WHITFORD

REPORT 6

PRODUCTS LIABILITY

SUMMARY BY THE STAFF OF THE NATIONAL COMMISSION ON PRODUCT SAFETY

This report investigates certain aspects of court actions brought against manufacturers of household products in which the manufacturer was alleged to be liable for injuries caused by deficient product design or by inadequate instructions concerning use of the product.

Although the responses were often disappointing, certain meaningful information was obtained from those queried. While no instance of a change in design or warning in direct response to a court decision was uncovered, only one instance was reported wherein a manufacturer continued to use a product design which a court had found to be defective. The survey of rotary mower manufacturers did indicate that most of the responding makers were unaffected by the substantial amount of litigation involving this product.

The project uncovered circumstantial evidence suggesting that civil litigation has little direct impact on product designs or warnings. It was found, first, that the time lag between injury and verdict was at least 2 years, and in many cases 5 years; second, that many manufacturers apparently allow their insurance carriers to handle all claims and often do not even learn of the final outcome; third (as was clearly indicated by the rotary mower manufacturers) that many companies make no attempt to keep abreast of litigation involving other manufacturers within the same industry. Finally, the survey indicated that the potential costs of pursuing a lawsuit—especially the cost of expert witnesses—may serve as a substantial deterrent to initiating litigation.

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BACKGROUND

This project investigated certain aspects of court actions brought against manufacturers of household products in which the manufacturer was alleged to be liable for injuries caused by a deficient product design or by inadequate instructions concerning use of the product.

The most important purpose of the project was to acquire some empirical evidence about the impact of decisions adverse to the manufacturer on the manufacturer's product design or on the content of its instructions and warnings. A second purpose of the project was to inquire into some of the potential difficulties studied in this project including the expense of the lawsuit and the difficulty of proving in court such technical matters as the deficiency of a product's design. Specific inquiry was made to determine whether manufacturers usually litigate product design and warning cases to the utmost, refusing to consider settlement and thereby increasing the probable costs of any successful litigation.

Finally, some effort was also made to test a hypothesis that most consumers are unaware of the possiblity of litigation against the manufacturer of products which cause injury and fail to consider litigation when such injury occurs.

The information needed for this project was collected almost exclusively from responses to letters sent to attorneys and manufacturers involved in reported litigation of the relevant type. The first step in the project was to search for all reported cases decided between January 1, 1965, and approximately September 1, 1969, in which allegations of improper design or of issuance of inadequate warnings were made concerning a product clearly within the jurisdiction of the National Commission on Product Safety. Altogether, only 37 such cases were discovered.

This number was disappointingly small in view of the desirability of obtaining the responses of a large number of attorneys and manufacturers. Even cases reported in 1965, however, often involved injuries occurring in 1960 or before. Consequently it was decided not to lengthen the list of cases to be studied by including decisions reported earlier, since the reliability of the responses of attorneys and manufacturers concerning events that occurred so long ago would be suspect.

In some instances, letters were sent to attorneys and manufacturers involved in design or warning cases decided in 1965 or after, involving products not clearly within the Commission's jurisdiction, but for the most part resembling such products.

It seems appropriate to assume that the problems arising during the litigation involving these products, and the responses of the manufacturers to that litigation, would not be different simply because the product may not be within the Commission's jurisdiction. Therefore, information gained from the responses to these letters is included in this report. The cases studied are described at the end of this report.

Letters were sent to 22 of the manufacturers involved in the cases eventually included in the list for study. Such letters were sent if the reported opinion indicated that the manufacturer had had a final judgment entered against him. Often letters were sent also if the reported opinion suggested that the facts presented a jury issue concerning the adequacy of a product's design or instructions for use. In both situations, a rational response to the litigation by the manufacturer might be to redesign the product or redraft instructions and warnings in order to forestall future litigation. In some instances, letters were sent also to manufacturers who had verdicts entered in their favor on a technical ground (e.g., contributory negligence) that might not be available in a similar state of facts or on a proposition of law that might not be sustained in other jurisdictions.[1]

A significant number of the cases (7) involved claims about rotary lawnmowers. To determine what effect this relatively high incidence of litigation about a single product had had on design of rotary mowers by all maunfacturers of that product, letters were sent to 30 companies listed in *Thomas' Industrial Register* as manufacturing rotary mowers.

Two cases involved allegations that water heater manufacturers were liable for failing to install at the factory adequate safety devices against overheating in the event that thermostat failed. On the basis of these cases, letters were also sent to 30 manufacturers listed in an industrial register as producing water heaters. The responses received (12) indicated that many of the manufacturers written did not produce household water heaters and that those who did were often prevented from installing safety devices at the factory because they marketed their products in areas having different building code regulations concerning installation of such devices. Except for what is here stated, the results of this survey are not included in this report.

Letters were sent to 30 plaintiffs' attorneys and 22 defendants' attorneys. The attorneys to whom letters were sent were selected by determining from the reported opinions which attorneys would most likely be able to provide useful responses. The letters to attorneys inquired principally about difficulties facing a consumer contemplating products liability litigation.

Examples of the letters used in this project are reproduced at the conclusion of this report.

To increase the response rate, at least one reminder letter was sent to all persons or companies who did not respond to the original letter. These reminders did induce some additional responses. In a few instances, we called by telephone in an attempt to elicit responses. On one occasion, a staff member of the National Commission on Product Safety called a manufacturer who initially refused to supply the requested information on the ground that it was confidential. It was difficult to employ these personal-contact methods of eliciting responses to most of the manufacturers who failed to respond because, unless some response was received, it was impossible to determine which official in the corporate structure could provide the requested information.

The results obtained from the responses that were received are reported below according to type of respondent to whom the reported letters were addressed.

RESULTS

Of the 22 manufacturers involved in reported cases, 17 have responded, answers came from 18 of the 30 rotary lawnmower manufacturers, from 20 of the 30 plaintiffs' attorneys, and from 14 of the 22 defendants' attorneys. Many of the responses failed to provide the information needed. Typical explanations for unresponsive answers were that the information was no longer available because records had been destroyed in the time period that had elapsed since the injury giving rise to the litigation occurred or because of a sale of corporate divisions since the reported litigation.

