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PRODUCT LIABILITY ASPECTS OF THE RISKS OF TECHNOLOGICAL CHANGE – A U.S. PERSPECTIVE

*Malcolm E. Wheeler**

I was intrigued by the title of the session that Henry asked me to address because the issue, as he framed it, was the effect of technology development on product liability law. Normally, one thinks of the issue the other way around, in terms of the effect of product liability law on technology and the development and implementation of technology. It did not register at first, but the more I thought about it, the more I realized that it was an intriguing title and that there are, in fact, two major ways in which technology development affects the law.

I thought I would start by talking about those effects, then segue into the opposite, which is the effect of the law on technology development, and I will finish with a very clear example of this interplay.

First, I will discuss the two major ways in which I see the development of technology affecting the law. The first way in which technology affects the law itself is by generating “technology-enforcing regulations.” What has happened in a number of regulated industries over the course of the last couple of decades is that, as technological developments have occurred, regulators have seen news releases about them or, from their contact with industry, have found out about research being done in the various fields. Then they have gone back to Washington and promulgated what they call “technology-enforcing regulations.” We commonly see this in the automobile industry. We certainly saw this tendency all the way back in the late 1960s and early 1970s with regards to air bags and other forms of automatic restraints.

A second respect in which technology affects the law itself is that it engenders beliefs in judges and juries about what manufacturers could have done, or should have done, or can do and should do in the future. I see it happen all the time. I cannot tell you how many times I have been in a courtroom trying a case when the plaintiff’s lawyer began his or her opening statement by saying to the jury, “If we could put a man on the moon in 1969, then why could we not do these things that would have made these products

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one hundred percent safe twenty or thirty years ago." Of course, there is no such thing as a "safe" product, and there never will be, because every product and every activity entails some level of risk. But plaintiffs' lawyers pretend otherwise.

A wonderful example of that, which I hope will generate some disbelief, is a major class action suit that was scheduled to go to trial in California in late April. In this case, the plaintiffs' lawyers have seen fit to sue Ford Motor Company and have actually persuaded a court in Alameda County to certify a statewide class of almost all people who originally purchased new Ford vehicles, trucks, vans, and cars made between 1983 and 1995, or who now own them, on the theory that all of those vehicles were defective because they had a thick film ignition module that causes stalling. The class, by the way, consists of owners of vehicles that have never stalled and have never caused an injury. That is a limitation on the scope of the class: people who have never suffered any property damage or any physical damage. They allegedly have a fear, now that the plaintiffs have told them about this issue, that their cars might stall sometime in the future. The court has seen fit to certify the statewide class of all these disparate vehicles with dozens of different designs, dozens of different results, and dozens of different warranty return rates. The main point that the plaintiffs are making in the case is that when this new technology, called "thick film ignition technology," first came out in 1983, the warranty return rates were above ten percent. Over time, as with all technology, they went from above ten percent to six percent to four percent to two percent to one percent, and got down to below one percent by the time the technology was adjusted and was no longer considered new technology.

Again, on this idea of how technology drives the law, we see this massive class action being litigated on the theory that, if you could get the warranty return rates down to less than one percent after eight years of educating customers, improving diagnostic technology, and improving the modules, well then, why could you not have done it in 1983 when you first introduced it?

The third way that we see this happening is engendering beliefs in legislatures about what manufacturers can and should do. The auto industry is, again, a prime example. You may remember the 1970 Clean Air Act¹ and what happened to cars in the early 1970s. Your car did not run very well; it stalled a lot; you had to take it in to get it tuned about every six months or so; and even after you did that, you still ended up with problems with your car. Why was that? It was because Congress saw fit, in the wake of the Green Movement, to promulgate the 1970 Clean Air Act and forced technology,

¹ See Clean Air Act, 42 U.S.C. §§ 7407-7642 (1970).

legislatively, in a way that simply was not sound. Some manufacturers tried to incrementally improve existing technology, and did the best they could with it, while others tried to take a revolutionary step and develop brand new technology. The latter had the most problems in the short run. The other manufacturers had the greater problem over the period of the next six or seven years. We saw the problem continue to develop and materialize in all sorts of ways in the 1980s, when all sorts of different electronic engine controls came in. But again, all of this occurred because of the notion that because we have all of these new electronics developing today, the auto manufacturers ought to be able to implement them yesterday. These are the ways in which the development of technology actually drives the law, statutorily, in terms of implementation by the courts, and in terms of how the cases are presented to juries.

