Santa Clara University
School of Law

Santa Clara Law Review

Volume 15 | Number 4 Article 7

1-1-1975

Book Review [Hazardous Product Litigation]

Santa Clara Lawyer

BOOK REVIEWS

HAZARDOUS PRODUCT LITIGATION. By Edward M. Swartz. Rochester: Lawyers Cooperative Publishing Co. 1973. Pp. 416. Cloth. $35.00.

It is unique when I find a law book for review which I can wholeheartedly recommend to the practitioner in a particular area. However, Edward M. Swartz's *Hazardous Product Litigation* is one of those unique books, in one of the most litigious areas of modern torts.

In the modern trial, "we try facts, not law." I think in products litigation this is particularly true, and for a modern law book in this field to be useful it must deal with the specifics. Swartz's book does.

In the first chapter, the author summarizes the facts of hypothetical cases involving items that can be potentially dangerous, and thus the subject of a lawsuit. Swartz, divides an assortment of commonly used products into categories based on the type of article and the potential hazard it creates: household products, electrical appliances, flammable items, glass doors, glass explosions, cartons, automobiles, toys, playgrounds, recreational equipment, sports equipment, food and beverages, medical, military hardware, products which produce allergic reactions, and many others. One is soon convinced that some of the most common and frequently used articles—floor wax, color television sets, portable hair dryers—can become the most hazardous when negligently designed or manufactured. The author suggests that these short fact patterns can be used as an "immediate method of thinking through the material which accompanies the cases at various points in the text."[1]

The second chapter discusses theories of liability—negligence, warranty, and strict liability in tort—and the defenses to those actions. Examples of a "breach of warranty notice letter," and other sample forms also are included. To paraphrase the Virginia Slims ad, "Baby, you've come a long way since *Winterbottom v. Wright!*"[2]

The chapter on procedural considerations discusses forum

1. E. SWARTZ, HAZARDOUS PRODUCT LITIGATION 7 (1973) [hereinafter cited as SWARTZ].

2. 152 Eng. Rep. 402 (Ex. 1842).

shopping and jurisdictional problems from *International Shoe*[3] through the most recent cases. Jurisdiction is especially important in product litigation, since the multi-state context of most product liability cases presents the plaintiff with a choice of forums. The exemplar forms and their citations, covering, for example, motions for change of venue and supporting affidavits, are good.

Many product liability cases are won in the investigation stage through deposition and discovery. The chapter on pre-pleading investigation offers some good methods of acquiring and using product history. Swartz recommends obtaining investigatory help from union members and using the telephone to call fellow lawyers. That last suggestion is a good library short cut that no practicing lawyer should be ashamed to use.

The pleading chapter provides sample complaints and pleadings, but it is the discovery chapter which is particularly welcome. It includes sample briefs, depositions and interrogatories; specific suggestions on how to discover and how to do a deposition; and checklists and descriptions of informal means of discovery. I remember once visiting an aircraft factory in Connecticut to take a court-ordered deposition. On the bulletin board was a notice: "Be more careful assembling tail rotors—carelessness has already caused one fatal accident!" It was my case! I included this "discovery" in my deposition.

Use of the economist's report is discussed in the "Damages and Settlements" chapter, as well as actual damages for specific injuries. Swartz includes a discussion of "wrongful life," that is, suit against manufacturers whose birth control products failed. The "wrongful life" suit is a new breach of warranty tort which includes elements of morality, religion and economics, but it is a viable tort.

I find the chapter on "Trial" good enough to be included in any law book, and not specifically limited in its usefulness to the area of products liability. The reader is taken from the fast-disappearing field of voir dire, through opening statement, examination and cross-examination. Swartz gives excellent advice, suggesting, for example, that "[i]f counsel feels he must take on the task of cross-examining a technical witness . . . , he should seek to conduct a clever collateral attack rather than encounter the expert squarely on his own terms . . . ."[4] While jury instructions must be tailored to the law of each state, Swartz describes the principal areas to be covered in every products liability case in any state. Sample instructions are included with citations.

The last chapter, "New Developments and Missed Opportun-

3. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
4. SWARTZ, *supra* note 1, at 299.

ities," shows that hazardous products litigation is expanding and never ending. The author suggests that there is much for the trial lawyer to learn and try, since even manufacturers are unaware of all the dangerous potential of their products. Thus, for example, as we learn more about their effects, "chemical contamination in the guise of insecticides, preservatives, colorings, hormones and artificial flavorings is one area of food contamination which is rich in potential litigation,"[5] and will expand as we learn more about the effects of chemicals.

