintiff may be working with a dangerous substance, such as anhydrous ammonia. Nonetheless, he does not expose himself to the risk of being blinded when a defective hose ruptures. In this illustrative situation, it would be a particular error to allow cross-examination on such matters as:

(a) Whether he knew anhydrous ammonia was dangerous;

Whether he was aware that if this substance contacted human tissue, it would burn it; and

Whether he knew that if he did not have his goggles on, he could be blinded.

All of this would be immaterial unless there was a showing that he knew of the defect in the hose and nonetheless assumed the danger of that defect. Would it not seem the better course to require such a showing rather than to attempt to handle the matter by a motion to strike specific evidence—a procedure which would require repeating the offensive matter?

While inadvertence or diversion of attention may be negligence, it is not assumption of risk. This is classically illustrated by the Elder case, representative of an excellent comprehension of the doctrine. Plaintiff was injured on a book binding machine. She turned the machine on, and in some manner, two of the fingers of her left hand went into an opening, where they were severed. On cross-examination, she stated she did not know how it happened. Here is what occurred:

Q. Mrs. Elder, will you concede that what happened was that in a moment of carelessness and thoughtlessness, that you put your fingers into a place where they were not supposed to be, didn't you?
A. No, I wouldn't do that deliberately, stick my hand in there.
Q. Well, of course you didn't do it deliberately, but you did it in a moment, a split-second of thoughtlessness and carelessness, didn't you?
A. No.
Q. Well, how did you do it? Why did you do it?
A. I don't know. It happened instantly.
Q. You did do it, didn't you?
A. It happened.

Plaintiff's judgment was affirmed on appeal since there was no assumption of risk as a matter of law. Negligence standards must be avoided, particularly on the issue of the character of the product and the injured's conduct.

**Reasons for the Doctrine of Strict Liability**

The reasons for this doctrine have been repeated too often. Nonetheless, it is these reasons which make understandable evolutions in the rules of evidence we shall later discuss. We all know they were first

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12. *Id.* at 773.
expressed in Judge Traynor's famous specially concurring opinion in the *Escola* case,\(^{13}\) the progenitor of the doctrine crystallized in Mr. Chief Justice Traynor's *Greenman* decision.\(^{14}\) This justification is succinctly stated in the *Restatement of the Law of Torts*:

... the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of a product which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that 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 market the products.\(^{15}\)

This paraphrases Holmes' thought "that the safest way to assure care is to throw the risk upon the person who decides what precautions shall be taken."\(^{16}\)

**Recognition of the Potential Products Action**

Today, each set of facts surrounding an injury or death should be analyzed with these queries: Do they afford a potential products action? Is there evidence of defectiveness of some product? What about its design? Was it such that a more adequate warning was required? The duty of analysis is not confined to plaintiff's counsel. With the growth of third party practice, the development between active and passive wrongdoing, astute defense counsel will transfer the liability of his client to a third party, frequently the manufacturer or seller. Often, such a third party action, although not resulting in a complete transfer of responsibility, will provide a substantial contribution towards disposition of the principal action. It may be a source of contribution making possible settlement.

Even of greater consequence is that products liability may be the only possible common law action. This is particularly true of work injuries, where the employee, be he laborer, tradesman or airplane pilot, is circumscribed by Workmen's Compensation Acts. On closer

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examination of the proximate causes—and there may be multiple proximate causes—the equipment, tools or devices with which he works is incriminated. It may be a hammer,\(^{17}\) a nail,\(^{18}\) a grinding machine,\(^{19}\) or an altimeter.\(^{20}\)

Probably, the classical case is that of the sewage treatment workers who were injured and killed by asphyxiation in an effort to save a fellow worker whose gas mask failed to function. In the effort, one ripped off his own mask, while the others entered the tunnel without masks. All had an action against the manufacturer, with the rescue doctrine being applied.\(^{21}\)

It is mandatory that when injury occurs without intervention of a third party it be determined whether there is product involvement. Consider the party riding in a leased vehicle which goes out of control and strikes a stationary object or an innocent motorist. He may well have an action if the defectiveness of the rented car is a cause of his injury. The commercial lessor is in the same position as the retailer and manufacturer in the conduct of commerce. So also is he in a far better position than the consumer to know the character of the product.\(^{22}\)

Recognition of a potential action in strict liability in tort calls for an awareness of the term “defect.” This word has a singular sense; it is far broader than its everyday meaning. It is not limited to a specific condition. And there is no requisite that a specific defect be proved. On the contrary, “defect” as used within this doctrine is both a generic and elastic term.