The second major category in which technological developments affect product liability law is the way in which these cases are litigated. It turns out, for example, that with all of the development in electronics technology, the courts today are, and for the last several years have been, doing things like ordering defendants in a major group of cases, or pattern litigation, to put hundreds of thousands or millions of pages of documents onto CD-ROM, and then pass these disks out to the various members of the plaintiffs' bar, so as to make it easier for the members of the plaintiffs' bar to deal with the documents, and communicate with each other. For years there has been a major plaintiffs' group called the Attorneys Information Exchange Group (AIEG). It is a computerized nationwide database. Plaintiffs' lawyers, when they do discovery in a given case, send copies of the documents to the AIEG computer headquarters down in the southeast, and the documents are put on the database. They have millions and millions of documents for the auto industry, the drug industry, the airplane industry, the motorboat industry, and just about any other major industry.

A second technological development, and this one is even more stunning, is that some courts around the country have begun to take the position that manufacturers must provide a computer terminal and an engineer who works with that computer terminal to sit there while the plaintiff's lawyer stands over his shoulder and requests that he display all documents pertaining to passive seat belts, for example, and then all documents that pertain to seat belt latches. As these things come up, the plaintiff's lawyer is literally allowed to tell this engineer to dive down into that area and retrieve all the documents that were authored by a certain person or all the ones that have a certain date. The manufacturers find themselves in the position of having to make very interesting decisions about what they put on the computer, know-

ing that they might someday face this type of a discovery obligation from some court someplace in the country.

A third type of technological development that is driving the way the law goes is something we have seen very recently in the Microsoft case with Bill Gates.² The main evidence that David Boise has used to try to hang Bill Gates is Gates' own e-mails.³ The computerized discovery of e-mails and, of course, the inability to really erase e-mails from the system, except in a very expensive way, is something that we are beginning to see in product liability litigation. The *Microsoft* case is an antitrust case, but it is happening all the time in the product liability area as well.

The fourth, and perhaps most noticeable, way in which technological development is driving product liability litigation is in the courtroom. If the case is a significant product liability case, there is no more resemblance to the way the cases were litigated when I first started practicing thirty years ago than there is to the man in the moon. They are completely different. Today, both sides are likely to be sitting with computer terminals doing a real-time transmission of the testimony. There is often a very high-tech, three-dimensional holographic video reconstruction of whatever the accident was. There will be use of CAD-CAM⁴ right in the courtroom, often by the manufacturer, trying to show why the allegedly safer design would actually lead to all sorts of problems. Any alternative design the plaintiff presents is likely to be shown in some high-tech way to prove how it could be done. And the manufacturer is likely to show in some slightly more high-tech way why it could not be done. It has become an extraordinarily high-tech presentation.

Jurors tend to expect something like that. They see these kinds of presentations on television and in the movies, in stories about litigation, and they expect to be entertained. If you do not entertain them, you are at something of a risk when you are in the courtroom.

Also, technology in the courtroom is very much a one-way street. Those first three things I mentioned are things that had to do with large document populations. Who has large document populations in a product liability case? Only one party, the defendant. The plaintiff does not have a large document population. So he or she imposes massive litigation costs on the defense in these cases, sometimes hundreds of thousands, or even millions of dollars, just dealing with document issues. The plaintiff's lawyer can sit down and dictate a set of document requests in about ten minutes or pull it out of the

² See *U.S. v. Microsoft Corp.*, No. 98-1232 (D. D.C. filed May 18, 1998); see also David Ignatius, *The Microsoft Mind-Set*, WASH. POST, Feb. 28, 1999, at B7.

³ See John Wilke & Keith Perine, *Microsoft Claims Its Distribution Facts Didn't Hinder Netscape with Consumers*, WALL ST. J., Feb. 9, 1999, at B6.

⁴ Computer-aided design (CAD) and computer-aided manufacture (CAM).

word processor. Indeed, it is truly a one-way street, and the effect is generally on product prices, on product development, and on the time spent by the various engineers, scientists, and management people at the various companies.

Now let me discuss the effect of product liability on technology development because they really are related. How does product liability law affect technology development? In virtually ninety-nine percent of the cases, it affects it in a negative way. First, the threat of product liability litigation inhibits innovation because engineers and scientists are driven to use only evolutionary changes and not revolutionary changes. The risks to themselves and to their companies of making revolutionary changes, something that has never been done before, are immense because, if they do something that is revolutionary and something happens as a result, you get product liability lawsuits.

Product liability lawsuits are very expensive. Again, if you are trying the case in Dade County, Florida, or even worse, in Starr County, Texas, or in Cook County, Illinois, you are betting the bank, basically, on the revolutionary change that you think would really be good for society.