Manufacturers Involved in Reported Litigation

The letters to manufacturers generally asked for three specific items of information: (1) did the litigation induce a change in product design or warnings, and why or why not; (2) had other users of the product involved in the litigation complained of injuries caused by the product's design or by the inadequacy of the warnings concerning its use, and if so, what had been the manufacturer's response to the complaints; and (3) what generally were the manufacturer's policies concerning complaints about injuries allegedly caused by deficient product design or warnings. The primary purpose of the second and third questions was to determine whether the manufacturers were willing to settle some cases.

Of the 17 manufacturers who answered the letters, 6 indicated an inability to respond to the first question about the impact of the reported litigation on product design or warnings. The substances of the responses for the 11 remaining manufacturers was as follows:

1. A manufacturer of houses was held liable for injuries caused by a deficient design. The manufacturer changed the product design during the year in which the litigation was initiated but the decision was "unconnected" with the litigation. The change was made so that the product could be adapted more easily to new advances in air conditioning.

2. A manufacturer of water heaters was absolved of liability for deficient product design but by a divided decision of the appellate court and on the technical ground that the installer of the product could have provided a safety device that would have prevented the injury. Another manufacturer was held liable in similar circumstances by a different court. Although not unequivocally responding to the question whether the product has been redesigned, the manufacturer did state that "we have not redesigned our (product) because of this or any other litigation."

3. A manufacturer of baby equipment was held liable for over $100,000 for deficient product design. A substantial number of similar claims are pending against the company. The design of the particular product involved was changed a number of years ago. The manufacturer indicated that the change was not a response to litigation but was due to an advance in the "state of the art." None of the lawsuits involving this product had been decided at the time the change was made. The manufacturer indicated, however, that because of the company's experience in incurring substantial liability for deficiencies in previous product designs, today the potential for litigation is an important factor in determining product design.

4. A manufacturer of cosmetic products won a jury verdict in a suit for injuries allegedly caused by inadequate warnings. The appellate

court affirmed but indicated that the case was properly submitted to the jury. The manufacturer has made no change in its warnings. On the other hand, the product is regulated by the Federal Food, Drug, and Cosmetic Act and the manufacturer cannot change its warnings without the approval of the Food and Drug Administration.

5. An appellate court directed a jury trial in a suit for injuries allegedly caused by inadequate warnings concerning use of a household cleaning product. The final outcome of the litigation is unknown. The manufacturer turned the claim over to its insurer and has not followed the course of the litigation. Apparently the litigation has had no effect on the content of the warnings. The product is subject to the Federal Hazardous Substances Act.

6. A jury verdict against the manufacturer in a design and warning case was reversed on appeal and a new trial ordered. The appellate court strongly suggested that the plaintiff's evidence was insufficient to establish a cause of action. The final outcome of the litigation is unknown. The manufacturer has made no change in its product design or warnings as a result of this litigation. The manufacturer indicated, however, that consumer complaints do sometimes prompt design changes. The product involved in this litigation is farm machinery.

7. A motion for a directed verdict after the close of the plaintiff's case was granted in favor of a manufacturer of an automotive product in a suit alleging liability for inadequate warnings. This verdict was affirmed on appeal. The manufacturer has made no change in the labeling or warnings issued with the product.

8. A manufacturer of a surface-coating product won a jury verdict in a suit alleging liability for an inadequate warning. The appellate court affirmed but indicated that it was proper to submit the case to the jury. The manufacturer has made no changes in its warnings, although there have been some subsequent complaints of injuries that allegedly could have been avoided by a change in the same warning. (These complaints are also groundless in the manufacturer's opinion.) The product is regulated by the Federal Hazardous Substances Act.

9. A manufacturer of recreational equipment ultimately won a jury verdict in a suit alleging liability for defective design and inadequate warnings. Previous decisions in the case had established that a jury issue was presented by the evidence. The manufacturer has made no change in product design or warnings.

10. A manufacturer of space heaters won a jury verdict in a suit alleging liability for inadequate warnings. An earlier decision in the case established that a jury issue was presented by the evidence. The manufacturer has made no change in warnings as a result of this decision, although the firm regularly reviews installation and operating instructions to determine whether any improvements are possible.

11. A manufacturer of furnace parts had a final judgment entered aginst him in a suit alleging defective product design. The manufacturer has made no change in the product design because the firm continues to believe that the product is properly designed. No further claims have been made against the manufacturer with regard to this product.

A number of other comments relevant to the purposes of this project were made in the responses received from the manufacturers. One manufacturer, who had made no specific change in its product as a result of the reported litigation, indicated that complaints about his products do sometimes prompt redesign of various parts or additions to the instruction booklet. Although it was not stated unambiguously that these changes related to safety considerations, the implication was to that effect.

Another manufacturer, who could not determine whether the reported litigation had had any specific effect on the design of the product involved, indicated that "we are constantly redesigning our equipment for safety as well as efficiency but certainly litigation is not the moving factor."

A third manufacturer indicated that the reported litigation did not prompt any change in its labeling, but noted that: "Intensive study and what is really considered superfluous warning labels, etc., are being incorporated in all products today due to the political popularity of the consumer affairs program as well as the recent court decisions."

Finally one manufacturer, who had sold the division that produced the product involved in the reported litigation, indicated that "continued safety problems and customer complaints concerned with the product involved substantially influenced our decision to sell this division."

A number of the manufacturers indicated that they had in fact settled suits before trial in which there were allegations of defective product design or warnings. Many other manufacturers were reluctant to comment

on this matter, apparently for fear that information would get into the hands of potential complainants. Only one manufacturer suggested that it would never settle a design or warning case.

A number of manufacturers indicated that all products liability claims, including those relating to product design or warning, are handled by an insurer. One manufacturer went so far as to state:

> All liability claims are turned over to our insurance carrier. We do not orginarily have direct contact with the claimant, and do not always find out which claims lead to litigation. Therefore we are seldom in a position to know how much of a financial settlement was made, if any.