As Mr. Justice Traynor has observed: “... No single definition of defect has proved adequate to define the scope of the manufacturer's strict liability in tort for physical injuries.”\(^{23}\) An excellent compendium is found in an Illinois decision of Mr. Justice Schaefer:\(^{24}\)

Although the definitions of the term “defect” in the context of products liability law use varying language, all of them rest upon

\[^{18}\text{Sweeney v. Matthews, 46 Ill. 2d 64, 264 N.E.2d 170 (1970).}\]
\[^{19}\text{Taylor v. The Carborundum Co., 107 Ill. App. 2d 12, 246 N.E.2d 898 (1969).}\]
\[^{23}\text{Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 375 (1965).}\]
the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function. So, Chief Justice Traynor has suggested that a product is defective if it fails to match the average quality of like products. (Traynor, "The Ways and Meanings of Defective Products and Strict Liability," 32 Tenn. L. Rev. 363 (1965).) The Restatement emphasizes the viewpoint of the consumer and concludes that a defect is a condition not contemplated by the ultimate consumer which would be unreasonably dangerous to him. (Restatement Torts (Second) § 402A, comment g.) Dean Prosser has said that "the product is to be regarded as defective if it is not safe for such a use that can be expected to be made of it, and no warning is given." (Prosser, "The Fall of the Citadel," 50 Minn. L. Rev. 791, 826.)

The doctrine embraces defects in design. A design which makes the product unreasonably dangerous is defective. If the product is unreasonably dangerous as the result of its design, an action under this theory is recognized.

Wherever there is a problem of showing that the product was in the same condition at the time of injury as at the time it left the maker's possession, it is particularly important to determine whether its design made it dangerous. The design can be shown by the defendant's records. These may be blueprints and various literature, including brochures, and photographs. They make possible identification of the product as defendant's, demonstrate its defectiveness, and dissipate any contention of change in its condition.

Defectiveness may result from a failure to warn. A product may be defective if it is unreasonably dangerous without adequate warning. An excellent illustration is the Crane case. A surface preparer was sold by Sears and manufactured by a co-defendant. The label warned it was an inflammable mixture, not to be used near fire nor flame. The plaintiff, while working with the preparer, became enveloped in flames. The defense's position was that the cause of the fire came from a water heater six feet away from the plaintiff. She had a cause of action, in that the labeling, while cautioning about the inflammable character of the preparer, did not state that it was combustible or explosive.

To what products does the doctrine apply? Dean Prosser states: “All types of products are obviously to be included.” Sometimes the line of demarcation between service and product, or method of installation and product may be narrow. In a rather unique situation, the injured supervisory employee in a moment of distraction entered a target room where a linear electronic accelerator—a volatile source of radiation—was in action. It was possible for him to make the entry while the accelerator was on since the area was not protected by a door whose opening would break the circuit and shut down the machine. There was no doubt of the plaintiff’s contributory negligence. The only avenue upon which to proceed was that the device was unreasonably dangerous without the circuit breaker. But what was it—the product or its mode of installation—which made possible this terrible occurrence?

THE IMPORTANCE OF THE PRODUCT ITSELF

There are many cogent reasons for the product’s presence at trial. Probably the least important is whether it is necessary to maintain the action.

Yet in a case against General Motors, no action could be maintained without the presence of the allegedly defective tire. This rule fortunately has not been followed in subsequent cases in the same court. The requirement is obviously too harsh since the offending product may have been destroyed. It may never have been in the custody of the injured, such as an infant burned through a defective incubator in a hospital. Countless other situations making impossible the product’s presence can be conjured up.