The second thing is that the litigation threat inhibits candid critical evaluation of existing designs. In every major company in the country there are lawyers presenting seminars to engineers and scientists on how to write documents and how not to write documents. What they are telling those engineers and scientists is, "Do not write documents, even though it is the efficient thing to do. If you have to write a document, picture that document a year from now on billboards in the middle of freeways all over the country because that is exactly the kind of publicity it will get. Instead, you have to write your documents, Ms. Engineer and Mr. Scientist, with an eye toward a plaintiff's lawyer a year from now, two years from now, five years from now, who will terribly, terribly distort the nature of scientific and engineering communication."

Third, litigation impedes the implementation of new technological developments because any new design feature that is implemented makes the old one "defective" in the eyes of the plaintiff's bar. All over the country there are people sitting in meetings thinking, "Should we implement this new design feature tomorrow or wait a year, or wait for two years? What is it going to do to our product liability litigation for our existing products and for the products we made five years ago?" It is a real serious moral dilemma for an engineer or scientist when you know you have a better product, you know you have an improvement, but you also know that, as soon as you implement it, you are going to be in court in six months or a year with ten cases, twenty cases, one hundred cases, or a thousand cases explaining why you had not

done it earlier. "If you could do it today, why could you not do it last year? Why could you not do it ten years ago?" That is the mantra of the plaintiffs' bar, and it is misleading, unfair, and unrealistic – but it is effective in a courtroom.

The fourth way in which product liability law impedes technological development is that it occupies engineers and scientists and management in the courtroom and in discovery. Instead of doing what they should be doing, which is to spend their efforts as scientists and engineers and managers developing new and better products for the future, they are being mired in the past. For example, think about the asbestos litigation. Think about the millions and millions of hours of time that scientists and engineers spent litigating over what was actually known in 1941 and 1945 about asbestos, and which articles had been written in obscure journals that had been seen by any of the employees in these companies around the world. That has been a terrible drain on the scarce resources of this country.

The last impediment I am going to mention is that the law has had an interesting impact, and quite a negative impact, on what otherwise would be beneficial mergers and acquisitions. Think about the discussions that must have occurred before Daimler and Chrysler agreed to merge.⁵ Daimler, which makes primarily high-end cars that start at about \$40,000 and go up to about \$135,000, was trying to decide whether to merge with Chrysler, which makes mostly low-end cars for ordinary folks, cars that start at about \$11,000 and then run up to the mid-luxury range. If you are Daimler, you have a very, very small number of lawsuits. If you are Chrysler, you have hundreds of lawsuits, such as Jeep rollover litigation or litigation stemming from what happens when a 2,500-pound car gets hit by a 4,500-pound car and the plaintiff says that the smaller car was not strong enough.

Daimler, in deciding whether this merger was a good idea, had to decide how much of a product liability tail it wanted to buy. It had to add that factor into the other more reasonable factors, such as whether the merger would make the companies more efficient; is this horizontal integration going to be good for the companies, for consumers, and for workers; what better products are going to be able to be made available, and so forth. They had to ask the product liability tail question, and who knows how close that merger came to not occurring or how many other mergers and acquisitions that should have occurred have not occurred because of those kinds of concerns.

I have a few tips and suggestions with which I want to finish. Major corporations in this country do not realize how much is being done to them at the state legislative level. This is a major mistake. There is always a huge

⁵ See Brandon Mitchener, *Daimler Supervisory Board Clears Planned Merger with Chrysler*, WALL ST. J., May 15, 1998, at B4.

focus on Congress and what is going on in the courtrooms, but very little attention is paid to what is going on in the state legislatures. Before I moved from California to Denver, I was involved in a legislative reform effort that resulted from the enactment of something called the California Corporate Criminal Liability Act,⁶ which in effect criminalized tort law in the state of California – an amazing piece of legislation. Yet none of the lobbying organizations who acted on behalf of American industry even knew it when that statute was being enacted. I found out about the legislation by word of mouth from a friend of mine in Sacramento, and started calling my corporate clients to tell them. They were stunned.

The second example involves things like anti-protective-order bills. Corporations have a major interest in having protective orders to make sure that their trade secrets are not disseminated widely to their competitors for free. Yet, ostensibly in the name of safety, the plaintiff's bar has managed to implement all over this country bills that make it very difficult to get protective orders in product liability litigation.

