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Introduction: Symposium on Products Liability

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SYMPOSIUM ON PRODUCTS LIABILITY

INTRODUCTION

The four comments in this symposium deal with four of the many questions which are still unsettled in the area of products liability under section 402A of the Restatement (Second) of Torts. The purpose of this introduction is to give a very brief overview of the strict liability theory in products liability cases.

Until the 1960's, products liability cases were handled by the courts either on a warranty theory[1] or on the traditional negligence theory.[2] These two theories, however, impose rather difficult burdens on the plaintiff. The courts began to look for a way to provide a remedy for the injured consumer which would eliminate some of the technical defenses which exist in warranty cases under the law of sales[3] and ease the burden of proof which the plaintiff faces in negligence actions.[4]

In 1963, the Supreme Court of California decided the case of *Greenman v. Yuba Power Products, Inc.*[5] and adopted the concept of strict liability in products liability cases:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.[6]

This case has become the foundation upon which other courts have developed the strict liability rules.

In 1965, the American Law Institute adopted section 402A of the Restatement (Second) of Torts:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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1. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
2. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
3. UNIFORM COMMERCIAL CODE, §§ 2-313, 2-314, and 2-315; and Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
4. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
5. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
6. *Id.*, 377 P.2d at 900, 27 Cal. Rptr. at 700.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[7]

In adopting this section, the Wisconsin Supreme Court said that, from the plaintiff's viewpoint, the most beneficial aspects of the rules are that it removes his burden of proving specific acts of negligence and it protects him from the warranty theory defenses of notice of breach, disclaimer and lack of privity.[8] Therefore, the strict liability theory serves as the vehicle the courts use to provide a remedy to the injured consumer.

Strict liability, then, developed as a vehicle of social policy and is geared toward the protection of the public safety.[9] In *Greenman,* the California court stated:

> The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. . . .[10]

The court was obviously concerned with protecting the injured individual who is in no position to protect himself and who is probably in no position to carry the financial burden caused by his injury. Therefore, two basic policy reasons are given for the imposition of strict liability in tort: (1) the manufacturer is in a better position to protect against the risk; and (2) the manufacturer is in a better position to spread the loss.[11]

Although the courts are interested in protecting the user or consumer of the product, section 402A was not intended to impose absolute liability upon sellers or make them insurers of their products.[12]

> Surely . . . a manufacturer is not to be subjected to liability for a harm producing event solely because of the twin-facts that he

7. RESTATEMENT (SECOND) OF TORTS, § 402A (1965).
8. Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967).
9. 63 AM. JUR. 2d *Products Liability* § 123 (1972).
10. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, ____, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).
11. Brody v. Overlook Hospital, 121 N.J. Super. 299, 296 A.2d 668 (1972).
12. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Netzel v. State Sand and Gravel Co., 51 Wis. 2d 1, 186 N.W.2d 258 (1971); and 63 AM. JUR. 2d *Products Liability* § 123 (1972).

> put a product into circulation and it was involved in the (injury producing) event. . . .[13]

It is still necessary for the plaintiff to prove that the product was in a "defective" condition when it left the control of the manufacturer or seller.[14] This also involves the concept of the product being in a condition "unreasonably dangerous" to the user or consumer.[15] It is also necessary for the plaintiff to prove that the defect in the product was a cause of the injury.

The basic section 402A rules are not all settled. As noted, the following four comments deal with four unsettled questions. These questions are: (1) What is or is not a "product" under section 402A?; (2) Should a manufacturer be excused in a "strict liability" case because the "state of the art," at the time of sale and prior to injury, was such as to make it impossible or impractical to minimize a known or knowable risk?; (3) Should a manufacturer be excused in a "strict liability" case because the injury resulted from a danger that was a scientifically unknowable risk prior to the injury?; and (4) May an entier industry be held liable for injuries caused by its products?

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WHAT IS OR IS NOT A PRODUCT WITHIN THE MEANING OF SECTION 402A

I. INTRODUCTION

The rapid development of products liability is typified by the expansion of section 402A of the RESTATEMENT OF TORTS.[1] In

13. P. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969).

14. *Id.* at 563; Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967); *see also*: W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99 (4th ed. 1971).

15. RESTATEMENT (SECOND) OF TORTS § 402A (1965); 2 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(e); *but see*: Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); and Glass v. Ford Motor Co., 123 N.J. Super, 599, 304 A.2d 562 (1973).

1. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

(1) One who sells any "product" in a defective condition unreasonably dangerous