It would seem ample proof of its character could be shown by its age, its pre-accident use, its pre-accident appearance, the nature of the occurrence, and its post-occurrence condition. Whatever evidence possible could be wrapped up in a hypothetical question, and the opinion of an expert obtained.

One excellent opinion discusses almost all the contingencies under which problems of proof might arise concerning the defective product, with or without its presence. These are:

28. Carpenter v. Electronized Chem. Co., Circuit Court of Cook County, Case No. 66 L 16371, handled for the plaintiff by the writer.
(a) The opinion of an expert based upon an examination of the product is the usual method.

(b) Where the product is not available, the opinion of the expert is based on a hypothetical question.

(c) Where there are no eyewitnesses and the product is destroyed, proof of the occurrence itself and the particular probabilities may be adequate.

(d) The probabilities of the defect, plus the negating causes not attributable to the defendant, may suffice.\textsuperscript{31}

To the Stewart catalog, two additional categories could be added:

(a) The unavailable defectively designed product.

(b) The product defective because of failure to warn but unavailable.

As we have noted, proof of the defect in design can be made from defendant's records, including drawings, blueprints, and other relevant documents. These would be adequate foundation for a qualified expert to describe the details of its defectiveness.

Where the issue is failure to warn, we again find defendant's own documents the best source. The label on the product, the accompanying instructions, together with the composition of the product are significant. With the aid of an expert, all that is possible will be presented.

The product itself may demonstrate its defectiveness—a compelling reason for its availability. Consider a can explosion case.\textsuperscript{32} In the explosion, the cap of the can remained on, but the body seam split open. This demonstrated the pressure was adequate to split the seam of the body but inadequate to blow off the cap. This was the safety valve. Had it blown off, no explosion would have occurred.

In a recent tire case,\textsuperscript{33} the product was the best proof of its harm. "The four-ply rayon tubeless tire here involved was available for examination by the various expert witnesses at the trial. The blowout or

\textsuperscript{31} "If an accident sufficiently destroys the product, or the crucial parts, then an expert's opinion on the probabilities that a defect caused the accident would be helpful. If no such opinion is possible, as in the present case, the user's testimony on what happened is another method of proving that the product was defective. If the user is unable to testify, as where the accident killed him or incapacitated him, no other witness was present at the time of the accident, and the product was destroyed, the fact of the accident and the probabilities are all that remain for the party seeking recovery. At this point the plaintiff can attempt to negate the user as the cause and further negate other causes not attributable to the defendant. These kinds of proof introduced alone or cumulatively are evidence which help establish the presence of a defect as the cause of the damage." Stewart v. Budget Rent-A-Car Corporation, 470 P.2d 240, 243, 244 (Hawaii 1970).


\textsuperscript{33} Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306, 312 (1968).
rupture on the tire occurred on the side away from the road so that the user would not have been aware of any insipient damage unless he had been under the car a short time before the tire failure occurred. There was a definite crack in the innerliner which allowed air to escape into the outer ply. It created a bubble in the outermost ply that grew large and burst.” In an earlier ladder case, the Court said “. . . plaintiff’s evidence on the subject of defectiveness was a ladder itself and the circumstances under which it was used.”

Probably the most important reason for the presence of the product is for examination by an expert, who plays such an important part in products litigation. Hence, the importance of an outstanding man. He must be knowledgeable in this particular area of his specialty. Remember, the deeper that knowledge, the greater the ability to ascertain deviations from the normal, and to know the significant from the meaningless. More than that, however, he should be entirely familiar with all means available to expose the particular defect. Photographic techniques, with magnifying lens, offer an invaluable aid in showing up the flaws and weaknesses in the product.

Drawings and charts illustrating the normal and the want of it in the particular product are but a few of the almost limitless methods available. These are as broad and deep as knowledgeable imagination. Be certain that the expert knows that his job is to convey the meaning of the defect he has found through the most simple avenue of communication. This will frequently stir him to demonstrative methods.