In the litigation inquired about, this manufacturer indicated it was unaware of any developments in the case since 1967, although there had been a reported appellate opinion in the manufacturer's favor since that date. Comments from other manufacturers also indicated, although less unambiguously, that they direct all products liability claims to insurers and make little effort to follow the course of the outcome of the litigation.

Manufacturers of Rotary Lawn Mowers

The letters to manufacturers of rotary lawnmowers asked whether the manufacturer had received complaints about injuries allegedly caused by the mower's design, whether the manufacturer kept track of litigation involving other manufacturers of rotary mowers, and whether litigation involving rotary mowers had in any way affected product design. Of the 18 manufacturers who responded to these letters, 9 indicated that they had left the lawnmower business or that they did not manufacture residential lawnmowers. Two other manufacturers refused to answer the questions directed to them on the ground that the information was confidential.

Of the seven remaining manufacturers who answered, all but two (both small companies) indicated that they had received complaints in recent years of injuries allegedly caused by defective design, in some instances in quite large numbers. Four of these five companies also indicated that they had offered financial settlements to complainants in some instances. Two of the manufacturers who had received complaints indicated that litigation involving product design had some effect on the design of their products while the others indicated that it did not. Neither of the manufacturers who had not received complaints indicated that litigation had affected their product design. In response to the question whether they routinely kept track of litigation involving design of rotary mowers, one manufacturer responded affirmatively, four negatively and two ambiguously.

Again, a number of the manufacturers indicated that insurers play a dominant role in the claim settlement process. One manufacturer indicated that although he left to the insurer the major responsibility for dealing with claims, his research and engineering department received notice of any product liability claims. Another manufacturer suggested that allegations of improper design accompany almost all complaints pertaining to injuries caused by rotary mowers. The manufacturer's explanation for this phenomenon was that the "most common accident is that of getting fingers or toes involved with the blade of a rotary mower, and the improper design allegation becomes the inevitable means for avoiding contributory negligence." The same manufacturer, although indicating that litigation had no effect on its design decisions, noted that—

> . . . the burgeoning wave of consumerism that basically originated with the Ralph Nader's involvement in the automobile industry, and the more recent activities of the National Commission on Product Safety have certainly had an influence on the entire industry with respect to the safety of its products. . . . I feel that it would be only fair to say that our company's efforts along the lines of safer design have been intensified in recent months and years.

Plaintiffs' Attorneys

Letters to plaintiffs' attorneys typically asked how the plaintiff learned about the possibility of litigation, whether the attorney had difficulties in obtaining and presenting expert testimony, whether the defendant had made any settlement offers, what fee arrangements were made with the client and what costs, including witness fees, were incurred in the litigation. All the responses from plaintiffs' attorneys were responsive at least to some of the questions asked.

The first question was designed to test the hypothesis that most consumers are unaware of the possibility of litigation against the manufacturer of products which cause injury. If it could be shown that most of the consumers who do bring lawsuits learn of the possibility of doing so from insurance companies or incidentally from attorneys whom they happen to be seeing about unrelated matters, there would be a strong

implication that most consumers are unaware of the possibility of litigation and that many consumers who are injured by inadequately designed products never learn of the possibility. In fact, 9 of the 20 plaintiffs' attorneys indicated that their clients either knew about the possibility of suing the manufacturer when they first contacted the attorney or wanted to know whether they might have legal rights as a result of the injury.

One of these instances might be classified as a special circumstance, in that the plaintiff had formerly worked as a secretary in the firm which later handled her claim and was on a more-or-less friendly basis with her former employer.

In four other cases, the lawsuit was initiated by an insurance company which had become subrogated to the insured's rights. In two instances, the plaintiff came to see the attorney about a matter unrelated to the action against the manufacturer and the lawsuit was conceived only when the attorney, by chance, learned of the injury. One attorney wrote about another case which he is now handling in which the plaintiff learned about the possibility of litigation "only by accident." In the remaining five instances, the attorney replied ambiguously to the question, indicated he did not know why the plaintiff first came to a lawyer, or failed to respond to this question.

A few attorneys offered more general comments about the hypothesis that consumers are unaware of the possibility of products liability litigation.

Some attorneys thought that most people would inquire about their legal rights in any instance in which they suffered serious injury as a result of an accident. Other attorneys agreed with the hypothesis. One attorney thought the hypothesis had particular applicability to lower income individuals:

> Personally, I believe that individuals in the lower economic brackets in our society are deprived of information which others, more well to do, have at their finger tips, and that it is only the middle or upper income groups who instinctively think of seeing a lawyer when some problem has affected someone's family. Unfortunately, lower income groups still believe that lawyers are only for the rich or near-rich and are unaware of the contingent fee basis upon which most plaintiffs' lawyers accept lawsuits. I have no statistics that verify my opinion but my personal experience tends to bear out my present conclusion.

Thirteen attorneys indicated that they had little or no difficulty in obtaining the expert testimony necessary to show the deficiency in the product's design or the inadequacy of the warnings concerning use of the product. Two attorneys did experience difficulty in this regard and five attorneys either responded to this question ambiguously or failed to respond at all. The general comments that were made also suggested that the necessity of introducing expert testimony did not present a serious problem in these lawsuits. Moreover, most plaintiff's attorneys were of the opinion that juries understood the expert testimony quite well. One attorney emphasized that it is important that the expert appear honest and candid. He apparently thought that such an appearance was more likely to influence the jury favorably than the content of the expert's testimony.

Seven plaintiffs' attorneys indicated that their clients had received serious settlement offers, while nine other attorneys indicated that no offer was received, other than perhaps one for the nuisance value of the suit. Three attorneys failed to respond to the question about settlement offers and one attorney responded ambiguously.