A third example is procedural. California enacted a statute prohibiting summary judgment unless it is on an entire claim.⁷ What that means is that a plaintiff can file a broad-based, very vague, very nonspecific lawsuit, and the manufacturer cannot do anything to narrow it. The manufacturer is going to be subjected to massive discovery of documents and depositions, interrogatories, and the whole nine yards, and cannot do anything to narrow the scope of the lawsuit because of this peculiar statute.

All those things happened in the California legislature in Sacramento. All those things happened without any understanding or knowledge or participation by American industry. That is not good for consumers or for the economy. Manufacturers need to be more involved.

It is a good idea to create at least one really good document that accurately states the basis for every major decision that is made. In product liability litigation today, and this has been true since the mid-1980s, and will be true for the rest of my career, product liability litigation is document litigation. What most plaintiffs' lawyers do, the ones who are really effective, the ones who are very rich, is serve massive document requests and enforce them. They try to win the case before they ever get to the courtroom, and what they have when they get to the courtroom is 100 or 200 documents written by scientists and engineers who are not litigation-savvy. There is no good document there that really explains the terribly complex and difficult judgments that management and engineering and scientific people had to make. If you can give me one document that I can show was the decision-

⁶ CAL. PENAL CODE § 387 (West 1999).

⁷ CAL. CIV. PROC. CODE § 437c(f)(1).

making document for a feature that was adopted or a design change that was or was not made, I can win the case for you. Just give me one document that really sets out the reasoning and cannot so easily be distorted by the plaintiffs' bar.

I tried a very highly publicized case at the end of last year called *Tebbetts v. Ford*.⁸ That was a case in which I spent considerable time with one document, a 1985 document that was presented to one of Ford's highest level committees. This was a document that was written by some very knowledgeable personnel within the company that set out exactly what the decision-making process was, and why the company had chosen the program plan it had chosen. The jury, I believe, was extraordinarily impressed with that document and how thorough the company had been in its decision making, how it had considered the safety ramifications and decided which ones were more important and which ones were less important, and how it had tried to act in the best interest of consumers in a very complex area.

Those documents are very rare, and in companies you cannot possibly get 100,000 employees, 20,000 employees, or even 10,000 employees all to learn how to write good documents. What you have to do is to have somebody in-house whose responsibility it is to ensure, when a major decision is going to be made, that a good, thorough, accurate document is created and that it is available to your defense lawyer in the litigation.

The third tie is to educate juries about technology. There was a wonderful book written about five or six years ago called *To Engineer is Human*.⁹ It was written by a professor in the Civil Engineering Department at Duke University. It is a wonderful description of the difficulties that an engineer faces. It is a wonderful description of what engineers do, which is mainly to take something that has been done before and try to do it better.

His examples are civil engineering examples: A bridge built over a ten-foot wide river might lead an engineer to try to build a similar bridge over a twenty-foot wide river, or to try to build a similar bridge over another ten-foot wide river with cheaper or stronger materials. Engineers are always looking for ways to improve things. It is an ongoing evolutionary process. Jurors do not understand that because most jurors do not know what engineers do. They have never been to an engineering school, never had an engineering course. A major job of companies, defense lawyers, and anybody who really has a responsible view of what this country is all about should be out there trying to educate jurors and the public about engineering and what it involves and what the process is.

⁸ 140 N.H. 203, 665 A.2d 345 (1995).

⁹ HENRY PETROSKI, *TO ENGINEER IS HUMAN: THE ROLE OF FAILURE IN SUCCESSFUL DESIGN* (1992).

Lastly, the media, the courts, the legislatures, and the juries simply have to be reminded of a number of really important facts. We have the most extensive product liability system in the entire world, but our products are not any safer than the products in Europe or the products in Japan. What is it that we have accomplished with this system that is so incredibly expensive that pays defense lawyers, plaintiffs' lawyers, and litigation consultants a lot of money? What is it that we have accomplished that is good? Have we done anything better than Europe, than Canada, than Japan in producing safer products? I think the answer is pretty clearly no.

Look at the states in this country that do not have punitive damages. In states like Michigan, Washington, Louisiana, and Nebraska, which do not have punitive damages, is there some rampant wave of injuries and deaths occurring there that does not occur in the other states? Not that I know of, and I have not seen any article in economics, medical, or engineering literature that suggests that those states' products are any worse or that there are any more torts occurring in those states. In states like California, which has the most prodigious product liability law in the country, including the California Corporate Criminal Liability Act, there is no evidence that those states have safer products or safer activities or that people act any better than in the other states. The fact is, there is simply no good case to be made for the kind of product liability system that we have developed and that we continue to try to expand.

