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Torts: Products Liability: Strict Liability

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RECENT DECISIONS

Torts: Products Liability: Strict Liability—In *Netzel v. State Sand and Gravel Co.*,[1] the Wisconsin Supreme Court stated its position on the emerging theory of strict liability as it applies to allegedly defective products. Plaintiff sustained ankle burns while working as a "puddler" when concrete fell inside his shoes and lodged against his legs. He brought an action based upon strict liability against the concrete supplier, contending that the concrete was contaminated with a caustic additive. The jury returned a verdict finding the defendant 100 per cent negligent. As to the jury finding that the concrete was defective and unreasonably dangerous, the defendant, on appeal, contended that the only expert testimony offered contradicted such findings and, since no expert witness was produced by the plaintiff, there was no basis for finding either a defect or an unreasonable danger.

Although judgment was reversed and the cause remanded for a new trial on the issue of contributory negligence, the court held that the unexplained event, when combined with evidence rebutting the existence of other probable causes, is sufficient to warrant a jury finding of a defect in the concrete making it unreasonably dangerous.

Previous to the *Netzel* decision, the Wisconsin Supreme Court adopted, in *Dippel v. Sciano*,[2] the rule of strict liability in tort for defective products as set forth in *Restatement (Second) of Torts* section 402A.[3] What this means in Wisconsin, with its doctrine of comparative negligence, "is that a seller who meets the conditions of sec. 402A . . . is guilty of negligence as a matter of law."[4] The liability to be imposed under the rule of strict liability, while not grounded upon a failure to exercise ordinary care with its element

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1. 51 Wis. 2d 1, 186 N.W.2d 258 (1971).
2. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads as follows:
(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.
(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.
4. 37 Wis. 2d at 464, 155 N.W.2d at 66 (concurring opinion).

of foreseeability, is virtually the same as negligence per se.[5]

To be found negligent per se under this doctrine, the plaintiff must prove:

> (1) that the product was in defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages, (4) that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.[6]

Therefore, while strict liability obviates the necessity of establishing foreseeability of harm as a requisite for a finding of negligence, the plaintiff is not relieved from the burden of showing a defect in the product. Thus, the manufjcturer's strict liability depends on what is meant by "defective."[7]

The court, in *Dippel*, expressly refrained from adopting or rejecting any of the definitive comments which supplement section 402A,[8] and did not otherwise define "defective condition" or "unreasonably dangerous" which appear in elements (1) and (2) above, not having been faced with those questions. But the court in *Netzel* was directly faced with the question of the measure of proof required to establish the presence of a defect, the answer to which requires adoption of appropriate definitions for "defective" and "unreasonably dangerous."

The trial court in *Netzel* defined "defective condition" and "unreasonably dangerous" in its instructions:

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5. Negligence per se was defined in Osborne v. Montgomery, 203 Wis. 223, 240, 234 N.W.2d 372, 378 (1931) as follows:

> We now come to a consideration of that class of cases where foreseeability is not an element of negligence—a more accurate statement would be to that class of cases where the defendant is foreclosed or concluded upon the question of foreseeability. In all those cases where it is said that the performance of the wrongful act being admitted the defendant is guilty of negligence as a matter of law or that the act is negligent per se, the case is one which admits of no question as to reasonable anticipation or foreseeability.

6. 37 Wis. 2d at 460, 155 N.W.2d at 63.

7. For a complete discussion of what constitutes a defect in a product, see Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

8. 37 Wis. 2d at 459, 155 N.W.2d at 63.

> 'By defective condition is meant a condition not expected by the purchaser, which then renders the product unreasonably dangerous for its intended or foreseeable use.
>
> 'To be unreasonably dangerous, the product must be dangerous to an extent beyond that which would be expected by the ordinary user with the ordinary knowledge common to the community as to its characteristics.'[9]

The supreme court's express approval of these instructions,[10] which in essence frame "defect" and "unreasonably dangerous" in terms of deviation from the norm,[11] clarifies to some extent the present state of products liability law in Wisconsin.

But these definitions, when applied to a certain class of products, become over-inclusive. To circumvent this, the *Restatement* would impose no strict liability for what are classified as "unavoidably unsafe products."[12] These products are characterized as those "which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use."[13] The *Restatement* stipulates that "[s]uch a product, properly prepared, and accompanied by proper directions and warning, is not defec-

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9. 51 Wis. 2d at 11, 186 N.W.2d at 263.

10. *Id.* at 11, 186 N.W.2d at 264.

11. Approval of these instructions is, in effect, an adoption of two comments to RESTATEMENT (SECOND) OF TORTS § 402A (1965). Comment *g* at 351, *Defective condition,* reads, in part, as follows:

> The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. . . .

Comment *i* at 352, *Unreasonably dangerous,* reads, in part, as follows:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . .

12. RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* at 353 (1965) reads in part as follows:

> *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs . . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous . . . . The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

13. *Id.*

tive, nor is it *unreasonably* dangerous."[14]

Prosser, in discussing the types of products to be included within the doctrine of strict liability, also recognizes the existence of unavoidably dangerous products:

> There are quite a few cases involving a product such as cement, useful and reasonably harmless for proper purposes, but capable of causing serious harm when the user kneels in it and burns his skin; and in all of them it has been held that there is no liability whether for negligence or for breach of warranty.[15]

The defendant in *Netzel* contended that the trial court should have held its product to be unavoidably unsafe, with a corresponding instruction that "cement cannot be made without the presence of lime as a principal ingredient."[16] The Wisconsin Supreme Court, without elaboration, rejected this contention on the basis that both plaintiff and defendant had introduced evidence "that ordinary concrete was not unavoidably dangerous, at least not to the degree of causing second or third degree burns."[17]

This reasoning apparently assumes that the effects of the use of a given product are consistent in all situations—if the product has been used at least once without causing harm, then it is not unavoidably unsafe. But the unavoidably unsafe products with which the *Restatement* deals are not characterized by their inevitable causation of harm, but rather by the "unavoidable high degree of risk which they involve."[18] This appears to be the degree of risk which the court recognized when, in dealing with the issue of contributory negligence later in the opinion, it stated that "concrete, even ordinary concrete, can inflict burns."[19]

Courts in various jurisdictions, when considering cement burn cases, have consistently held that the plaintiff had failed to estab-

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14. *Id.* As to the necessity for warning, comment *j* at 353 states that

> a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. . . .

