

AN APPROACH TO DISCUSSING PRODUCT LIABILITY IN A BEGINNING MARKETING COURSE

Craig A. Kelley, California State University, Sacramento

ABSTRACT

It is generally acknowledged that the legal environment influences marketing decisions. However, a discussion of product liability may be overlooked in a beginning marketing course. This paper reviews the various legal theories of product liability and relates their application to the marketing mix.

INTRODUCTION

The legal environment of marketing can have profound effects on marketing activities. For this reason, marketing students should become aware of the legal doctrines that are relevant to marketing activities. Since only about 8% of university marketing departments offer a course in the legal aspects of marketing in their curriculum (Kelley and Brown 1986; Murphy and Lacznik 1980), the beginning marketing course would be one place to provide this discussion.

Product liability is an area of law that can have a major impact on marketing strategies and consumer choice. Yet many of the marketing textbooks positioned toward a beginning marketing course do not mention the legal remedies possible in product liability actions (Kelley and Brown 1986). The billions of dollars in liability claims filed against A. H. Robins (Dalkon Shield IUD) and the Manville Corp (asbestos), and the exodus of competition from the manufacture of diphtheria, tetanus, and pertussis (DPT) vaccine support its inclusion in a discussion of the legal environment (Fortune 1986).

Several reviews of specific product liability implications of marketing decisions already exist in the marketing literature. For example, Morgan (1982) discussed the liability concerns of the promotion, product and distribution decisions of a single firm. The product liability implications of personal selling (Morgan and Boedecker 1980) and advertising (Morgan 1979) also have been examined. Intra-industry liability has been addressed by Sheffet (1983) and Roedecker and Morgan (1986). However, a synthesis of all of the product liability areas does not exist in the literature. Furthermore, the educational perspective has not been explicitly presented. The purpose of the present paper is to correct these shortcomings by integrating the various product liability theories and discussion their application to the marketing mix.

IMPORTANCE OF PRODUCT LIABILITY

Although the legal doctrines of product liability are not new, many businesses have only recently acknowledged the magnitude of the impact that these doctrines have on their marketing decisions

(McInturff 1981). Marketers have responded to this heightened level of liability awareness by redesigning or dropping product lines, raising prices, educating consumers, and lobbying for state and federal liability reform legislation. Sometimes the response has been successful as in the case where industry-wide training standards and improvements in product design reduced injuries resulting from exploding truck wheel rims by 80% (Fortune 1986). In other cases, the response has hurt American business. For example, the decision to drop a product line has left foreign competition as the sole provider of some products.

Business students, and specifically marketing students, need to be made aware of product liability developments and how a firm might deal with these developments, if they are going to learn to incorporate liability risk into decision-making. This awareness begins with an understanding of the basic theories of product liability.

PRODUCT LIABILITY THEORIES

Product liability cases usually involve physical injuries to consumers, but may involve property damages. Negligence, strict liability, breach of warranty, and misrepresentation are individual firm liability theories that may be applied in cases where the cause of an injury can be traced to the actions of only one firm at a given channel level. Intra-industry theories -- alternative liability, concert of action, enterprise liability and market share liability -- may be applied in cases where the cause of an injury is traced to two or more possible firms at the same level in a channel of distribution. Constraints on paper length preclude a comprehensive legal discussion of each of these theories together with a detailed review of case law as offered in the articles referred to earlier. However, a synopsis of each liability theory is highlighted below.

Individual Firm Theories

Individual liability theories are rooted in contract and tort law. Breach of warranty is a contractual theory that could involve an express or implied warranty. Express warranties are specific statements, either oral or written, made concerning the qualities of a product. An implied warranty of merchantability (i.e., that the product will perform the functions for which the product is normally used) is part of any sales transaction according to the Uniform Commercial Code. A breach of warranty occurs when the warrantor does not satisfy the duties required under the warranty.

Tort law is the other area involved in product liability cases. Generally, there are three burdens of proof placed on the plaintiff when a tort

is involved. The plaintiff must show: (1) there was a defect; (2) the defect was attributable to the defendant; and (3) the defect was the proximate cause of the injury (Noel and Phillips 1981). One additional condition was necessary for a legal action to take place prior to and immediately after the turn of the 20th century. This was the rule of privity. Privity existed between only those parties who had direct contact with each other. Since many products moved from manufacturer to retailer to consumer, there was no way for the consumer to sue the manufacturer because no privity existed between the consumer and manufacturer. Hence, there were comparatively few product liability actions brought against manufacturers. This changed in MacPherson v. Buick (1916) when the decision was made to reject the rule of privity and allow "a remote manufacturer" to be held negligent. It was then possible to bring a tort action against anyone in the distribution channel.

