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THE "genius of the common law" has been its vitality to develop, its ability to expand, its compassion to enfold new problems of society within the framework of its own historical structure.

The layman turns to this marvelous machine of social engineering to maintain certain principles of fairness. The lawyer looks to it to provide a basis of predictability in the relations among men. We all thus avoid the violent jolts that society would suffer if every new social problem was answered by a sudden act of legislation, born of the heat of the moment and very possibly sprung full grown from the draftsman's pen but without benefit of known antecedents of orderly growth.

The common law, proceeding from case to case, and not attempting to solve all the peripheral perplexities of a problem in one inspirational prescription, irritates the impatient and infuriates the positive. We live in an age of such compulsive urgency that the law, like coffee, is expected to be available in the "instant" brand. But even the eager and ofttimes impatient law student soon realizes that there is not and cannot be "instant law" in the framework of common law jurisprudence.

A bit of reflection on the disastrous results that have flowed from twentieth century impetuosity in other of man's ventures may help us retain or regain a proper regard for the value and necessity of preserving a last deliberate and careful procedure for regulating the relations among all men in society.

Private insurance against the mounting catastrophies of modern living has been hailed as one of the great social advances of a democratic society. Our nation has been inundated with advertising of the virtues of spreading the risk of loss among many to make it possible for the individual to bear the economic burden of adversity. The feudal serf had no need for an insurance policy. The lord of the fief had to care for him in sickness and for his family when death delivered him from feudalism.

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But industrialized society has no such keeper of the weaker brothers —so, insurance. From the five cents a week industrial policies of fifty years ago to insurance against thermonuclear explosion damage of today, insurance has been accepted as the socially desirable method of alleviating individual economic hardship and protecting great industries from fortuitous disaster.

Liability insurance for manufacturers of goods is everywhere accepted as a requisite of good management and common sense. The corporate management that didn't insure the buildings against loss by fire would surely be found personally liable to the stockholders for their dereliction of duty.

Yet, today, there is outrage in the voices of manufacturers because the common law has adopted, and is adapting industry's own philosophy of the social desirability of insurance to protect the individual from loss caused by the manufacturer's defective and deleterious products. And the common law courts have been ridiculed because they have applied this risk-spreading philosophy in a case-by-case method, utilizing the traditional devices and theories of common law jurisprudence to fit this new doctrine into the common framework.

The very reason that this great law journal is devoting an entire issue to the problem of liability insurance is that a vociferous part of the American business community now professes shock at the law's logical and inexorable development of the theory of liability insurance that our business community fostered.

Law in a democratic society has always had for its basic problem the protection of the poor and the weak. From the earliest times the English common law protected the consumer from the seller of harmful food products. This was done on the basis of "public policy."

"Public policy" is the court's reaction to the felt needs of the times; it is the court's reflection of the community's ideas of fairness and right. This public policy must be fitted, in a logical manner, into the history and stage of growth of the body of precedents and decisions upon which the common law rests and builds. It is this latter requirement that causes the slowness that infuriates the impatient, as it reassures the wise who shy from revolution—industrial, atomic, political or economic.

Today, the trend to hold manufacturers and sellers liable to consumers and users for harm caused by defective and deleterious products is assuming proportions that cause anguish in the business community. For many years, business was protected from financial responsibility for this destruction because of the careful, slow method of the common law in adapting to the problems created by an industrial age. For many

years, too, business imposed its idea of public policy on a society in which political democracy had far outrun economic democracy.

But the common law *had* the tools, and many judges, in many courts, through many decisions over the years have honed out the legal theory of manufacturer's liability. This change in our law finds its practical justification and social utility in the availability of liability insurance.

Perhaps the clearest and most succinct statement of this theory has been enunciated by Justice Traynor of the California Supreme Court in his historic concurring opinion in *Escola v. Coca Cola Bottling Co.*:[1]

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person insured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

Res ipsa loquitur, warranty, failure to warn and absolute liability are trending in the law toward a coalescence. The fabricator of goods finds that he must have more commercial protection accordingly. But the insurance companies proclaim that the cost of premiums on some of the old policies, as well as on the new, is pricing the protection out of the market. Yet was this not also the same complaint with the "absolute liability" insurance tailored for the first victims of the "new" workmen's compensation acts enacted years ago? At least, let us hope so. Otherwise we shall be forced, alternatively, to admit that the protective bonds of our capitalist society have reached the breaking point and we must look to other governmental structure!

Perhaps even more than with the rapidly trending law of the Four Horsemen—warranty, *res ipsa loquitur*, absolute liability and failure to warn—is the problem of the insurance industry more acutely felt in modern science, specifically atomic insurance. No *little* atomic catastrophes are contemplated. Therefore, no small coverage for such event is adequate. So, many plants today find the advent of atomic power unavailable not because of scientific shortcomings but because the mag-

[1] 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

nitude of the necessary insurance programs has been a financial deterrent. And without insurance, no plant, regardless of size, can be run safely. It will not operate and take a chance of a catastrophe that without insurance would mean bankruptcy.

As a corollary, the social value of insurance is that an operating factory, smoke pouring from a smelter's tall stacks, an airplane coursing across the sky, all, by their very act of operating (at least in this capitalistic country) assure that worker and public alike are protected through insurance.

In war, the enemy's bombers first seek to destroy the source of their antagonist's oil. Without this one commodity every factory must cease its turning. Industry and the country cease to exist. In peace time in the modern capitalistic state there is, too, the single naturally precious commodity that is just as vital to the very existence of the state—private liability insurance. Cease that institution and every industrial wheel, from the watchmaker's tiny mainspring to the turbines of the power plant, will cease its revolutions. No manufacturer, railroader, fabricator, druggist or industrialist will continue to risk his fortune.