This comment also would be applicable, since the plaintiff in *Netzel* testified "that he knew that cement containing lime has a burn potential and, if left in contact with the skin for a prolonged period of time, will cause burns." 51 Wis. 2d at 13, 186 N.W.2d at 265.

15. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 810 (1966).

16. 51 Wis. 2d at 11, 186 N.W.2d at 264.

17. *Id.*

18. Note 12 *supra.*

19. 51 Wis. 2d at 13, 186 N.W.2d at 265.

lish a jury case by proving that he was burned upon contact with concrete. In *Dalton v. Pioneer Sand & Gravel Co.*,[20] plaintiff sought damages based upon a breach of warranty for burns received from handling cement. In affirming a judgment of dismissal, the court noted that the plaintiff, despite having been burned, had failed to show that the cement contained any unusual substance or differed in any way from ordinary cement.[21]

The court in *Netzel* held, on the theory of strict liability, that "the unexplained event when combined with evidence rebutting the existence of other probable causes is sufficient to warrant a jury finding of a defect in the concrete that was unreasonably dangerous."[22] Should this measure of proof be applied to a product which is unavoidably unsafe? If so, the practical effect is to impose absolute liability on manufacturers of these products. This was not the intent of the Wisconsin Supreme Court when it adopted the theory of strict liability:

> Strict liability does not make the manufacturer or seller an insurer nor does it impose absolute liability. From the plaintiff's point of view the most beneficial aspect of the rule is that it relieves him of proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts.[23]

The *Netzel* measure of proof, predicated upon an "unexplained event," appears to be analogous to one of the elements in the res ipsa loquitur doctrine, which requires an injury which does not ordinarily occur in the absence of negligence.[24] But a product which is unavoidably unsafe can, by definition, cause injuries in the absence of both negligence and defect. Application of this measure of proof to such a product has the effect of shifting the burden of proof to the defendant, requiring him to show the absence of a defect.[25]

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20. 37 Wash. 2d 946, 227 P.2d 173 (1951).

21. Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P.2d 26 (1956); Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959); Baker v. Stewart Sand & Material Co., 353 S.W.2d 108 (Mo. App. 1961); Imperial v. Central Concrete, Inc., 1 App. Div. 2d 671, 146 N.Y.S.2d 307, *aff'd*, 2 N.Y.2d 939, 142 N.E.2d 209, 162 N.Y.S.2d 35 (1957).

22. 51 Wis. 2d at 8, 186 N.W.2d at 262.

23. 37 Wis. 2d at 459-60, 155 N.W.2d at 63.

24. Turk v. H.C. Prange Co., 18 Wis. 2d 547, 119 N.W.2d 365 (1963).

25. For discussion of the inapplicability of the res ipsa loquitur doctrine in proving the existence of a defect in a product under the strict liability theory, see Freedman, *"Defect"*

Can the court's measure of proof, assuming *arguendo* its applicability to an unavoidably unsafe product, be satisfied without reference to expert testimony? The Wisconsin Supreme Court has held that "expert testimony should be adduced concerning matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience."[26] Differentiating between a dangerous defect and a dangerous characteristic intrinsic to the product would seem to be such a matter.

How then do we determine when a defect exists that is unreasonably dangerous, so as to attribute injuries to the manufacturer? While inferential evidence of a defect by negating other probable causes may be appropriate in many products liability cases, proof of defect in an unavoidably unsafe product would seem to require either direct evidence of an expert, or circumstantial evidence through use of expert opinion, of the specific defect.

These and other proof problems, however, cannot be satisfactorily resolved in a products liability case until the meanings of "defective" and "unreasonably dangerous" are clarified. Adoption of comment k to section 402A[27] would accomplish this in the area of unavoidably unsafe products and would facilitate a more just and accurate delineation of the scope of a manufacturer's liability.

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Torts: The Constitutional Validity of Parental Liability

Statutes—In 1956, the Georgia Legislature passed a law which stated that parents would be liable for the "willful and wanton acts of vandalism" of minor children under their custody and control.[1] In a series of cases interpreting that provision, the Supreme Court of Georgia found that, because of the use of the word "vandalism", the enactment was intended to apply only to acts directed against property, or to personal injury incidental to acts directed against property.[2] In obvious response to the court's holdings, the legisla-

in the Product: The Necessary Basis for Products Liability in Tort and in Warranty, 33 TENN. L. REV. 323 (1966).

26. Cramer v. Theda Clark Memorial Hospital, 45 Wis. 2d 147, 150, 172 N.W.2d 427, 428-29 (1969).

27. Note 12 *supra*.

1. Law of March 9, 1956, no. 421, [1956] Ga. Laws 699 (repealed 1966).

2. Vort v. Westbrook, 221 Ga. 39, 142 S.E.2d 813 (1965); Bell v. Adams, 111 Ga. App. 819, 143 S.E.2d 413 (1965); Landers v. Medford, 108 Ga. App. 525, 133 S.E.2d 403 (1963).