Similarly, many lawyers overlook the opportunity afforded by military hazardous products. I've tried a number of military hazardous products cases and I agree thoroughly with Swartz that an injury resulting from a piece of defective military equipment can and should be treated as an ordinary products liability case. I also agree that "it is likely that greater investigation will be necessary to obtain the facts needed to prove your case in the face of governmental bureaucratic inertia and the so-called Freedom of Information Act."[6]

One genuinely useful section describes the way in which an entire industry may be indicted in a civil suit for its hazardous products. It is no defense that every manufacturer in the industry produced the commodity in the same way, if in fact the commodity is dangerous. This is illustrated by the story related of the blasting cap industry and its trade association. A suit in negligence and strict liability in tort was based on industry-wide failure to place warnings on individual blasting caps. Although it was impossible to identify the manufacturer of the particular blasting cap which caused the injury, there was evidence that the manufacturers had knowledge of the danger that these products presented to children, and evidence that they acted in concert to eliminate warning labels required by legislation.

The book is replete with excellent citations and bibliography, and contains practical suggestions on choosing and making use of testing organizations and certifiers of quality.

I find *Hazardous Product Litigation* illustrative of a new style of law book which combines the practical and specific facts with the necessary academic discussion of available case and textual authority.

*Melvin M. Belli**

5. *Id.* at 371.
6. *Id.*

* A.B. 1929, LL.B. 1933, University of California at Berkeley (Boalt Hall); J.D. (hon.), New England School of Law; Past Dean, International Academy of Trial Lawyers; Past President, American Trial Lawyers Association; Author, *Modern Trials and Modern Damages* (1954), *Trial and Tort Trends* (1954-62).

THE LAW, THE SUPREME COURT AND THE PEOPLE'S RIGHTS. By Ann Fagan Ginger. Woodbury, New York: Barrons Educational Series, Inc. 1970. Pp. xv, 695. Softbound. $3.95.

The author states that the purpose of this book is to help people "to start learning about the realities of the law."[1] She refers to "a deepening interest in . . . how (and whether) the judicial system works."[2] Thus, it must be assumed that the purpose of the book is to help students in schools and colleges, and non-lawyers generally, to understand the Supreme Court through a study of one particular aspect of the work of that Court. While the book would be useful as a reference work for law students, it is not a text for lawyers and law students. Not only the content, but also the format confirm this: except for the principal cases, the citations are left to one of the appendices at the end of the book. Also, the glossary included among the appendices is obviously aimed at those who have not studied for the legal profession.

The book is clearly successful in describing the operations of the Supreme Court in the area of "the people's rights" during the tenure of Earl Warren as Chief Justice. The selection of that era in the history of the United States for such a study is logical. As the author states, it was "the first and only era to date in which the United States Supreme Court has considered a significant number of cases in this field."[3] The selection of topics and of cases, which are described in detail, is fully adequate and appropriate to the author's stated purpose. The description of the work of the Supreme Court is accurate and complete in all substantial respects. The writing is clear and the descriptions of the cases are handled in an interesting manner. In general, the book should fulfill its purpose and provide a useful historical reference work for the period and subject it covers.

Nonetheless, the work left me with an uneasy feeling that some important elements were understated in the treatment of the subject, and even of the Warren era. This is partly because I read it from a lawyer's viewpoint, and, as the author conceded, it is not really addressed to lawyer-readers, although the author is trained in the law. My trouble stems from a feeling that the author has somewhat oversimplified the analysis of the developments in the civil rights area during the Warren tenure. The author herself admits a straight line bias: while she has selected "landmarks in

1. A. GINGER, THE LAW, THE SUPREME COURT AND THE PEOPLE'S RIGHTS x (1970) [hereinafter cited as GINGER].
2. *Id.*
3. *Id.* at xi.

human rights law,"[4] she does not consider any decision to be a "landmark" unless it was a victory "for the proponents of human rights law."[5] In her view, when a case was lost "by the advocate of human rights," the law was left unsettled, because "nothing is settled until it is settled right."[6]

Although I probably would be on the same side of all the issues as this author, I cannot bring myself to look upon every decision that went the other way as simply wrong. There are too many judges and commentators whom I greatly respect who have been on that "wrong" side. Many of the judges have held philosophical views that led them to decide against the "advocates of civil rights" in particular cases. Such deviations from the straight line of the civil rights advocates are found in opinions by many of the justices most revered by those advocates. The list of those justices goes beyond Black and Frankfurter, and includes even Earl Warren. The author described the *Shapiro* decision[7] as "a blunderbuss method of denying welfare."[8] It seems to me that the dissenting opinion written by Chief Justice Warren and concurred in by Justice Black, which found the residence requirement constitutional, needs some philosophical analysis rather than mere quotation of some of the Chief Justice's words.

