

PANEL DISCUSSION

I would like to introduce to you Mr. Marvin Lewis, practicing attorney in San Francisco. He specializes in trial work. He has been chairman of the Rapid Transit Commission in the area and during World War II was OPA Commissioner for 11 western states.

Next I would like you to meet Dr. Harold Lundgren of the Western Regional Laboratory, in Albany. He is Ph.D. in chemistry from the University of Minnesota, has done research teaching and currently is chief of Woolen Mohair Laboratory at the western regional laboratories.

Next, Mr. McKay McKinnon, Jr., a chemist with a master's degree from North Carolina State College. He is chief director of the San Francisco Food and Drug Administration.

Mr. Vincent Paul Wright. Dr. Wright is not a technical man from the point of view of being a chemist but an economist. He is dean of the College of Business Administration at the University of San Francisco, with bachelor, master and doctor degrees from Harvard University.

ATTORNEY MARVIN LEWIS. The advancement in any science, we like to think (we trial attorneys), may be helped by a good verdict and a well publicized decision and as in the malpractice cases, we like to think that maybe doctors have become a little more careful.

We also like to feel that in your products liability field it is the ingenious lawyer with the well enlightened Supreme Courts that are advancing the way in the products liability field. We like to think that those who are putting out on the market mechanized products, and advertising them so well from Madison Avenue, have been made to at least pause and think of their actions by the enlightened decisions that have been enunciated through the country.

I remember when I went to law school the law on products liability was entirely different than it is today. Of course, if we go back far enough we go to the law in the United States for many years that emanated from England. That went back to the old Winterbottom case in 1842 and, as they say, it is like oxtail soup.

Aren't you going back a little too far to find something good?

But anyway there was a carriage that broke down and it was owned by the postmaster general. He had a man to keep that carriage in good repair. The poor people and the driver who were injured sued the repair man. They were told you can't sue the repair man. The only man who can come into court and claim any harm was the postmaster general because he dealt with the repair man. We had that ridiculous law all the way up until 1914.

Then there came a break-through in a famous case of MacPherson versus Buick in which our courts then held, under Justice Cardozo for the first time, that we didn't have to have that privity between two people. That if there was negligence and someone was driving an automobile they could actually sue the manufacturer but they still had to do it on the principle of negligence. And then you had to find something that was imminently dangerous before that doctrine was applied.

They extended the law to food products and then very carefully they came along to chewing tobacco. A buyer found a human toe in the tobacco. After a long discussion, with seven justices going different ways, they finally said this was a food products case and agreed that normally you wouldn't find a toe in tobacco.

Finally we came into the case of Heminson v. Bloomfield, which was decided about 1960. They got away from negligence entirely and said if you have something that is imminently dangerous we are going to apply what has been known as the law of contracts or warranty; you don't have to show negligence, all you have to show is the defect and that is sufficient.

STATE LED WAY IN IMPORTANT DECISION

Then we came along until just 1964. I am privileged to say that my state led the way in a very enlightened decision of our California Supreme Court. The opinion was written by Chief Justice Trainor, who stated in that opinion that there was no straight liability in California on a manufacturer or a wholesaler and even on the retailer.

The defendant cannot come along and say, "I did not negligently maim you, or I did not negligently blind you, or I did not negligently kill you." They came right out and called a spade a spade and said if you want to be in business putting out articles for the general public and spending millions of dollars on Madison Avenue to advertise your products, then insurance is one of the means of protecting the public. It is far better for you, the manufacturer, you the wholesaler, and you the retailer, to be responsible and let each of you carry in-

surance and let each of you sue the other, if need be, through your respective insurance companies.

Now we come to different types of injury in the products liability field. When we come to the defect in the product this is relatively simple. Then we get into a question of whether it is latent or whether it is patent. When you say latent, that is something that can't be seen.

But now they have even gone to the point that where even if it is patent and it is some type of a machine that needs a gear protection or a shield, the person does not use it at his peril. It is still up to the manufacturer, if he has negligently designed that particular article, to protect the public.

They have even gone so far as to hold that the mere fact that something has been manufactured that way for years is not the test. We had a case of a trailer and a semi-trailer that was pulled by means of a lock-key chain and this had been done throughout the country for years. Yet, the court said the fact that it had been done for years doesn't mean that it is the right way.

We even went so far as to get a judgment against Greyhound Bus for having a depressed aisle. It was a brand new bus but a lazy passenger forgot that she had to step up and she fractured her hip. They paid off because I don't think they wanted to have a decision that those buses have no business to have depressed aisles. You may say, "She should have looked where she was going." But if there isn't any good reason for this particular design the public should be protected against it.

SUBJECT OF USE MORE DIFFICULT MATTER

Now we come into another subject in the law of products liability. That is the subject of use and this gets a little more difficult. Has there been a violation of an intended use of a product, even though there has been no defect? It is a very simple matter when you get to the lawn mower. You know this machine is not made to cut hair. But if you get to a can opener someone may use that opener for another purpose and it may cause injury.

Then the question becomes: Even though the can opener wasn't used for its intended use, was it being used for a foreseeable use?

There is the lady who bought fertilizer. It was fine for aiding the growth of grass. There wasn't anything wrong with the fertilizer. But about a month later she wore her bikini and she sat on the grass. Her skin became burned. The court said that was a foreseeable use and there should have been a warning with the sale of that fertilizer.

Directions aren't enough. They say that more than 500,000 children a year are consuming chemicals that are on the market. They say a child is going to climb if it sees an attractive package and break it open and test the contents. Parents can't watch these youngsters 100 percent of the time. Manufacturers must include a notice on the package that the product is dangerous and warn parents to keep the product out of reach of children.

