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SOLLY ROBINS AND THE DEVELOPMENT OF PRODUCTS LIABILITY LAW IN MINNESOTA

Leo F. Feeney†

At the turn of the twentieth century, American corporations had attained great wealth due, in part, to benefits conferred by the government, whether it be government grants, tax breaks, trade preferences or direct government spending designed to make life easier for corporate entities. It was an article of faith that what is good for business is good for America. In the 1950’s flourishing corporate entities were producing new products for consumers at an astonishing pace. The quest for market share resulted in many products that had not been properly tested or accompanied by adequate information easily reaching the market place. Media advertising tended to glamorize these products and obscure their unsafe qualities. The average consumer almost universally accepted the assumptions and representations contained in these slick promotional materials. Consequently, many of these products were purchased by consumers with little or no understanding of their inherent dangers.

At the same time, there was an accelerating imbalance between the protections the law was affording to the manufacturers of these products and ordinary consumers. Both courts and legislators, since the turn of the century, believed in aiding the growth of manufacturing and commerce and were reluctant to support individual claims against commercial entities. Consequently, controlling legislation and court decisions failed to place injured consumers on a more equal footing in actions brought against the manufacturer of dangerous products. In the year 1963, prevailing law greatly favored the manufacturer at the expense of the consumer. Meritorious claims by consumers, at that time, were regularly being denied on the basis of a wide range of legal theories in-

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cluding *caveat emptor*, lack of privity, assumption of risk, contributory negligence, and the always asserted allegation that "the hazard was not foreseen." These legal barricades, which greatly benefitted the purveyors of products at the expense of the ordinary consumer, were extremely difficult obstacles to overcome on behalf of an injured victim.

It was against this historical background that Solly Robins was to test his belief that these significant hurdles to recovery by consumers required re-examination in these "more modern times." Throughout his legal career, as of 1963, he had been forced to deal with a system inclined to shift responsibilities to injured consumers while holding less accountable the makers of dangerous products. There was no incentive for manufacturers to change their ways.

Robins, a great student of the law, who frequently did his own legal research, had great faith in the common law and believed that some day the common law would "catch-up" with the needs of this more modern society. Support for this proposition, he believed, was evident in the observations of three distinguished jurists of that era. These observations are contained in the matter of *Dalehite v. United States.*

In his office, Solly Robins kept close at hand a copy of this decision and the dissent authored by Justice Robert Jackson. Joining in the dissent were Justices Felix Frankfurter and Hugo Black. The reasoning and observations of these three distinguished jurists in the dissent had a great impact on Robins and fueled his belief that other courts would eventually adopt the philosophy so well articulated by Justice Jackson. Set forth is a passage from the *Dalehite* dissent that Robins would most often quote:

>This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot

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experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.2

Ten years later, Justice Jackson's compelling philosophy was delivered by Solly Robins to a Ramsey County jury during his final summation in the matter of McCormack v. Hankscraft.3 Andrea McCormack was a young girl who had been severely burned by an electric steam vaporizer manufactured by the Hankscraft Company. The McCormack family, prior to retaining Robins, had previously been advised by other counsel that they were not likely to prevail in the matter. Notwithstanding the opinion held by other counsel Robins sensed, based in large part upon the dissent in Dalehite, that the basic criteria by which courts determine liability in the case of harmful products was slowly evolving and that the time was ripe for the courts to adopt the reasoning of Justice Jackson in Dalehite.

Robins strongly felt that the consequences of the manufacturer's failure to make its product safe for its intended use should not be borne by the innocent victim or society but rather by the defendant manufacturer. Convinced that he was right on both counts he undertook the representation of Andrea McCormack. At the conclusion of the submission of the evidence, he set forth in his argument to the jury his beliefs on deterrence, and who should best bear the consequences of injuries when a defective product is being used as it was intended to be used. He presented his argument on these issues with a series of rhetorical questions each designed to make his point. He urged the jurors to consider the following factors:

Should this defendant corporation be found guiltless and without fault in this case there would be no deterrent to manufacturing [such items] for profit regardless of consequences. Why should this defendant corporation be held blameless when it warranted that its product was safe and practically foolproof....It ill behooves the defendant to try to avoid liability by stating "It's somebody else's fault

2 Id. at 52.
-They shouldn't have used it if it was a dangerous product." Now let us look at that frankly and candidly. Should defendant avoid liability even though its product was being used exactly as it was intended to be used? Should people buy defendant's product and not use it?....

Who is to bear the consequence of [the manufacturer's] failure to make it a safe product? Society? The parents? The public? Or, the defendant corporation? The answer is self-evident...Defendant corporation has filled its brochure with quiet and persuasive assurances....Judgment in this case...reduces itself to a consideration of whether or not defendant corporation should be held responsible for its failure to produce a product that was not defective in normal use, or, put another way, that was not fit for the purpose for which it was intended to be used.

He repeatedly in his summation presented the jury with the logical extension of the manufacturing defenses: "Should people buy defendant's product and not use it?" The Supreme Court of Minnesota clearly understood the validity and truth of his arguments and consequently adopted the law of strict liability. Robins believed passionately in the philosophy articulated by Justice Jackson in Dalehite. He believed passionately it was time for the common law to "catch up" with the ways and perils of a more modern society. As a result of his efforts on behalf of Andrea McCormack, the reasoning of the dissent in Dalehite eventually found expression in Minnesota law and Minnesota courtrooms.

In a speech delivered at a jurisprudence award dinner in Minneapolis on May 18, 1995, some 32 years after the McCormack v. Hankscraft decision, Robins quoted from the words of George Bernard Shaw: "The worst of sins toward our fellow creatures is not to hate them, but to be indifferent to them: that is the essence of inhumanity." It was the corporate indifference he saw directed at an innocent little girl disabled for life, that motivated him to take the Hankscraft case. On that same occasion he went on to reassert his belief in his profession and in the common law:

[W]e [lawyers] should affirmatively and steadfastly institute and promote programs to restore our besieged and falsely assailed profession to its rightful dignity as a noble profession, remedying all wrongs and injuries without limit and unfettered by unfair, unconstitutionally contrived laws and statutes which are sponsored and supported by commercial groups....
Solly Robins, was not anti-business but he was always on guard against becoming a mere servant of businesses. He was dedicated to the ideal of lawyers using their time and talents through the common law to shape a just society.

Those of us who had the opportunity to work with him in this area of the law were touched by his passion and compassion for the common person and his constant striving to remedy the imbalance between the great corporation and the ordinary citizen. We were inevitably enriched by his constant striving to fight for improvements in the law and to eliminate deficiencies in the administration of justice.