Of course, your adversary is always aware of the importance of the examination of the product by his expert. His client wants to know: (a) if it is its product; (b) if it is defective; and (c) if any defect is attributable to it or to misuse or abuse. The opposition always knows far more about its product than you do. While your adversary has a right to examine and to perform certain tests, it cannot do anything which will in anywise change the character of the object. Character means every characteristic which makes it what it is. To insure preservation of the product, have it photographed before it is given the opposition.

35. Under magnification, the interior of an exploding can was not uniformly rusted. There were shiny surfaces rust free, particularly where the can would be crimped at the seam. This indicated the existence of the rust before the explosion, as that part was folded over and not subject to corrosive action. Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636, aff’d 46 Ill. 2d 288, 263 N.E.2d 103 (1963).
The order of the proposed examination by the adversary should, whenever possible, include:

(a) A detailed description of the testing, specifying the limitations imposed by the court;
(b) That your expert shall be present;
(c) That whether the testing is according to the order may be determined by your expert who shall have the right to terminate such examination until the court has had a hearing; and
(d) If the court finds the product impaired or destroyed by the testing or examination, certain sanctions will be entered, such as the use of the photographs, or other secondary evidence, together with the right to inform the jury why such secondary evidence is employed.

Assume there is an issue whether the defendant is the manufacturer. Then the product involved is all important. The name of the defendant on the product estops him from putting that in issue.36

So also, by examination by an expert, the particular maker can be identified. A wire rope, or metallurgical part is susceptible to identification by such means. Whenever the identity of the product—a common and very serious issue—is a question, the importance of the product itself is obvious.

STANDARDS AND MANUALS

Standards are admissible today. It is immaterial whether they are enacted by a governmental body or voluntary associations. They are probative of the expected quality of the product. The admissibility of standards had its origin in negligence cases.

In what is probably one of the leading cases on this question,37 a negligence action, where a one-ton wire screen slipped because of an error in the mating of the hoist cable and clamps, safety codes with recommendations concerning the mating of cables and clamps were received in evidence, together with expert testimony. The New Jersey Supreme Court observed that the codes were admitted:


as objective standards of safe construction, generally recognized and accepted as such in the type of construction industry involved. A treatise is usually no more than one expert's opinion regarding a particular factual complex. On the other hand, a safety code ordinarily represents a consensus of opinion carrying the approval of a significant segment of an industry... It is offered in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care.

It is to be noted that the mating recommendations in the manuals stemmed from both private and governmental sources, and the court drew no distinction between them.

It is now well established that codes of various reputable safety corporations are admissible to show a defect. Yet when a product is defective when it fails to perform in the manner to be expected in the light of its nature and intended function, there is a compulsive reason for admissibility to show the norm of like products.

In Illinois, this question is no longer open to dispute after a recent Supreme Court decision. In a railroad crossing case, a publication of the Department of Public Works and Buildings setting standards for grade crossing protection of public highways was properly admitted in evidence, notwithstanding that the Illinois Commerce Commission had exclusive jurisdiction over all phases of grade crossing regulation. The standards admitted prescribed when "cross buck signs" are adequate, when flashing lights with gates are necessary, and when grade separation is warranted.

In a subsequent Appellate Court opinion, also a railroad crossing case, the Uniform Traffic Control Device Manual of Iowa, as well as the Federal Uniform Traffic Control Device Manual, were received in evidence to aid the jury in determining not only defendant's knowledge, but what was feasible. "Feasibility" is the term used in products actions to justify the admission of alternative methods, as well as modifications in products litigation.

Manuals may be employed for any relevant matter. One California case describes the varied manuals which may be employed for vary-

tire blew out. The action was predicated on strict liability, warranty and negligence. Here are some of the manuals, bulletins and publications employed:

(a) A “Tire Guide” recommending a certain size tire for use on all Chevrolet station wagons, such as the one in question.