The author discusses the changes in American society during the Warren era that appeared to be causes of the great increase in human rights cases coming before the Court. That discussion, however, leaves unanswered the question why the justices who heard those particular cases both agreed to hear them and then formed majorities in favor of the advocates of human rights. There are those who believe that many of the "landmark cases" of the Warren era were merely the last step in a course that had been moving inexorably toward that outcome for many years. For example, as the quotations from the *Gideon*[9] opinion make clear, that decision was foreshadowed 30 years before in the decision of the *Scottsboro* case,[10] but the author's accompanying text does not discuss the significance of the earlier decision as a landmark on the way to the Warren Court's holding.

Not only did I miss emphasis on the ancient underpinnings of the civil rights decisions of the Warren era, but I also missed adequate credit to the many lawyers and lower court judges whose

4. *Id.*
5. *Id.* at xii.
6. *Id.*
7. Shapiro v. Thompson, 394 U.S. 618 (1969).
8. GINGER, *supra* note 1, at 587.
9. Gideon v. Wainwright, 372 U.S. 335 (1963).
10. Powell v. Alabama, 287 U.S. 45 (1932).

convictions led them to argue, in briefs and opinions, in favor of the positions that ultimately were supported in the Warren era. Perhaps it is surprising to find Justice Sutherland writing the opinion in the *Powell* case,[11] upholding the right of poor, black defendants to adequate counsel, since he was known to all as an archconservative justice. But is not surprising to find that judges such as Fahy, Wright, Tuttle and others were writing opinions that later became the law of the land by decision of the Supreme Court. Indeed, author Ginger mentions the decision of Judge Waring of South Carolina in one of the cases decided under the title of *Brown v. Board of Education of Topeka.*[12] She states that his dissenting opinion "foreshadowed almost every issue, every tactic, every basic problem in the school desegregation cases that were to follow,"[13] but she only suggests the special significance of the advocacy of the human rights position by him and other trial judges. Similarly, the lawyers who presented the civil rights cases, beginning in the trial courts and working up to the Supreme Court, played a vital part in the changes that the Supreme Court decisions made final. One wonders what would have happened to Gideon without the arguments prepared by Counsel Abe Fortas, and to many other parties to the landmark cases that were argued by Thurgood Marshall before he joined the Court. This inadequate treatment of these background factors left me feeling a need for a more enlightening explanation of why the Warren era was so productive of "landmark cases" in the highest court. The author states that the "Court did not stop handing down decisions on human rights cases when Earl Warren stepped down,"[14] but I would like to have seen more recognition that advocacy of human rights did not start when the Warren era began. The earlier struggles and victories are also part of the "realities of the law."

When the author did discuss the social and historical conditions that preceded the decisions, I had an uncomfortable feeling that the observations were tailored to support the conclusion that the justices on the Warren Court who made the "right" decisions were almost unique in their convictions. For example, the author stated that "the *Brown* decision did not grow out of a deep conviction held by the people or by the other two branches of government—Congress and the President. The court was almost alone in feeling that the time had come to integrate the public schools."[15] There is no citation of authority for that statement and it makes me

11. *Id.*
12. 347 U.S. 483 (1954).
13. GINGER, *supra* note 1, at 416.
14. *Id.* at xvi.
15. *Id.* at 428.

uncomfortable. For example, Congress, at the urging of some Presidents, was passing civil rights acts during this same period. I wonder if many of the American people were not merely unaware of their own conviction in these fields.

The Warren Court showed us the light, time and time again, but I am not prepared to classify those who had not rounded the bend in the tunnel as blind to the people's rights. Nor do I think we should overlook the landmark decisions and eloquent jurists of earlier eras that provided the Warren Court with precedents for its triumphal rulings. Chief Justice Warren was meticulous in citing those precedents: "Over the years, this Court has consistently repudiated . . . ," he said, in one of his "landmark" decisions.[16] It does not detract from the quality of his leadership to recall the triumphs of the past, but it does better illuminate the judicial system.

*Michael H. Cardozo**

16. Loving v. Virginia, 388 U.S. 1, 11 (1967).

* A.B., Dartmouth University; LL.B. 1935, Yale University; Executive Director, Association of American Law Schools, 1963-73; Administrator, PREVIEW OF UNITED STATES SUPREME COURT CASES, 1973-75.