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# JUDGES AND PRODUCTS LAW: PROVISIONAL TRUTHS AND DESIGNATED DESIGNERS

*Marshall S. Shapo*

## INTRODUCTION

Are judges still making products liability law? Should they be? As Steve Landsman said, the answers are both self-evident and complicated. The complexity of the answer is evident in the fact that I agree with everyone on something and I disagree with everyone on something. Partly it depends on what you mean by lawmaking and, as Mike Green explained by colorful reference to riverboat piloting,<sup>1</sup> what you mean by law.

I find an implicit message in Ted Eisenberg's article<sup>2</sup>—although I understand that he does not announce this conclusion—that we have developed a mature jurisprudence. I tend to subscribe to that idea, although I observe that it would be interesting to see data on the period beginning in 1963, when the judicial revolution in products liability began in earnest with *Greenman v. Yuba Power Products, Inc.*,<sup>3</sup> and *Goldberg v. Kollsman Instrument Corp.*<sup>4</sup>

I found very interesting the ideas of Lucinda Finley, whose work intersects with the idea of market experimentation that I advanced in 1979 in *A Nation of Guinea Pigs*.<sup>5</sup> An important issue she identifies is whether, in cases of uncertainty, courts will tilt toward putting the burden on the consumer or the seller.<sup>6</sup> This is a particularly interesting presentation of the question of how regulatory tort law should be.

Mike Green's quotation from Joseph Sanders on a "congregation of Bendectin cases" was quite apt.<sup>7</sup> The thrust of the quotation is in line

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1. Michael D. Green, *The Road Less Well Traveled (And Seen): Contemporary Law Making in Products Liability*, 49 DEPAUL L. REV. 377, 377 (1999).

2. Theodore Eisenberg, *Judicial Decisionmaking in Federal Products Liability Cases, 1978-1997*, 49 DEPAUL L. REV. 323 (1999).

3. 377 P.2d 897, 900-02 (Cal. 1963).

4. 191 N.E.2d 81, 82-83 (N.Y. 1963).

5. MARSHALL S. SHAPO, *A NATION OF GUINEA PIGS* (1979).

6. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 366-67 (1999).

7. See Green, *supra* note 1, at 396.

with my portrayal of a cross-country conversation among courts about products liability law.

I do not disagree with Ted leaving out the asbestos cases,<sup>8</sup> but I point out their importance in the general scheme of things. As I will elaborate in a moment, asbestos cases are not, doctrinally, a world unto themselves, but rather have provided a shot of legal hormone into general products liability jurisprudence.

### I. LAW AND CULTURE

These staccato remarks provide a partial foundation for my response to the question, are judges still making products liability law? The general answer is that indeed they are. Products law is at once a battleground and a cultural mirror, and it is a cultural mirror because it is a battleground. It is reflective of the tensions in society, and corresponding tensions in the minds of judges; it reflects, to a certain extent, mood swings in society.

Working against this background, and by the force of their roles as resolvers of disputes, judges are the designated designers of law. "Making law" in this sense is an ongoing transcription of changes in society's mind. Products decisions represent readings of the effects of technology and of marketing, and they reflect increasing judicial sophistication about science—both its contributions and its limits as a tool in legal decisionmaking.

### II. A GARDEN OF LEGAL VERSES

Some recent developments represent a holding of the line, and sometimes a drawing in of the boundaries. But the line is a jagged one. Let us look at some specifics.

#### *Scientific proof*

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>9</sup> and its progeny, *Joiner v. General Electric Co.*,<sup>10</sup> and now *Kumho v. Carmichael Tire Co.*,<sup>11</sup> confirm Mike's reference to defective prophecy. (I would note, though, that this is a minor error in prediction, as legal analysis goes, as compared with such egregious mistakes as that of the Supreme Court in *Jones v. Clinton*.<sup>12</sup>) One question on the table now is

8. See Eisenberg, *supra* note 2, at 325.

9. 508 U.S. 579 (1993).

10. 78 F.3d 524 (11th Cir. 1996).

11. 119 S. Ct. 1167 (1999).

12. 520 U.S. 681 (1997).

whether interpretations of Federal Rule of Evidence 703 emphasizing such factors as peer review will ultimately be recognized as significant mistakes.<sup>13</sup>

Are judges making law in the proof area? As explicated by Mike and Lucinda, courts surely are refining a group of legal principles. Lucinda's remarks dramatically demonstrate the overlap of substance and procedure. We will have many more chapters in this saga, with many more twists and turns in the attempt to define what truth is for purposes of the law.

### *Economic loss*

A notable demonstration of judicial lawmaking in this quintessentially common law area appears in the Supreme Court's decisions on the economic loss issue in products liability. One member of this interesting pair of cases is the *East River Steamship Corp., v. Transamerica Delaval, Inc.*,<sup>14</sup> applying the economic loss rule to deny recovery in admiralty. The other is *J.M. Martinac & Co. v. Saratoga Fishing*,<sup>15</sup> which establishes a liability rider for other property. *East River* is particularly interesting because, although it has no precedential force in state courts, it has been cited frequently in state decisions.