Of the attorneys who replied to the question about the costs (other than attorney fees incurred in the litigation), about one-half indicated that the costs were approximately \$100 or \$200 and the other half indicated that the costs were much more substantial, generally over \$1,000. In one instance, costs were \$15,000. In this case, the expert witnesses had made extensive laboratory tests on the product, and these witnesses' fees accounted for the bulk of the costs.

In 17 of the 20 cases, the attorneys fees were reported to be on a contingent basis, generally one-third of any recovery. The other three attorneys failed to indicate what fee arrangements they had with their clients.

Defendants' Attorneys

Defendants' attorneys were usually asked only about any difficulties they had in presenting expert testimony and whether their clients had made significant settlement offers. In some instances, a reply was received from the defendant's attorney in a case in which a reply was also received from the plaintiff's attorney.

Only 1 of the 14 responding defense attorneys experienced difficulty in presenting expert evidence. Three other attorneys either failed to respond to this question or replied ambiguously. More defendants' attorneys than plaintiffs' attorneys expressed doubts about whether the jury understood the expert testimony. Several defendants' attorneys expressed the view that the appearance and manners of the expert were at least as influential on the jury as the content of his testimony.

Responses to the question about settlement offers were approximately evenly divided between those indicating a significant settlement offer was made and those

indicating no offer was made. Only two defense attorneys indicated that their clients had a firm policy against settling design suits.

IMPLICATIONS OF THE RESULTS

The most important purpose of this project was to assess the impact of products liability litigation on the decisions of manufacturers regarding the design of their products and the content of the warnings issued about dangers connected with their products' use. Little direct evidence has been obtained on this point. Not one instance has been uncovered in which the manufacturer conceded he changed design or product warnings in direct response to a court decision holding the manufacturer liable for deficiencies in one of these regards. In only one instance, however, has a manufacturer continued to use a product design which a court has found to be defective. Most of the manufacturers contacted in this project who had had final judgments entered against them failed to reply responsively to the letters sent to them.

Letters were sent to 13 manufacturers against whom it could be determined that a final judgment had been entered. Only three of these manufacturers replied responsively to the questions asked, and in two of these instances the manufacturers at first indicated that the information was confidential but ultimately responded anyway after their attention was directed to the subpoena power of the National Commission on Product Safety. Six other manufacturers replied but indicated that they were unable to supply the desired information for various reasons. There is no feasible way to assess the legitimacy of these reasons. Four of these manufacturers failed to reply to these letters at all. By way of comparison, nine letters were sent to manufacturers involved in cases in which a final judgment was entered for the defendant or in which the final outcome is unknown. In eight of these instances responsive replies were received. The remaining manufacturer failed to reply.

The substantial disparity of the percentage of responsive replies received from these two groups of manufacturers may be due to chance, given the small numbers involved. Even if it is assumed that the disparity should be explained by the manufacturers' reluctance to reveal their responses to cases which they lost, however, the significance of this finding is unclear. There may be a reluctance to admit that there has been a change in product design or warnings as a result of the litigation, for fear that plaintiffs in similar cases in the future would use this information against them. On the other hand, there may be a reluctance to admit there has been no change in product design or warnings for fear that this information, if it became public, would adversely affect their public relations.

The survey of rotary mower manufacturers did produce some direct evidence about the impact of products liability litigation. Although there has been a substantial amount of litigation involving this product, a majority of the responding manufacturers indicated that litigation did not affect their design decisions.

The circumstantial evidence uncovered in this project, together with what direct evidence there is, suggests that products liability litigation usually has little direct impact on product design or warning decisions. The circumstantial evidence is of three types.

First, in many of the cases studied the time period between the occurrence of the injury and the final outcome of the litigation exceeded 5 years, and in almost every case the time period was at least 2 years. The design of many products is changed periodically for reasons unconnected with safety, and when these products are involved in litigation, the court is usually asked to determine whether a design no longer in use was sufficiently safe. Moreover, even if the court decision does cause a manufacturer to abandon an unsafe design, in the extensive period before a decision can be reached many products with designs determined to be unsafe will be sold and used. For example, one manufacturer who had had a judgment entered against him indicated that the design for the use of which he was found liable had been abandoned long before the final decision in the litigation. Many similarly designed products had been sold, however, and that the manufacturer feared that they would continue to cause injury for which he would be liable. The manufacturer referred to the existence of so many of these poorly designed products on the market as a "time bomb."

Second, a number of the manufacturers who did reply responsibly indicated that their insurers handled all products liability claims. In some instances, the manufacturers apparently do not even inform themselves of the final resolution of the claims, and for these manufacturers it is obvious that a court decision will have no direct effect on product design or warning decisions. A manufacturer who intended to take account of litigation results would be likely to exert more control over the claim setting process since the other interests that enter into design decisions could be undesirably affected by an adverse outcome.

Finally, a majority of the rotary mower manufacturers who replied responsively indicated that they did not routinely keep track of litigation involving other

manufacturers. A manufacturer taking account of products liability litigation in its design decisions would logically inform himself of the outcome of litigation involving manufacturers of similar products, particularly in an industry in which there has been so much litigation.

At this point it is perhaps appropriate to indicate what is not being suggested in the test. It is not being suggested that the general increase in products liability litigation that has occurred in recent years, together with the current wave of consumerism, has had no effect on the extent to which safety considerations are incorporated in product design or warnings. Nor is it being suggested that if a large number of judgments were rendered against a particular manufacturer because of a design he is using, that manufacturer would not change that design. The only statement being made is that the available evidence indicates, although not conclusively, that many, probably most, court decisions against manufacturers do not result in an immediate change in the product design or warnings involved in the litigation.

The principal purpose of the survey of attorneys was to determine whether there are substantial deterrents to initiating a product design or warning suit. If such deterrents exist, then even assuming that a court decision can have some direct impact on product design or warnings, product liability litigation would not be an efficient regulator of designs and warnings, since many questionable designs and warnings would not be challenged in court.