Now, the attorney has a real problem. He gets the case and many times he must act like a detective. An airplane has crashed and out of the burning embers we have to reconstruct the defect—and who is liable. A car crashes into a tree. We used to say it was an unforeseeable accident, couldn't have been avoided. Now we are cognizant of the fact that we can sue the manufacturer. The maker is going to say that nothing is wrong; the driver was intoxicated or fell asleep. Now we have to get experts. Let us say the maker is Ford. It has many experts, and if it doesn't have enough, it can get more from General Motors. And the poor plaintiff has to find an expert.

RECALLS CASE OF FAULTY DYNAMITE

Take the case we have now with Hercules Powder. Something apparently went wrong with the dynamite. It is very hard to find an expert in this field because a man who is an expert must depend on either Hercules or DuPont or some other big company for his explosives.

In closing I want to read you a little extract from the fabulous case: Vandermark versus Ford Motor. This opinion has been quoted all over the United States:

"And the dam has been now broken and we are making terrific progress along this line requiring no more privity and requiring no longer negligence but having strict liability in the field of products liability.

"A manufacturer now is strictly liable when he knows an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Since this liability is strict, it encompasses defects regardless of their source. No longer can the manufacturer of a completed product escape liability by tracing the defect to a component part supplied by another."

What the court is saying is that no longer can Ford say we merely assembled this automobile, we didn't make the component parts. The assembler is now liable for all the component parts put together. As one other court has said in the case of Ford Motor v. Mathers:

"Though discerning industrialists or students of our economy should know that in each car as it rolls off the assembly line there is represented countless man hours of labor by workers scattered throughout

hundreds of plants independently owned and operated, not even these sophisticated men of distinction would suppose they were bargaining for a mobile assortment of nuts, bolts and moving parts, which if well-greased, coaxed and fueled would act like an automobile.

"The purchaser of a new automobile is led by the manufacturer-assembler to think that the car is a quality order product. The purchaser doesn't distinguish between an assembler or a manufacturer. Nor does the manufacturer-assembler wish him to do so.

"Although he may realize the assembler actually does not design and manufacture every component part, the purchaser assumes the manufacturer-assembler will procure non-defective parts from a reputable concern without the consumer-customer having to ascertain the manufacturer of each part."

GREAT ADVANCEMENTS HAVE BEEN MADE

So, great steps and great advancements have been made by the courts. And while it is true that we lawyers are in business and while it is true that in doing the things we are doing we make fees and our particular clients receive compensation from the courts and juries, yet in the whole we like to feel that these enlightened decisions are helping throughout the country you who are interested in products liability and in protecting the general public.

We like to feel that we also have been helpful in advancing legislation throughout the country that gives the public better protection in this mechanized age. In many respects we, the trial lawyers, are the red line that is holding back the jungle of injured and maimed from the mechanized liability that comes from Madison Avenue. Thank you.

DR. HAROLD LUNDGREN. Mr. Kaplan is representing the testing scientist and I am representing the research scientist.

From where we sit I would like to give you some of our viewpoints that might be helpful in tomorrow's products. At the laboratory where I am, which is one of our regional laboratories of the Department of Agriculture, we are working on farm products. We are studying their composition, stability and getting basic understanding of quality differences. We are modifying these products in an effort to develop new and better products and finally developing more economical processing of farm products, including our new products.

One of the big problems among scientists today is communication. We are deluged by information and this information is accumulating at a fantastic rate and this is forcing a revolution in information processing.

We are hearing more and more about electronic data processing, collecting data, filtering the data and retrieval. This is possible among scientists because we have a well defined code of symbols. When we see a formula, this formula means something immediately in terms of properties.

Unfortunately, there is a relative barrier separating the scientist from the consumer. We have already heard in the speeches about the gap between the scientist testing, and the research scientist, and the consumer—and how this gap is being breached by sales managers using sales gimmicks. One of the problems is the changing terminology.

I happen to be more familiar with textiles, particularly wool. A long time ago there used to be the common expression that a fabric had good quality. This referred to its composition and to its construction primarily. Then the term "good" was dropped and we now speak of "quality fabrics." Nowadays, quality fabrics to many consumers mean predominantly style and color, whereas the factors of composition and construction are relatively secondary.

Now, we scientists are accustomed to think in terms of individual atoms and individual molecules, but in order to make progress in understanding these we have had to deal with statistics and molecules in the mass. This is what is happening among people. The individual man is being forced into a mass society by our present system.

HOUSEWIFE NEEDS RELIABLE LABELING

In other words, we are being forced into planned consumerhood and where the trend is toward automated selling and, incidentally, this is more substantial in

Europe than it is in the United States because the American housewife likes to see what she buys and likes to feel it and to read about it and to change her mind and put it back.

Therefore, the American housewife needs accurate and reliable labelling, and she needs proper symbolism. Symbols, like pictures, tell more than words and like the scientist, she needs product facts. She needs facts about keeping quality, as well as the fresh-manufactured quality, and she needs communication direct from the scientist, as much as is possible from the research scientist. It may be necessary in time, with the deluge of consumer data that is coming out, that we may be forced to consumer data processing and retrieval.

I would just like to take a second to show an example of a new product that we have developed and one that is necessary to get to the consumer level.

I have a pair of socks here. They were both originally the same size. They were washed together. This one shrank. This one did not.

This one still looks and feels like the original sock. This has come about from our research in which we have gone into the details of wool fibre structure, literally split the hairs, and we have rebuilt the structure so that it meets modern requirements, meets the requirements of the modern consumer.

Now this is the kind of information I am referring to that needs to reach the consumer—the accurate information, not just the same gimmick type of thing. That's all I have to say.