### *Asbestos*

As I have indicated, asbestos litigation presents a particularly powerful demonstration of judicial lawmaking in the products area. Asbestos, if a set of crystallographic worlds unto itself, is not just a law unto itself. It has provided extra substance in the law of products liability, occasionally to the point of being transformative.

The strands of fibrous warp and woof that run throughout products law begin with *Borel v. Fibreboard Paper Products*,<sup>16</sup> with its insistence that "the product could still be unreasonably dangerous . . . if unaccompanied by adequate warnings."<sup>17</sup> They include the few decisions that have viewed asbestos as unreasonably dangerous per se.

In warnings law, some decisions have contributed to a theoretical basis for a true strict liability for failure to warn. *Borel* was an initiator of this process, although the court cited abundant evidence of the recognized dangers of asbestos.<sup>18</sup> Much-battered *Beshada v. Johns-*

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13. See, e.g., *Daubert*, 509 U.S. at 593-94.

14. 474 U.S. 814 (1985).

15. 520 U.S. 1263 (1997).

16. 493 F.2d 1076 (5th Cir. 1973).

17. *Id.* at 1089.

18. *Id.* at 1092-94.

*Manville Products, Corp.*<sup>19</sup> represents the fullest flowering of this idea in case law. Asbestos also features the interplay, perhaps insufficiently explored, between warnings and defect law.

We should not forget the plain vanilla negligence law that has emerged from the asbestos cases. The most graphic examples appear in the decisions dealing with that marvelous example of the value of discovery, the Sumner Simpson papers.<sup>20</sup> Asbestos gives us volumes of law on proof, for example, concerning the question of whether a particular firm's product was involved in the development of an illness.

### *Discovery*

A little encyclopedia of case law has featured fact-specific questions arising under the discovery rule for purposes of statutes of limitations. Asbestos has been a recurrent actor on this stage. One of the most provocative opinions features Judge Weinstein's recognition in a DES case that plaintiffs may only discover claims "in pieces," and that sophistication and gender may be elements of the discovery puzzle.<sup>21</sup> Lucinda has given us important background for our understanding of these matters.<sup>22</sup>

### *Preemption*

One area where casual observers might not ordinarily think of judges making products liability law is in the field of intergovernmental relations, but that is exactly what is happening in preemption, across more than half an alphabet of states. *Medtronic, Inc. v. Lohr*<sup>23</sup> is the most recent prime example. It is the parent of a large family of decisions on devices, but there are also streams of cases on auto restraints and pesticides.<sup>24</sup> These decisions feature important arguments, under the magnifying glass of products law, about how we govern ourselves.

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19. 447 A.2d 539 (N.J. Sup. Ct. 1982).

20. Sumner Simpson was President of Raybestos-Manhattan Corporation, and the Sumner Simpson papers consist of correspondence between Simpson and the general counsel for Johns-Manville regarding the dangers of asbestos. See *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1369 (3d Cir. 1991); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1025 (5th Cir. 1990).

21. See *Braune v. Abbott Labs.*, 895 F. Supp. 530, 545 (E.D.N.Y. 1995).

22. See *Finley*, *supra* note 6.

23. 518 U.S. 470 (1996).

24. See generally, 1 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶ 11.03[6][a-t] (3d. 1994 & Supp. 1999).

## III. DEFECT

*Restatement and Reaction*

A continuing enterprise in judicial lawmaking features exegesis on the test for defect. The Connecticut court's decision in *Potter v. Chicago Pneumatic Tool Co.*<sup>25</sup> provided an immediate challenge to the Products Restatement's strong expression of preference for a risk-utility test in design cases.<sup>26</sup> It also advanced a counterpoint to the *Restatement's* general requirement that claimants show a reasonable alternative design.<sup>27</sup>

*Warranty*

With respect to basic private law theory, an interesting progression appeared in the *Restatement* drafts concerning the use of warranty as a products theory. The early drafts exhibited hostility to warranty as a poacher on tort turf.<sup>28</sup> The New York Court of Appeals confronted this position frontally in *Denny v. Ford Motor Co.*,<sup>29</sup> answering a certified question to the effect that a jury could rationally find a breach of implied warranty of merchantability while also concluding that a vehicle that rolled over was not defective. Perhaps judicial lawmaking proved influential on *Restatement* synthesis here. The final *Restatement* softened its position and hedgingly recognized that defect claims may be brought under the implied warranty of merchantability.<sup>30</sup>

Whether these judicial performances are, strictly speaking, making law, or confirming law—a subject on which Terry Kiely and Steve Sugarman have commented—may be a matter of dispute. Perhaps under Mike Green's definition,<sup>31</sup> they are not, strictly speaking, making law. But clearly judges are not being potted plants.