Costs, including both filing and witness fees, may sometimes be a substantial deterrent to initiating litigation. In a significant percentage of the cases in this survey, the costs exceeded $1,000, and the plaintiff is usually expected to absorb these costs if the litigation is unsuccessful. The cases in my study all involved at least one appellate decision and often more than one trial. Since costs tend to rise with the length of the litigation, it is possible the information I collected about costs is quite unrepresentative of the general situation. On the other hand, the bulk of the expenses in many of these high cost cases seem to be expert witness fees, and in some of the cases these fees were paid mostly for laboratory testing of the product involved. Since these costs would most likely be incurred even if the lawsuit never progressed beyond the trial level, it seems logical to assume that where a substantial amount of expert evidence will be needed to establish the manufacturer's liability, the possibility of having to absorb the costs is a significant deterrent to litigation.

The survey produced little evidence of other substantial deterrents of litigation, although the results may not be used to show that all other possible deterrents do not exist. The responses of the attorneys suggest a widely held belief that there is little difficulty obtaining and presenting the expert evidence that is necessary in any design or warning suit. Certainly the attorneys do not perceive more serious problems in preparing this type of lawsuit than are presented by any other lawsuit in which expert evidence must be used. The comments by some attorneys emphasizing the importance of the manner and appearance of the expert suggest that the court system may not be an efficient judge of the adequacy of product designs and warnings, in that decisions may often be based on irrational factors. Of course, decisions based on irrational factors are probably quite a common phenomenon in our court system, but this fact does not reduce the significance of this point in assessing the adequacy of products liability litigation as a regulator of product design and warnings.

The evidence supplied by the manufacturers and the attorneys indicates that most manufacturers of household products are willing to settle design and warning cases if the prospects of losing the litigation are substantial. The finding is significant since if manufacturers regularly resisted all such claims to the utmost, they would greatly increase the costs of making a claim and would consequently discourage many persons from filing a claim at all.

Persons familiar with automobile products liability litigation often state privately that the automobile manufacturers will nearly always resist to the utmost any claim based on defective design, apparently because they are concerned about the implications of any concession of liability for other similar claims, of which there could be many in a defective design situation. As indicated in the text, the attitude of most manufacturers of household products is apparently different.

Similarly the usual availability of an attorney on a contingency basis means that products liability litigation is possible for the consumer who could not afford to pay the attorney unless the litigation were successful.

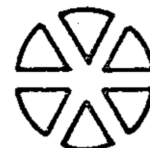
This survey of attorneys failed to produce evidence that could adequately test the hypothesis that large numbers of consumers are so unaware of the possibility of products liability litigation that they would not consult an attorney in the event of a product caused injury. A significant percentage of the plaintiffs in the cases surveyed had first contacted an attorney because they knew or wondered about the possibility of litigation. Only if nearly all the plantiffs had learned about the possibility of suit by chance or had been encouraged to sue by insurers would it have been permissible to conclude on the basis of this survey that most consumers must be unaware of the possibility of litigation in a products liability situation. Of course, the absence of such a result does not establish or even suggest that most consumers are aware of the possibility

of products liability litigation. Many attorneys who were surveyed think such an awareness does not exist and their conclusion is quite consistent with the results of this survey.

COMMENTS

Although it was not a purpose of this study to examine doctrinal problems facing plaintiffs in products liability cases involving allegations of defective product design or warnings, a survey of so many cases invites some comment in this regard. In only one case was the plaintiff's action denied on the ground that there was no privity with the manufacturer, and in this case the plaintiff litigated his action only in warranty. The court hinted that there might have been a different result if the action had been litigated in negligence.[2] There are two doctrinal problems that do arise in a significant number of cases, however. The first concerns the scope of a manufacturer's duty to design products safely and to issue appropriate warnings. This issue often takes the form of whether consistency with the state of the art of industry-drafted safety guidelines is a defense to, or relevant evidence in, a products liability lawsuit.[3] The second issue concerns the scope of the contributory negligence and assumption of risk defenses. The issue is important because of the frequency with which the manufacturer can make a plausible argument that the plaintiff should have been aware of the risks in using a product lacking certain safety features.[4]

This survey has established that the methodology used was inadequate to obtain most of the information sought. It is important to speculate on the reasons for this so that the same error is not repeated at a later time. The major difficulty encountered was simply a lack of reported cases to include in the survey. This difficulty may be overcome with time. Even in the limited time period covered, a substantial increase in the number or reported cases was observed in the later years. (Only 5 cases in the study were decided in 1965, 18 cases were decided in 1967, and 15 cases in 1968). A second problem encountered was the reluctance of many manufacturers, despite repeated urgings, to reply responsively to the letters used to elicit the needed information. Since mail surveys have been used successfully in the past to elicit reliable information about business practices, it is tempting to attribute the failure of this methodology in this survey to the political sensitivity of the product safety issue today. It may be that mail surveys will always be inadequate to collect information of potential political significance from business concerns.



REFERENCES

1. *State Stove & Manufacturing Co.* v. *Hodges*, 189 So. 2d 113 (Miss., 1966), is one such case.
2. *Evangelist* v. *Bellern Research Corporation*, 199 Kan. 638, 433 P. 2d 380 (1967).
3. E.g., *Nordstrom* v. *White Metal Rolling and Stamping Corp.*, 453 P. 2d 619 (Wash., 1969); *Levin* v. *Walter Kidde & Co., Inc.*, 251 Md. 560, 248 A. 2d 151 (1968).
4. E.g., *Vroman* v. *Sears, Roebuck & Co.*, 387 F. 2d 732 (6th Cir., 1967); *Wilson* v. *American Chain & Cable Co., Inc.*, 364 F. 2d 558 (3d Cir., 1966): *Myers* v. *Montgomery Ward & Co.*, 253 Md. 282, 252 A. 2d 855 (1969).