Yet the insurance industry presents the paradox that the plaintiffs' lawyers (who wouldn't try a liability case if there weren't liability insurance) are the very ones who are decapitating the fowl that gestates the thing of value. These lawyers answer, "not so, it's the cost of living and the administrative expenses that make insurance premiums sky high, not the 'Adequate Award.'"

But neither the layman nor industry nor the legislatures nor the law will patiently listen any longer to the fixing of blame (if blame there is) or to long rationalizations. Action, which means protection (insurance) within price reach, they demand *now*. And the private insurance industry itself is supplying the answers. It has grown with social and industrial complexities and has come up with new forms of insurance. It is beginning fully to appreciate that it is a business almost completely impressed with public convenience and social value.

Private insurance's new proposals are neither completely tested nor exhausted. They do, however, carry as much promise of vigorous growth, adaptation, expansion and speedy protection as does the common law itself. There is the uninsured motorist policy, the installment verdict instead of a lump sum verdict, the rehabilitation centers for the victims of assured tort feasors established by the very companies whose assureds were the tort feasors, the codes of ethics for adjustors, the settlement of a cash sum to a minor traffic victim with an insurance policy in addition for protection in case of future contingent injuries. These are only some of the new settlements or adjustments that afford

full protection to the injured, discharging the social obligation of the assured.

Neither plaintiff nor defendants have fully explored the protective possibilities of the institution of private insurance. They are just beginning to do so.

The law is ready, willing and able. It has offered discovery, pretrial, streamlined evidence and a more businesslike procedure both in and out of court. The layman no longer can afford the Victorian luxury of a forensic Dickens' *Bleak House*. He must have his award, if he is to have it at all, contemporaneously with injury—or within the time his credit can carry him. He feels the practical pinch of "justice delayed is justice denied." And his *award*, if it is to be dignified by such objective appellation, must be *adequate* or *commensurate* with the injury and its economic consequences, transitory or permanent. It need not be added that if it is objectively adequate it can be neither *"reward"* nor *"excessive."*

What must Hammurabi's druggists and doctors have thought some 4000 years ago when he decreed his "absolute liability" laws (The malpractice surgeon treating an infected hand lost his own hand if the surgery was errant.)? And what must the child laborers have thought of their catastrophes in early industrial times when the legal wheel had so turned that the *defendant* was fully protected unless strict fault was proved? Probably the same such "woe is me" consideration as defendant Cutter Laboratories when the wheel again had come full turn to absolute liability.[2]

But the world didn't end with the personally cataclysmic decisions against Hammurabi's doctors, or the maimed child laborers or Cutter Laboratories. To each his age and each his law and each his social protection as decreed by the mores of his time.

In holding for plaintiff in warranty, plaintiff having ingested an unwholesome foreign substance in a bottled beverage, Smith, justice of the Michigan Supreme Court in *Manzoni v. Detroit Coca Cola Bottling Co.* said:[3]

> The warranty action, of ancient lineage, did not require a showing of negligence (though a showing of negligence, of course, did not defeat it) but it did require privity of contract. The negligence action, on the other hand, did not require privity but it did require that the plaintiff show a lack of due care with respect to the particular article, *e.g.*, the bottle of Coca Cola in the present case. Either of these doctrines, literally applied, gave the manufacturer a virtual immunity. As for privity, the injured consumer and the manufacturer were contractual

[2] Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

[3] — Mich. —, —, 109 N.W.2d 918, 920 (1961).

strangers, unless related by a fiction. As for negligence, the annual output of such bottles often ran into the millions. To show the negligence of the manufacturer with respect to any particular bottle was an impossibility.

Yet there was a problem here that required solution within the framework of modern commercial realities. At an earlier day, the day, in fact, when many of our precedents began to take form, commerce, as Llewellyn puts it, was "only one step removed from barter." Sales were little more than neighborhood trades. The "manufactured" article was a product of the local arts. It was made under the very eyes of the person who ultimately used it. That day is long over but the precedents linger. We need not trace the industrial development, the rise of the factor, the employment of agents and sellers far removed, the commercial necessity that the consumer's reliance be placed upon the product's name, or that of its maker, rather than upon his own inspection.

Today we have no barter, no simple village shop, no personal knowledge of the maker, of the source of his materials or of his methods of manufacture. Rather, rudely intruding upon the ancient precedents "like a belligerent wife crashing in on an assignation with a hussy," we have the facts of modern trade and commerce, centralized manufacturing operations in strategic areas complemented by regional or nationwide distribution networks, accompanied by advertising and assurances of quality directly aimed at the ultimate consumers.

The result of the operation of these forces has been a marked change in legal theory on a wide front. The food and beverage area is but a small subdivision of a field much more comprehensive, involving the whole topic of products liability. It ranges through areas both of contract and tort, from the liability of the manufacturer of a defective automobile wheel, or cinder blocks to that of the seller of an inflammable dress, or the distributor of unwholesome food or contaminated drink, or even the purveyor of a caustic perfume.

The Supreme Court of New Jersey has recently given this modern development exhaustive examination . . .:

Thus the older and narrower doctrines have given way in response to the "evergrowing pressure for protection of the consumer, coupled with a realization that liability would not unduly inhibit the enterprise of manufacturers and that they were well placed both to profit from its lessons and to distribute its burdens." As a result the requirement of privity has been abandoned outright in many jurisdictions rather than by the use of fictions, thereby opening the door to the widespread use of the warranty theory.

As tempus fugits for mortal men, so does the law keep apace. As insurance was designed to protect mortal man, each in his age, so too has it the capacity to keep apace.