*Varied State Approaches*

At the bedrock of theory, courts certainly are making law, sometimes different kinds of law. I have previously set out a catalog of the many paths to products liability theory that state courts have traveled—sometimes with differences only in the language, but sometimes also in concept. Examine the products jurisprudence of Alabama,

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25. 694 A.2d 1319 (Conn. 1997).

26. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

27. *Potter*, 694 A.2d at 1133-34.

28. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY (Tentative Draft No. 1, § 2 cmt. n, proposed final draft, § 2 cmt. n).

29. 662 N.E.2d 730 (N.Y. 1995).

30. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998).

31. *See Green, supra* note 1, at 378-79.

California, Illinois, Massachusetts, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Washington.<sup>32</sup> From coast to coast, from A to W, courts create law.

### *Cigarettes*

The case of cigarettes is a splendid example of where private law verges into the public law domain. We have witnessed an extraordinary, multi-faceted effort to bring cigarettes into a legislative framework. All of this has taken place in the shadow of products liability law—which, as Bob Rabin has observed, did not prove much of a boon to smoker plaintiffs for a generation.<sup>33</sup>

Bob has noted the remarkable recent surge in cigarette suits by both private and governmental plaintiffs. I simply record a symbolic event, a dramatic moment in the ALI's prolonged debate on the *Restatement*. Literally at the last minute, a member moved from the floor to eliminate cigarettes from the list of categorically immunized products, and the full Institute adopted the motion. Among other symbolisms, this extraordinary occurrence highlighted the political content of products liability law, not to mention of the *Restatement*.

We have come a long way from the billboards and radio ads I remember from my youth—"travels the smoke on the way to your throat"—and even from comment i's reference to "good tobacco."<sup>34</sup> The issue will have to be fought out across the country, but there is at least some ground to believe that cigarettes—long effectively viewed as virtually a nondefective product per se—might be considered unreasonably dangerous in their very fiber.

#### IV. JUDICIAL LAWMAKING AS A FACT

Some may indulge in primal scream at judicial lawmaking in products liability law. Others may glory in it. All must reckon with it as a fact: a striking illustration of a peculiarly American jurisprudence, creative, decentralized, and thereby often messy. Certainly it is never stagnant.

Do judges make products liability law? With the massive body of case law to which they now must refer, not to mention the uncontrolled growth of relevant academic theory, they may not, strictly speaking, invent it very often, but they surely do develop it.

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32. See Marshall S. Shapo, *In Search of the Law of Product Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 647-49 (1995).

33. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 448 (1999).

34. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1998).

As an aside, I point out that whatever law, or legal ideas that judges—or even law professors—create, is all done in the shadow of awesome predecessors:

- Traynor, professor, author of the separate opinion in *Escola v. Coca-Cola Bottling Co.*,<sup>35</sup> and, two decades later, the author of *Greenman*.<sup>36</sup>
- Prosser, the synthesizer of the *Assault Upon the Citadel*,<sup>37</sup> and the principal drafter of Section 402A.<sup>38</sup>
- Ehrenzweig, who in a remarkable 1951 essay defined a “negligence liability without fault” for “initially dangerous activities which, while legalized because of their social value, are held to strict liability in terms of the negligence rule” for injuries “typical for the particular enterprise” that reasonably could have been foreseen when starting an activity.<sup>39</sup>
- Robert Keeton, who it is our good fortune to have as a judicial colleague in this very enterprise, and who as a professor fashioned a concept of conditional fault that tied the embryonic development of products liability law to *Rylands v. Fletcher*<sup>40</sup> and *Vincent v. Lake Erie Transportation Co.*<sup>41</sup>

So all of us, judges and professors, labor in a vineyard that has been seeded for decades—for more than a century, as we reach back, with Andrew Kaufman’s magisterial work,<sup>42</sup> to the antecedents of *Macpherson v. Buick Motor Co.*<sup>43</sup>

Do judges still make products liability law? They can hardly avoid it. Ted Eisenberg’s statistics may imply a slowing down in the rate of lawmaking and even a pushing back of frontiers.<sup>44</sup> But this, too, involves lawmaking.

Should judges make products law? Here an answer that combines the normative and the descriptive: no matter how reluctantly they do so, they are compelled to make law by force of circumstance.

35. 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

36. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

37. William L. Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

38. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 402A (1965).

39. ALBERT A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

40. L.R. 3 H.L. 330 (1868).

41. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (1910).

42. ANDREW KAUFMAN, CARDOZO (1998).

43. 111 N.E. 1058 (1916).

44. See Eisenberg, *supra* note 2, at 323-31.



## V. CONCLUSION

I close with a cautionary note, instancing our society's views of witchcraft through the centuries. In pre-Revolutionary times, people believed in witches' curses as a fact. The sophisticated Americans of the nineteenth century saw this as nonsense, full well understanding that there were no witches. In the yet more enlightened last century of this millennium, we now recognize that a self-professed witch who utters a curse, knowing of the cursed person's emotional susceptibility, might be held for intentional infliction of emotional distress. The Problem of the Witch cautions us that all our truths are provisional, our certainties subject to the swings of social attitudes.