CASES STUDIED

The following cases studied in this project have been grouped into two categories. The first group consists of cases involving products clearly within the jurisdiction of the National Commission on Product Safety in which there was a seriously advanced claim that the manufacturer was liable because of a defective product design or because of a failure to provide adequate warnings about dangers associated with use of the product. In some of these cases the plaintiff also alleged that the product was defectively made or assembled. The second group consists of other cases studied in this project. If it is not absolutely clear that the product is within the Commission's jurisdiction—for example, because some aspect of its labeling is regulated by the Federal Hazardous Substances Labeling Act—the case is listed in this second group. Within each group the cases are arranged according to year of decision. After each citation, the product involved is indicated and the letters involving the case that were sent to participants in the case are noted.

Design or Warning Cases

Involving Products Within Commission's Jurisdiction, in which Opinion was Reported Between January 1, 1965 and September 1, 1969.

Anderson v. *National Presto Industries, Inc.*, 257 Ia. 911, 135 N.W. 2d 639 (1965). Product: coffee-maker. No letters sent.

Schwalbach v. *Antigo Electric & Gas, Inc.*, 27 Wis. 2d 651, 135 N.W. 2d 263 (1965). Product: furnace pilot relay. Letter sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Schipper v. *Levitt & Sons, Inc.*, 44 N.J. 70, 207 A. 2d 314 (1965). Product: home water system. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Oropesa v. *Huffman Mfg. Co.*, 9 Ohio App. 2d 337, 224 N.E. 2d 530 (1965). Product: electric lawn mower. No letters sent.

Webb v. *Zern*, 422 Pa. 424, 229 A. 2d 853 (1966). Product: beer keg. No letters sent.

Gutierrez v. *Superior Court*, 243 Cal. App. 2d 710, 52 Cal. Rptr. 592 (1966). Product: glass sliding door. No letters sent.

Erickson v. *Sears, Roebuck & Co.*, 249 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966). Product: ladder. No letters sent.

Lee v. *Sears, Roebuck & Co.*, 262 F. Supp. 232 (1966). Product: water heater. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

State Stove Mfg. Co. v. *Hodges*, 189 So. 2d 113 (Miss., 1966). Product: water heater. Letter sent to manufacturer.

Ilnicki v. *Montgomery Ward*, 371 F. 2d 195 (7th Cir. 1966). Product: power mower. No letters sent.

Wilson v. *American Chain & Cable Co., Inc.*, 364 F. 2d 558 (3d Cir., 1966). Product: riding power mower. Letters sent to manufacturer and plaintiff's attorney.

Trojan Boat Co. v. *Lutz*, 358 F. 2d 299 (5th Cir., 1966). Product: cabin cruiser. Letters sent to both attorneys.

Evaneglist v. *Bellem Research Corp.*, 199 Kan. 638, 433 P. 2d 380 (1967). Product: recapping device. No letters sent.

Dunham v. *Vaughan & Bushnell Mfg. Co.*, 86 Ill. App. 2d 315, 229 N.E. 2d 864 (1967). Product: claw hammer. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Royal v. *Black & Decker Mfg. Co.*, 205 So. 2d 307 (Fla., 1967), cert. to Fla. S. Ct. denied, 211 So. 2d 214 (1968). Product: power drill. Letters sent to manufacturer and plaintiff's attorneys.

Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del., 1967). Product: fire extinguisher. Letters sent to plaintiff's attorneys.

Kepling v. *Schlueter Mfg. Co.*, 378 Fed. 5 (6th Cir., 1967). Product: frying pan. No letters sent.

Springfield v. *Williams Plumbing Supply Co.*, 239 So. C. 130, 153 S.E. 2d 184 (1967). Product: hot water heater. Letter sent to plaintiff's attorney.

Swearngin v. *Sears Roebuck & Co.*, 376 F. 2d 637 (10th Cir., 1967). Product: power mower. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Lowe v. *Taylor Steel Products Co.*, 373 F. 2d 65 (8th Cir., 1967). Product: power mower. No letters sent.

Vroman v. *Sears Roebuck & Co.*, 387 F. 2d 732 (6th Cir., 1967). Product: power mower. Letters sent to manufacturer and plaintiff's attorney.

South Austin Drive-In Theatre v. *Thomison*, 421 S.W. 2d 933 (Tex. Civ. App., 1967). Product: power mower. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Fanning v. *Lemay*, 38 Ill. 2d 209, 230 N.E. 2d 182 (1967). Product: shoes. No letters sent.

McCormack v. *Hankscraft Co., Inc.*, 278 Minn. 322, 154 N.W. 2d 488 (1967). Product: baby vaporizer. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Hodges v. *Fuller Brush Co.*, 242 A. 2d 307 (R.I., 1968). Product: dog spray. Letter sent to manufacturer, plaintiff's attorney.

Kross v. *Kelsey Hayes Co.*, 29 App. Div. 2d 901, 287 NYS 2d 926 (1968). Product: pliers. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Levin v. *Walter Kidde & Co., Inc., et al.*, 251 Md. 560, 248 A. 2d 151 (1968). Product: siphon bottle. No letters sent.

Wallinger v. *Martin Stamping & Stove Co.*, 93 Ill. App. 2d 437, 236 N.E. 2d 755 (1968). Product: gas space heater. Letters sent to manufacturer and plaintiff's attorney.

Smith v. *Regina Mfg. Corp.*, 396 F. 2d 826 (4th Cir. 1968). Product: floor polisher. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Schedlbauer v. *Chris-Craft Corp.*, 381 Mich. 217, 160 N.W. 2d 889 (1968). Product: inboard pleasure boat. Letters sent to manufacturer and defendant's attorney.

O. S. Stapley Co. v. *Miller*, 103 Ariz. 556, 447 P. 2d 248 (1968). Product: pleasure boat motor. Letter sent to manufacturer.

Friedman v. *General Motors Corp.*, 411 F. 2d 533 (3d Cir., 1969). Product: automatic washing machine. Letters sent to both attorneys.

Nordstrom v. *White Metal Rolling & Stamping Corp.*, 453 P. 2d 619 (Wash., 1969). Product: Ladder. Letters sent to both attorneys.