(b) A Chevrolet owner’s manual, which made no reference concerning tire safety, but only recommended the pressure for ease in riding and tire life.

(c) A service bulletin issued by the tire manufacturer to its dealers showing recommended pressures for the tires, but making no reference about the maximum weight which could be safely borne.

(d) The maximum carrying capacity of the type of tire according to the standards of the Tire and Rim Association.

(e) The engineering publications for the Chevrolet station wagon indicating the maximum capacity of the rear wheels. (This, together with the tire manufacturer’s experts, showed the wagon to be overloaded when six normal weight people were riding in it.)

(f) Disregard of the standards of the Tire and Rim Association by General Motors, which did not advise the purchasers of its vehicles concerning overloading.

(g) Advertisements in *Newsweek* and *Readers’ Digest*, which were rerun in the *Oakland Tribune* six to ten times showing the tire comparable in strength to the one in question being driven over rocks and boulders—an abuse labeled by defendant’s expert as foolish.

These particular documents were employed to demonstrate the defectiveness of the product, as well as the failure to warn. Of course, since there was a negligence issue, they were relevant on that charge. This is an excellent example of the varying types of documents relevant in products litigation.

So also in the *Yoder* case, an encyclopedic opinion of many important questions in the implementation of this doctrine, the maker’s instructions were admitted to prove lack of warning.

Yoder’s instructions authorized the making of the duplicate stripper fingers but did not specify that they be made of hard maple . . . In any event, nothing in the Yoder instruction booklet indicated that the stripper fingers served a safety purpose.

It may be said that manuals, instructions and other literature are relevant to show (a) lack of warning; (b) the character of the product;

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(c) that plaintiff is within the scope of protected users, and any relevant issue in the cause. The instances in which such material may be relevant is dependent upon the particular case.

**OTHER OCCURRENCES—PRIOR AND SUBSEQUENT**

Similar occurrences have long been admissible in the law of torts. In negligence actions, the purpose of such evidence, according to McCormick, was to show:

(a) The existence of a particular condition, situation or defect;
(b) That plaintiff's injury was caused by the allegedly defective or dangerous condition or situation;
(c) That the defendant knew, or in the exercise of reasonable care should have known, of the dangerous or defective condition or situation sued for.

This, of course, is ancient teaching in the law of torts. Such evidence is admitted in negligence cases for a limited purpose, and the jury is so advised, not only at the time it is offered, but also in a specific instruction.

Today, in products liability litigation, occurrences subsequent to the happening of the particular event out of which the lawsuit arises are admissible. Similar accidents are relevant both as to the character of the product and causation. When the quality of the particular product is in issue, is there any difference between prior and subsequent occurrences? It would seem not. So also, on the issue of causation, subsequent occurrences would be relevant. Consider drug cases. If others who used Aralen for rheumatoid arthritis went blind, and others who ingested MER for a heart condition developed cataracts would not such evidence reflect on the causative factor?

In what is now a leading case, the plaintiff was caught in an automatic door while leaving a hotel. An action against the hotel and the designer of the door was unsuccessful. At the trial, evidence of prior

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43. MCCORMICK ON EVIDENCE § 167, p. 351 (1972).
accidents was admitted, while evidence of subsequent occurrences was excluded. In reversing as to the manufacturer, the reviewing court reasoned that subsequent occurrences were relevant to the issues of causation and the defective condition.\textsuperscript{40}

Proof of these similar happenings are often found in the company records showing the occurrence and injury. They qualify as records made in the ordinary course of business. And for certain conditions, particularly those requiring the evidence of treating doctors, this may be the only evidence. The more dramatic method of presentation is the testimony of the other persons involved. In a can explosion case,\textsuperscript{50} three persons, who had experienced similar incidents in California, New York and Wisconsin, testified by deposition. This was supplemented by company records substantiating their testimony. And where a truck driver sustained an injured eye when a light bulb lens shattered, it was error to exclude the evidence of other truck drivers who had the same experience.\textsuperscript{51} Such evidence was irrefutable proof of the character of the product.

