A REVIEW:

PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY

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UNIVERSITY OF MINNESOTA PRESS (1960)

Anyone reading this 210 page book (excluding the massive table of cases and index at the back) is bound to be impressed by the prodigious effort made by the author in collecting and analyzing the 552 cases listed in the table of cases and the numerous articles and books referred to in the 432 footnotes. Professor Gillam has, without doubt, compiled one of the most comprehensive lists of cases in this area of the law ever made.

Chapter I is an introductory and summary chapter. At the end of this chapter the author states that the following propositions "tend" to be substantiated by his book:

> 1. Professor A. V. Dicey was right and Sir Henry Maine was wrong: our society is becoming increasingly collectivistic in spirit and tends to define progress in terms of the development of status relationships, with a corresponding shrinkage of liberty of contract.
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> 2. The standards of civil liability are becoming increasingly objective in character: we test responsibility in terms of acts and their effects, and only secondarily in terms of culpability or subjective states of mind. (There are similar indications in the criminal law.)
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> 3. The renascense of strict liability is a feature of collectivism, status, and objective standards; it may be justified as an attempt to maximize economic welfare through optimum resource allocation resulting from a more perfect equation of social and accounting costs, and as an attempt to comply with the moral judgment of society that a small loss to many is better and more just than a catastrophic loss to a very few, at least where the few and the many are members of one class having an economic bond (such as common consumption of automobiles).
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> 4. The structure of the automobile industry suggests that it is unrealistic to hold that there is no privity of contract between automobile manufacturers and consumers, and that if products liability is to be imposed in the automobile industry, the manufacturers are in the best position to bear it and to shift the resulting costs to consumers in general.
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> 5. The modern tendency is to shift quality risks in sale transactions from buyers to sellers; this principle is well established as between parties

who are in privity of contract, and is gaining acceptance with respect to transactions in which privity in the legal sense is absent.

6. Winterbottom v. Wright is an unsound decision, and one which was improperly given a much broader interpretation than the precise question before the court justified; and it is inconsistent with the general tendencies of legal development then current. Therefore, it was quite proper for subsequent decisions to emasculate the Winterbottom case with exceptions, and ultimately to make the exceptions into the general rule, reducing the barriers to the plaintiff's recovery to the level of evidentiary problems.

7. The privity rule is beginning to weaken even in the warranty cases, although warranty traditionally is regarded as contractual in character and limited to the ambit of contractual relationships. Historically an excellent case can be made for regarding warranty obligations as tort duties, and decisions to this effect would greatly facilitate the extension of products liability.

8. However, it is preferable to base products liability upon direct tort principles because to do so is to avoid the disclaimer problem. Otherwise, or perhaps in any case, some control of disclaimers is called for.

9. The products liability of automobile manufacturers upon tort principles of deceit and negligence is well established, but in general recovery upon a warranty theory requires privity of contract, particularly where the warranty is implied. In tort the plaintiff's problems are primarily matters of evidence and causation.

10. Products liability has induced business managers (a) to adopt higher standards of care in manufacture, (b) to adopt higher standards of truth in advertising, (c) to adopt more complex forms of business organization, (d) to accompany almost every sale with a contractual disclaimer of liability, (e) to make every reasonable effort to satisfy complaining consumers, and (f) to some extent, but not in the automobile industry, to purchase products-liability insurance.

11. Full legal responsibility for product defects is desirable at the manufacturing level, at least in the automobile industry, as a means of achieving proportionate distribution among automobile consumers of the costs and benefits of automobile manufacture. The alternative is a disproportionate distribution of costs which outrages our sense of justice and results in misallocation of resources.

12. This full legal responsibility for product defects may be achieved by (a) frankly adopting strict liability both in tort and in contract, (b) holding that manufacturers are in privity of contract with consumers or abolishing the privity requirement both in contract and in tort, and (c) limiting the use of contractual disclaimers of liability.

13. The costs of litigation are such that the injured consumer's best protection often is simply the manufacturer's desire to satisfy his customers.[1]

In Chapter II the author briefly discusses some of the background economic factors in the automobile industry. His principle purpose is to demonstrate the

[1]Cornelius W. Gillam, *Products Liability In the Automobile Industry* (Minneapolis: University of Minnesota Press 1960) p. 8.

close economic relationship existing between automobile manufacturers and consumers.

In Chapter III the legal background to the product liability problem in general is presented. The leading articles and treatises are collected in footnotes and the main points contributed by various authors summarized and discussed in the text. As would be expected the story begins with the classic case of Winterbottom v. Wright and procedes through MacPherson v. Buick Motor Co. into the area of modern law where plaintiffs battle to overcome the privity Medusa and the lurking Charybdis of disclaimer clauses. Towards the end of the chapter, the author cogently reiterates his main theme:

> "But the advantages of the direct tort approach to manufacturers' liability, avoiding as it does frolics and detours into draftsmanship, business policy, judicial sophistry, and legislative fiat, need no further elaboration. It is clear that the law is Euclidean in this sense: a straight line is the shortest distance between two points."[2]

Chapter IV comprises 122 pages and is by far the longest chapter in the book. The cases and writing treating product liability in the automobile industry are collected and discussed in great detail. The author even groups and discusses the cases as to various types of specific defects such as defects of: design, chassis, body, engine and so on. The last part of this chapter treats such subjects as: Who is liable? What theories of liability are used? What defenses are used? The chapter ends with brief notes on British Commonwealth cases and aviation product liability cases.

Chapter V is entitled "Managerial Responses to Shifting Automobile Products Liability Risks." Professor Gillam argues the movement to *caveat venditor* has stimulated the manufacturers to exercise greater care as to the quality of their products. He notes that the automobile manufacturers have elected to carry their own risks of product liability rather than to insure with others. Although the disclaimer features of the standard new-car warranty are broad enough to limit the manufacturer's liability in personal injury cases, no manufacturer to date has used this warranty as a defense in a personal injury case.

In Chapter VI, the concluding chapter, the author states his conclusion relative to product liability for the automobile industry:

> "For purposes of public policy, it is desirable that the automobile manufacturer bear full legal responsibility for losses caused by preventable defects in his products. Such full responsibility is called for by the nature of the losses resulting from product defects and by the economic structure of the automobile industry."[3]

He supports this conclusion by analyzing the objectives of law in terms of social costs and resource allocation and an evaluation of alternative solutions. He concludes that under present law the tort liability of the manufacturers is about as complete as it can be made even though the plaintiff must still prove a defect and prove injury as a proximate result of the defect.

Professor Gillam, at the very least, has done a skillful job of collecting,

[2]Ibid, p. 64.
[3]Ibid., p. 196.

organizing, and summarizing the relevant material in this area. His book should prove particularly valuable to lawyers practicing in this area.

Although there are one or two spots where additional economic analysis might have been desirable, overall he did a commendable job of analyzing the economic and business aspects of the issues.[4] I think that any member of the association can profit by reading this book and it certainly would constitute a worthwhile addition for his library.

[4]For example, on page 186, the author states: "Current rates of business mortality demonstrate that the price of indifference (in regard to product liability) is high under modern competitive conditions . . . " It would be extremely difficult to substantiate in fact or in theory the causal relationship suggested.

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