Beck v. *E. I. Du Pont DeNemours & Co.*, 455 P. 2d 587 (Wash., 1969). Product: radiator flush. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Borrelli v. *Top Value Enterprises, Inc.*, (Mass.) 248 N.E. 2d 510 (1969). Product: Electric carpet sweeper. Letters sent to both attorneys.

Sills v. *Massey-Ferguson, Inc.*, CCH Prod. Liab. Rep. 6187 (N.D. Ind., 1969). Product: power mower. No letters sent.

Myers v. *Montgomery Ward & Co.*, 253 Md. 282, 252 A. 2d 855 (1969). Product: power mower. No letters sent.

Other Design or Warning Cases

(This list does not purport to be a complete list of design or warning cases reported in the 1965-69 period).

Hubbard-Hall Chemical Co. v. *Silverman*, 340 F. 2d 402 (1st Cir., 1965). Product: insecticide subject to Federal Insecticide, Fungicide, and Rodenticide Act. Letter sent to manufacturer.

McNully v. *Fuller Brush Co.*, 68 Wash. 2d 675, 415 P. 2d 7 (1966). Product: household cleaner subject to Federal Hazardous Substances Labeling Act. Letters sent to both attorneys.

Parris v. *M. A. Bruder & Sons, Inc.*, 261 F. Supp. 406 (E.D. Pa., 1966). Product: coating product subject to Federal Hazardous Substances Labeling Act. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Larance v. *FMC Corp.*, 192 So. 2d 628 (La., 1966). Product: fungicide subject to Federal Insecticide, Fungicide, and Rodenticide Act. Letter sent to manufacturer.

Gasteiger v. *Gillenivater*, 57 TnA 206, 417 S.W. 2d (1966). Product: staircase (construction of house by small time contractor). No letters sent.

Accetola v. *Hood*, Migh. App. 83, 151 N.W. 2d 210 (1967). Product: ladder (assembly line defect). Letter sent to plaintiff's attorney.

Thomas v. *Arvon Products Co.*, 424 Pa. 365, 227 A. 2d 897 (1967). Product: glazing product subject to Federal Hazardous Substances Labeling Act. Letters sent to both attorneys.

Thibodaux v. *McWane Cast Iron Pipe Co.*, 381 F. 2d 491 (5th Cir. 1967). Product: cast iron pipe for natural gas (product not within Commission's jurisdiction). No letters sent.

Callahan v. *Keystone Fireworks Mfg. Co.*, 72 Wash. 2d 823, 435 P. 2d 626 (1967). Product: fireworks (not type used by consumer). Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Mathews v. *Clairol, Inc.*, 371 F. 2d 337 (3d Cir., 1967). Product: hair dye subject to Federal Food, Drug, and Cosmetic Act. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Sears, Roebuck & Co. v. *Hough*, 421 S.W. 2d 714 (1967). Product: washing machine (assembly line defect). No letters sent.

Rumsey v. *Freeway Manor Minimax*, 423 S.W. 2d 387 (Texas, 1968). Product: roach poison subject to Federal Insecticide, Fungicide, and Rodenticide Act. Letter sent to plaintiff's attorney.

Riley v. *R. M. Hollingshead Corp.*, 29 App. Div. 2d 848, 287 N.Y.S. 2d 928 (1968). Product: fabric cleaner subject to Federal Hazardous Substances Act. Letters sent to manufacturer, plaintiff's attorney, and defendant's attorney.

Williams v. *Brown Mfg. Co.*, 93 Ill. App. 2d 334, 236 N.E. 2d 125 (1968). Product: trenching machine (product not within Commission's jurisdiction). No letters sent.

Moren v. *Samuel M. Langston Co.*, 96 Ill. App. 2d 133, 237 N.E. 2d 759 (1968). Product: production machinery (product not within Commission's jurisdiction). No letters sent.

Dazenko v. *James Hunter Machine Co.*, 393 F. 2d 287 (7th Cir. 1968). Product: commercial printing press (product not within Commission's jurisdiction). No letters sent.

Vandercook & Son, Inc. v. *Thorpe*, 395 F. 2d 104 (5th Cir. 1968). Product: commercial printing press (product not within Commission's jurisdiction). No letters sent.

Tomicich v. *Western Knapp Engineering Co.*, 292 F. Supp. 323 (D. Mont. 1968). Product: conveyor (product not within Commission's jurisdiction). No letters sent.

Stengall v. *Dot Manufacturing Co.*, CCH Prod. Liab. Rep. 6089 (1968). Product: drain solvent subject to Federal Hazardous Substances Act. No letters sent.

Zunck v. *Gulf Oil Corp. & Warren Petroleum Corp.*, 224 So. 2d 386 (Fla., 1969). Product: liquefied petroleum gas (product not within Commission's jurisdiction). No letters sent.

Warner v. *Kewanee Machinery & Conveyor Co.*, 411 F. 2d 1060 (6th Cir. 1969). Product: farm machinery (product not within Commission's jurisdiction). Letters sent to manufacturer, plaintiff's attorney, defendant's attorney.

Cakes v. *Geigy Agricultural Chemicals*, 77 Cal. Rptr. 709 (1969). Product: weed killer subject to Federal Insecticide, Fungicide, and Rodenticide Act. No letters sent.

SURVEY LETTERS

The following are examples of letters sent to:

(1) A manufacturer involved in reported litigation;

(2) A manufacturer of a rotary lawn mower who was not involved in reported litigation;

(3) A plaintiff's attorney; and

(4) A defendant's attorney.

The letters sent in this project were individually drafted to reflect the facts known about the litigation on the basis of the reported litigation. Consequently, although the following are examples chosen for their typicality, not all letters sent in this project took this form.