**Feasibility and Subsequent Modifications**

The policy in the law of negligence was to exclude evidence of subsequent changes. Its reason was to encourage precautions without subjecting the maker to a possible admission of liability.\textsuperscript{52} It soon became questionable whether this ancient policy was consistent with the object of the law of products liability. Without discussion, the old policy was discarded.

The first inroad into this law of exclusion was the admission of evidence of the absence of safety devices in products actions predicated on both negligence and strict liability.\textsuperscript{53} Another vehicle to the admission of alternative or different methods was “feasibility.” Feasibility and...
ity apparently means the effectiveness, practicalities and possibilities of the other methods.

In a case predicated both on strict liability and negligence involving the explosion of a can, evidence that the manufacturer subsequently employed a type of capping which it had used prior to the occurrence was properly admitted. Had this type of cap been on the can at the fatal time, no explosion would have occurred.\(^4\)

In a printer-slotter machine case, with apparently negligence and strict liability counts, a judgment was reversed solely on the trial court's refusal to admit evidence that there were safety measures in use in the industry on such products. The appellate court noted: (1) The standard imposed upon a manufacturer is to keep informed of the developments in his field, including safety devices and equipment; and (2) the safety measures were evidence of what was feasible and what measures were at the manufacturer's command to prevent such an occurrence.\(^5\)

It may be categorically stated the old policies prohibiting post-occurrence changes have no pertinency in products liability cases. This is manifest when the defectiveness may be demonstrated by alternative feasible methods,\(^6\) or the employment of feasible safety devices.

What about the admissibility of modifications subsequent to the injury? In a recent Illinois case,\(^7\) the reviewing court reversed the judgment solely for excluding evidence of modifications after the particular occurrence. The court reasoned that if other designs, as well as safety devices on other products, could be admitted on the basis of feasibility, "A post-occurrence change is equally relevant and material in determining that a design alternative is feasible." It seems

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\(^5\) Moren v. Samuel M. Langston Co., 96 Ill. App. 2d 133, 237 N.E.2d 739 (1968). In a negligence action, Matteucci v. High School Dist. No. 208, 4 Ill. App. 3d 710, 281 N.E.2d 383, 389 (1972), the court commented at page 717: "This contention begs the question. Plaintiff's position is that if the convenient plastic guard, so readily available, had been provided, plaintiff would have used it. In this regard, we find that the testimony of availability of this guard was competent under the facts and circumstances in the case at bar. Moren v. Samuel M. Langston Co., 96 Ill. App. 2d 133, 146, 237 N.E.2d 759 (1968)."

\(^6\) An excellent statement of the change of the law concerning alternative methods and the admissibility of modifications is found in Justice Stouder's opinion in Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749 (1972).

\(^7\) Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972). Cited therein is Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969), where the plaintiff, injured when his hand slipped into the centralizer of an earth boring drill, brought a products action. After the accident, plaintiff's employer welded a guard on the centralizer. "This evidence was, of course, admissible to show feasibility of guarding the centralizer, and the trial court instructed the jury that it should be considered only for this purpose and not as evidence that the respondent or retailer was negligent."
then, that subsequent changes, like possible alternative methods of design or potential safety devices, are admissible as demonstrating the character of the product and, unlike prior occurrences in the law of negligence, it is not received for a limited purpose.

**COST OF PROTECTIVE DEVICE**

Feasibility has become a watchword in evidence questions arising during products litigation. It has been employed to justify admitting measures available to make the product non-defective, as well as subsequent changes. Why not admit evidence of the cost of the safety measures and perhaps the subsequent modifications, particularly if these are minimal as compared with exposure? There must be considered the balancing of the likelihood of harm and the gravity of the harm, if it happens, against precautions effective to avoid that harm. The factors listed by Dean Wade are:

(1) The usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.  

This general principle of torts has been applied in a leading defective design case. **In a district court opinion it was remarked:**

On the other hand, a guard would not eliminate the machine’s usefulness, nor would the cost of $200 to $500 on an $8,000 machine be unreasonable.