Negligence is a breach of duty to exercise reasonable care in the design, labeling, packaging, distribution and promotion of a product when it is within the control of the marketer. In essence, a marketer can be negligent in developing all aspects of the marketing mix except price. For example, salespeople can be negligent in not fully disclosing the characteristics of a product and advertisements can be negligent by creating unfulfilled product design responsibilities.

Strict Liability is liability for injuries caused by defective products placed on the market. Product defects can occur in the design and quality of the product (e.g., safety shields) or in marketing communications (e.g., labels, warning messages, and advertisements). Since negligence on the part of the marketer is not involved, the issue in a strict liability action is the adequacy of the design, label, warning, or advertisement.

Strict liability does not imply absolute liability. The plaintiff is still responsible for the burden of proof discussed previously. However, product design cases may differ somewhat in that once the plaintiff has shown that the design was the proximate cause of the injury; the defendant may have to prove that the benefits of the product's design outweighed the risks of the design (Barker v. Lull Engineering Co., Inc. 1978).

Misrepresentation is liability for injuries caused by reliance on false statements concerning the nature or quality of a product. Misrepresentation is a tort arising from salesperson or advertising claims that are more than product puffery. To date, a finding of misrepresentation has only held when a large number of buyers are involved. However, misrepresentation is still developing as a separate theory and marketers must keep abreast of any changes in its application.

Intra-industry Liability Theories

The individual theories of product liability discussed in the previous section require the plaintiff to identify the defendant whose defective product caused the injury. What if the plaintiff is unable to make a positive identification because the products of all manufacturers in an

industry are the same (e.g., generic products)? Furthermore, what if the identification problem is made more difficult by an extended period of time between the consumption of a product and the discovery of an injury? These questions are addressed by the intra-industry tort theories. Marketers need to consider these theories when making marketing decisions since there is a trend toward more joint efforts in industry-wide testing, design and promotion of products.

Concert of Action is joint liability where two or more participants in an activity may be held jointly and severally liable for an injury resulting from the activity, even though each did not directly cause the injury (Bays 1981). In product liability cases, concerted action may be found when manufacturers collaborate in: (1) testing or marketing products; (2) lobbying; or (3) creating industry standards or warnings (Mallor 1981). An advertisement sponsored by a state dairy council would be an example of a concerted action.

Alternative Liability differs from concert of action in that only one defendant caused the plaintiff's injury. It is applied in cases where the individual actions of two or more defendants cannot be separated and the theory shifts the burden of proof to the defendants to show that they did not cause the injury (Summers v. Tice 1948). In product liability cases, alternative liability may be found when only two or three defendants are negligent in their marketing activities. This theory has not been extended beyond a few defendants presumably to avoid penalizing firms where there was only a remote chance they could have caused the injury.

Enterprise Liability is essentially an extension of alternative liability. It would be applied in cases where the plaintiff proves that there is a "high probability" that one of a few defendants were negligent in marketing the a product which caused the injury (e.g., in Hall v. Du Pont de Nemours & Co., Inc. 1972, there were six manufacturers). Again, the burden of proof under enterprise liability is shifted to the defendants to show that their product did not cause the injury.

Market Share Liability may be applied in cases that involve many defendants whose individual product offerings cannot be identified. Under this theory, each defendant would be liable for a proportion of damages awarded equal to his market share unless he could prove that he did not produce the defective product that caused the injury (Sindell v. Abbott Laboratories et al. 1980). The Sindell case was one of thousands that alleged Diethylstilbestrol (DES) caused cancer. DES was a prescription generic drug that prevented miscarriages but was found to cause cervical cancer in female offspring of mothers who took the drug while they were pregnant. The identification issue was confounded by the fact that there were over 200 potential defendants (some of which had gone out of business) and the length of time between consumption of the product and the discovery of the injury (10 to 12 years).

It is too early to tell whether the Sindell decision will be applied by all of the states since many unanswered questions of the decision have yet

Distribution

Since the Macpherson v. Buick decision all channel members may face some liability under the individual firm theories. It is less clear whether the intra-industry theories would apply vertically within a channel as well as horizontally. However, it is important to note that a product liability action may seek redress under a combination of individual firm and intra-industry liability theories.

Price

A case that has involved the liability of a price decision could not be found. It could be that many liability theories are still developing and have focused on more tangible aspects of the marketing mix. However, students may be asked to speculate on the liability of price decisions to complete the liability concerns of the marketing mix discussion.

CONCLUSION

Product liability is an important area of the legal environment. However, this topic is not covered in many marketing textbooks positioned toward a beginning marketing course. Through personal experience, the approach presented above has resulted in a lively discussion of the product liability implications of marketing decisions. In all cases, the individual instructor could do some additional reading of articles dealing with separate liability theories. The discussion may be capped by brainstorming about future product liability developments and a final question; what remedies are fair to marketers and consumers? discussion.

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