Mr. J. Richard Edmondson
Vice President and Counsel
Clairol, Inc.
1290 Avenue of the Americas
New York, N.Y. 10020

Dear Mr. Edmondson: I am engaged in a research project involving certain aspects of products liability litigation. I am particularly interested in cases in which the plaintiff alleges that the product was improperly designed or that inadequate warnings were provided about dangers connected with the product's use. I note that you were a defendant in one such case, *Mathews* v. *Clairol, Inc.*, 371 F. 2d 337 (3rd Cir. 1967). I would like to ask you several questions about that case:

1. Have you changed the instructions issued with the hair dye involved in this litigation so that the waiting period for a patch test is longer than 24 hours? If so, did this litigation in any way affect your decision to extend the waiting period? I note that although you won the case, the court in the opinion cited above indicated that a jury issue was presented about whether a 24 hour waiting period for a patch test was sufficient.

2. If you have not changed your instructions to advise a longer waiting period, have you considered doing so since the decision noted above? If you have, why did you ultimately decide not to change your instructions?

3. Have any other users of you hair dyes complained of injuries allegedly caused by your failure to recommend a sufficiently long waiting period for a patch test to determine sensitivity? If so, what has been your response to these complaints? Have you entered into financial settlements with any such complainants? Have any of the complaints led to litigation? If so, what happened?

4. I would like to know generally about your policy regarding complaints of injuries allegedly caused by improper instructions concerning the use of your products. Do you receive many such complaints? In what circumstances do you enter into financial settlements with such complainants?

I realize that some of the information I have requested may be considered confidential. I hope that you can find a way to provide me with it nevertheless. I am interested in learning about the experiences of a large number of manufacturers in products liability cases. My statistics will be largely meaningless unless a very high percentage of the manufacturers to whom I am writing provide me the information I request.

Sincerely yours,
WILLIAM C. WHITFORD
Associate Professor of Law

Southland Mower Company, Inc.
Selma, Alabama 36701

Dear Sirs: I am engaged in a research project involving certain aspects of products liability litigation. I am particularly interested in cases in which the plaintiff alleged that the product was improperly designed. There has been a substantial amount of litigation of this type involving rotary lawn mowers. Recent cases include, by way of example, *Swearngin* v. *Sears Roebuck & Co.*, 376 F. 2d 637 (10th Cir. 1967) (alleged unsafe design of the discharge chute) and *South Austin Drive-In Theatre* v. *Thomison*, 421 S.W. 2d 933 (Tex. Civ. App. 1967) (alleged failure to guard adequately the drive chain and gear socket near the rear axle).

I am writing you because you are listed as a manufacturer of rotary lawn mowers. I would like to ask you some questions about your involvement in and reaction to the litigation concerning this product.

1. Have any users of your rotary mower complained of injuries allegedly caused by the improper design of your product? If so, can you provide me with a rough estimate of the annual rate at which you receive such complaints? Have you entered into any financial settlements with such complainants? Have any complainants successfully sue you?

2. Do you routinely keep track of litigation of this type involving other manufacturers of rotary power mowers?

3. Has the litigation in this area in any way affected your decisions about the design of your power mower?

I realize that some of the information I have requested may be considered confidential. I hope that you can find a way to provide me with it nevertheless. I am interested in learning the experiences of a large number of manufacturers of rotary power mowers. My statistics will be largely meaningless unless a very high percentage of the manufacturers to whom I am writing provide me with the information I request.

Sincerely yours,
WILLIAM C. WHITFORD
Associate Professor of Law

Mr. David Kanner
Kanner, Stein, Feinberg & Barol
1 East Pennsylvania Square Building
Philadelphia, Pa.

Dear Mr. Kanner: I am engaged in a research project involving certain aspects of products liability litigation. I am particularly interested in cases in which the plaintiff alleges that the product was improperly designed or that inadequate warnings were provided about dangers connected with the product's use. I note that you represented one of the parties in such a case, *Friedman* v. *General Motors Corp.*, 411 F. 2d 533 (3d Cir. 1969). I would like to ask you several questions about that case:

1. How did the plaintiffs learn about the possibility of suing the manufacturer of the product which caused Mrs. Friedman's injury? It is my impression that most persons are unaware of the possibility of litigation in situations such as that which confronted your client, and I am interested in learning how persons who do sue come across the information that leads them to consult a lawyer.

2. The opinion indicates that you did not introduce any expert testimony at trial to support your contention that the washing machine was defectively designed. Did you try to hire an expert witness for this purpose? If so, why were you unsuccessful? Do you think your failure to present expert testimony harmed your chances before the jury?

4. What fee arrangements did you make with your client? What costs (filing, witness, etc.) were incurred in the litigation?

I realize that some of the information I have requested would ordinarly be considered confidential. I hope that you can find a way to provide me with it nevertheless. I am interested in learning about the experiences of a large number of attorneys in products liability cases. My statistics concerning a large number of cases will be largely meaningless unless a very high percentage of lawyers to whom I am writing provide me the information I request.

Sincerely yours,
WILLIAM C. WHITFORD
Associate Professor of Law

Mr. Perry S. Bechtle, Esquire
Liebert, Harvey, Bechtle, Herting & Short
7 Penn Center Plaza
Philadelphia, Pa. 19103

Dear Mr. Bechtle: I am engaged in a research project involving certain aspects of products liability litigation. I am particularly interested in cases in which the plaintiff alleges that the product was imporperly designed or that inadequate warnings were provided about dangers connected with the product's use. I note that you represented one of the parties in such a case, *Friedman* v. *General Motors Corp.*, 411 F. 2d 533 (3rd Cir. 1969). I would like to ask you several questions about that case:

1. The opinion indicates that you introduced expert testimony at trial on the issue whether your client's product was defectively designed. I would like to know what problems you had in presenting that evidence. I am particularly interested in your opinion about whether the jury was able to understand the expert testimony.

2. Did your client make any settlement offers during the course of the litigation? If not, why not? If so, were the offers for more than the nuisance value of the lawsuit?

I realize that some of the information I have requested would ordinarily be considered confidential. I hope that you can find a way to provide me with it nevertheless. I am interested in learning about the experiences of a large number of attorneys in products liability cases. My statistics concerning a large number of cases will be largely meaningless unless a very high percentage of lawyers to whom I am writing provide me the information I request.

Sincerely yours,
WILLIAM C. WHITFORD
Associate Professor of Law