It would seem that in demonstrating the feasibility of safety devices or modifications, the cost factor is highly relevant. Indeed, it goes to the practicability of the employment of the safety measures or modifications.

**EXPERT TESTIMONY**

Probably the greatest transition in the law of expert testimony is rep-

resented by the 1971 Illinois Supreme Court decision of *Merchants National Bank*. In that railroad crossing case, the court permitted an expert to express the opinion that the particular crossing "is very inadequately protected." The court reasoned that "since the trier of fact is not required to accept the opinion of the expert, such evidence does not usurp the province of the jury." In its holding, the court swept into discard a line of cases going as far back as 1873. The effects of this opinion are far-reaching. They extend into every phase of litigation where an expert testifies. Now the expert may express an opinion as to the ultimate issue in the case. The problem of proof is considerably eased in products liability actions. For example, the expert who has examined the object will now be permitted to state: (a) that he has an opinion, based upon a reasonable degree of scientific certainty, that the particular object is defective; and (b) most important, the reasons for his opinion that the product is defective.

This is in accord with the new Federal Rules of Evidence providing: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Apart from the ultimate issue of defectiveness, it would seem opinions on the various definitions of defectiveness would be proper. Thus, the expert could be asked whether there was a failure of the product to perform in the manner reasonably to be expected of it, or whether it matched the average quality of like products, or again, whether in his opinion the warning was adequate.

While the jury need not accept the witness' opinion, nonetheless, this is a strong weapon in proving the defect by direct evidence. We noted that in considering the value of the opinion expressed by the expert, courts of review are impressed by his qualifications. If the well qualified witness can make an impression upon appellate courts,

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62. Some of these are *Chicago and Alton R. Co. v. Springfield & N.W.R. Co.*, 67 Ill. 142 (1873), an action involving a cut under another railroad and the question being how the work should be done; *Keefe v. Armour & Co.*, 258 Ill. 28, 107 N.E. 252 (1913), where the issue was whether the method to adopt a boiler was unsafe; *Gillette v. City of Chicago*, 396 Ill. 619, 72 N.E.2d 326 (1946), involving the necessity of shoring during the construction of a subway; *Paisley v. American Zinc Co.*, 235 Ill. App. 22 (1924), concerning whether fumes caused property to depreciate, and *Hughes v. Wabash R. Co.*, 342 Ill. App. 159, 95 N.E.2d 735 (1951), where an expert witness who stated a railroad crossing was extra-hazardous was cause for reversal.


how much deeper do their qualifications cut with the trial judge and jury? With direct evidence of a well qualified witness in the record, the trial court will be loath to exercise his powers under the Pedrick doctrine either on motion for directed verdict or a motion for judgment notwithstanding the verdict.

Another important development in the area of expert evidence is the Darling case. It grants judicial permission to make liberal use of professional treatises and books when cross-examining an expert witness. Until 1965, Illinois followed the majority of jurisdictions in holding that a treatise could not be referred to in cross-examination unless the witness had based his opinion on it. Treatises may now be recognized in Illinois for use in cross-examination, or the court may take judicial notice of them. A disclaimer by the witness of knowledge of the article does not prohibit its use. If the witness states under questioning that he is not familiar with an authoritative work in his field, it is certainly a reflection on his qualifications as an expert. This is the same as Rule 529 of the Model Code of Evidence. This rule dictates a preparatory phase. When the pre-trial depositions of experts are taken, it might be advisable in certain cases to make inquiries first concerning the literature of their profession. Are they familiar with it? Are there articles which support them, and if so, what are they? Is there literature contrary to their position. Or it may be possible to obtain this information through interrogatories. The preparatory aspect is brought into focus in drug company litigation. These companies collect all the literature on the side effects of their products. One of the standard pre-trial requisites in such litigation is the bibliography of the company. After getting it, examine carefully the various articles. No doubt they will be of value on the cross-examination of the company experts.

Obviously, the preparatory vistas opened by such a rule are numerous. You must do the necessary preparation, if you intend to get the benefit of the rule. As with any other tactic in a lawsuit, treatises and documents should be used sparingly. Choose only one or two works of acknowledged stature which flatly contradict the opposing


66. Darling v. Charleston Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253, cert. denied, 383 U.S. 946 (1966). Rule 703 of the New Federal Rules of Evidence provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."
position and support your client's position. Such publications may not be evidence, but developments in the case may increase their importance and their impact on the jury.

While these articles are not substantive evidence, they may be of untold aid. Consider, for example, an action against a commercial blood bank, filed by a patient who had contracted serum hepatitis following a transfusion of blood furnished by the bank. There is, of course, no possible way to determine whether transfused blood is virally infected, but it is common knowledge that some commercial blood banks buy this human product from persons who are not in good health. They may be alcoholics, drug addicts, or suffering from venereal diseases. The most articulate spokesman of those opposing such businesses is probably Dr. J. Garrett Allen, professor of medicine at Stanford University. In his many articles on the subject, he has stated that the high incidence of hepatitis is a direct result of practices followed by the blood banks—practices similar to those used by a particular blood bank in a certain case. Indeed, he has very imposing statistics on the incidence of hepatitis in those furnished blood by commercial as opposed to voluntary blood banks. Blood banks, he points up, deal in a human product. The medical director of the defendant blood bank, a doctor, called as an adverse witness, admitted knowledge of the articles, the status of Dr. Allen in the medical profession, but stated he simply disagreed with the statistics. He could furnish none of his own, and knew of no others.

THE DECISION ON WHICH THEORY TO PROCEED

In many instances, the same facts will give rise to an action in strict liability in tort, express warranty, negligence and even wilful and wanton conduct. Upon what theory or theories should the case be presented? If after pretrial discovery, it develops that the facts may be successfully presented either on strict liability or negligence, one should not pursue both theories. If there is a solid strict liability in tort action, dismiss the negligence charge long before the trial commences. In making this decision remember the doctrine of res ipsa loquitur has no applicability to actions under this teaching.\textsuperscript{67} With only strict liability in tort doctrine, the case has a completely different posture.

The defendant's due care, defendant's negligence, as well as that of the plaintiff, have no place in the case. From the very outset, the attention of the jury is focused on the character of the product. The

only defense left to the defendant, assuming that a prima facie case has been presented, is that of assumption of risk—a difficult one at best.

If one delays until the close of the plaintiff's case, or, worse yet, until the close of all the evidence, to make the decision whether to proceed solely on the strict liability doctrine or on strict liability and negligence, he has tarried too long. Concepts of negligence have been brought to the jury's attention. Defendant may have made an opening statement outlining its due care and plaintiff's want of it. Worse yet, plaintiff has been subject to a cross-examination about his conduct. When this decision is not made until the close of all the evidence, the jury has heard evidence of due care including its painstaking testing and inspection methods and spot checks. Always remember to avoid the position of having to erase from the jury's mind all evidence of negligence and due care. It will not favorably react to a contention that all such evidence is meaningless, and that the case rotates solely around another issue.

There will no doubt be occasions when one desires to proceed on both strict liability and negligence counts. These are usually situations where the following circumstances play an important part:

(a) It is doubtful whether the doctrine of strict liability applies;
(b) There is no evidence of contributory negligence;
(c) Where the evidence of defendant's negligence is demonstrated by its own records—the most conclusive proof of negligence but, unfortunately, not too frequently encountered;
(d) Where the conduct of the defendant is wilful and wanton as to justify a claim for exemplary damages. This, of course, permits evidence of defendant's financial condition. This is undoubtedly a catalytic element.68

CONCLUSION

Strict liability in tort, although not of recent origin, brings into this phase of the law a new concept, responsibility without negligence. To implement this doctrine, new trial procedures, including rules of evidence, are requisite. These are as diversified as the doctrine itself. This effort only attempts to touch upon some basic empirical standards.