

Recent Decisions: Products Liability: Strict Liability in Tort Applied to Both Automobile Manufacturer and Retailer

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Products Liability: Strict Liability in Tort Applied to Both Automobile Manufacturer and Retailer—Six weeks after purchasing a new automobile, the plaintiff, while driving along a freeway, lost control of the car, swerved off the highway, and collided with a light post. An expert on the operation of hydraulic brakes testified that the brakes applied themselves owing to a defective master cylinder which did not allow the hydraulic fluid to escape after the brake pedal was released. The California Supreme Court, in *Vandermark v. Ford Motor Co.*,¹ held both the manufacturer and the retailer strictly liable in tort.

Ford, the manufacturer, contended that it could not be held strictly liable in tort without proof that the car was defective when Ford placed it on the market. The car was handled at various times by three authorized Ford dealers. But the court spurned the argument:

In *Greenman v. Yuba Power Products, Inc.*, . . . we held that '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.' Since the liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another.²

Ford replied that the product was not sold in the condition in which it was expected to reach the hands of the consumer because it was understood that the dealer would make all final inspections, corrections, and adjustments necessary to make the car ready for use. But the court held that

since Ford, as the manufacturer of a completed product, cannot *delegate its duty* to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do.³ (Emphasis added.)

Finally, the court held the retailer strictly liable in tort also, disregarding the dealer's warranties in the process:

Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. . . . [T]he fact that it restricted its contractual liability to Vandermark is *immaterial*. Regardless of the obligations it assumed by *contract*, it is subject to *strict liability in tort*, because it is in the business of selling automobiles, one of which proved to be defective and

¹ 37 Cal. Rptr. 896, 391 P. 2d 168 (1964).

² *Id.* at 898, 391 P. 2d at 170.

³ *Id.* at 899, 391 P. 2d at 171.

caused injury to human beings. The requirement of timely notice is not applicable to such tort liability.⁴ (Emphasis added.)

In *Vandermark*, the California court saliently reemphasizes the doctrine of strict liability first pronounced in *Greenman v. Yuba Power Products, Inc.*,⁵ and further extends this precept to include the retailer as well as the manufacturer. Following right on the heels of *Greenman* and *Vandermark* is the American Law Institute, which has recently extended strict liability in tort beyond any product intended "for intimate bodily use"⁶ and now applies liability without fault to any seller "who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property. . . ."⁷ (Emphasis added.)

There have been other recent cases of great importance in the strict liability field,⁸ but none that have rid themselves so completely of the confusing semantics of implied warranty and negligence as *Vandermark* and *Greenman* have done. This article will juxtapose *Vandermark* with *Tentative Draft No. 10* of the *Restatement (Second) of Torts*, and analyze the two in an attempt to discover the apparent guide lines of this obvious shift from negligence and commercial warranty law to strict liability.

Vandermark, *Greenman*, and *Tentative Draft No. 10* are based exclusively on the principle of strict liability, presumably stemming from the broad socio-economic policy of risk-spreading.⁹ Risk-spreading demands that the burden of accidental injuries caused by products intended for consumption be placed upon those best able to bear it. The seller can theoretically best shoulder the burden because the extra cost can be compensated for either by acquiring liability insurance or by passing it on to all consumers in the form of higher prices.¹⁰ The straining of implied warranty beyond its commercial and contract law limitations cannot accommodate the risk-spreading philoso-

⁴ *Id.* at 899, 900, 391 P. 2d at 171, 172.

⁵ 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1962), where the manufacturer of a combination power tool (note: a non-food product not intended for intimate bodily use) was held strictly liable in tort when a piece of wood which the plaintiff was working on suddenly flew out and struck him in the forehead.

⁶ RESTATEMENT (SECOND), TORTS §402a (Tent. Draft No. 7, 1962).

⁷ *Id.* (Tent. Draft No. 10, 1964).

⁸ *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y. 2d 432, 191 N.E. 2d 81, 240 N.Y.S. 2d 592 (1963); *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963); *Ford Motor Co. v. Mathis*, 322 F. 2d 267 (5th Cir. 1963); *Gottsdanker v. Cutter Labs.*, 6 Cal. Rptr. 320 (Ct. App. 1960), to name a few.

⁹ The philosophy of risk-spreading is generally identified with Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P. 2d 436, 441 (1944); see Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099, 1120-24 (1960); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855, 856 (1963); and Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964).

¹⁰ *But see* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957), where the author argues that certain competitive situations may prevent the manufacturer from passing on the cost incurred by the imposition of risk-spreading upon him.

phy for many reasons.¹¹ First and foremost, the courts cannot arbitrarily or completely dispose of the requirement of privity, which is fundamental to commercial transactions.¹² Also, tort liability does not require any reliance on the part of the consumer upon the skill, judgment, or reputation of the seller, nor any representation or undertaking on the part of the seller. Tort liability is not governed by limitations of the Uniform Sales Act, the Uniform Commercial Code, or other restrictions of warranty law such as timely notice of breach, definitions of "sale," "buyer," and "seller," scope and content of warranties, disclaimers,¹³ and the validity of the contract. Negligence cannot justify risk-spreading because it is inherent in the risk-spreading principle that fault is not an element of the defendant's liability. It is therefore apparent that the definition of products liability would be considerably improved if one of the three areas of liability mentioned briefly above were uniformly accepted; and it is also apparent that strict liability in tort may best disentangle the present morass of products liability law.

In basing liability on tort principles, two primary questions regarding the components of liability immediately present themselves. The first is: What is a "defective product"? *Vandermark* is not subtle here, because the brakes were clearly defective. No one could have operated those brakes safely at the time of the injury. Under the *Restatement*, the product is defective when it is "unreasonably dangerous"; that is, "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."¹⁴

Implicit in the *Restatement's* phrase "contemplation of the ordinary consumer" are at best two limiting factors. First, some products are commonly known to involve a degree of hazard, especially if imprudently used. This approach prompts the *Restatement* to exclude "good tobacco" from the class of unreasonably dangerous products, for "good tobacco is not unreasonably dangerous merely because the effects of smoking

¹¹ Prosser states that all the court is doing when it imposes liability in implied warranty is affixing tort liability as a matter of policy. Prosser, *supra* note 9, at 1134.

¹² See Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957), for a list of techniques which the courts have devised to hurdle the privity barrier.

¹³ See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69 (1960), where the court regarded the limitations of the express warranty as "so inimical to the public good as to compel an adjudication of its invalidity." However, contrast the very recent case of *Williams v. Chrysler Corp.*, 137 S.E. 2d 225, 231 (1964), where the court said: "[T]here can be no doubt that this language of the express warranty . . . clearly and conclusively precludes the [purchaser] from maintaining this action: ' . . . this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part. . . .'"

¹⁴ RESTATEMENT (SECOND), TORTS §402a, comment i (Tent. Draft No. 10, 1964).

may be harmful."¹⁵ Contrast *Green v. American Tobacco Co.*,¹⁶ in which the court applied the risk-spreading rationale in its full scope:

[A] manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. . . . [To so hold] would be to shift to the purchaser the risk of whatever latent defectiveness may ultimately be proven by experience and advancement of human knowledge, a risk which we are convinced was from the inception of the implied warranty doctrine intended to be attached to the mercantile function.¹⁷

Green clearly conflicts with the earlier case of *Lartigue v. Reynolds Tobacco Co.*¹⁸ where the manufacturer's liability was confined to foreseeable risks, not unknowable ones.

A second limitation in the *Restatement's* declaration of non-liability for manufacturers of unavoidably unsafe products (*e.g.*, the Pasteur treatment for rabies) and experimental drugs.¹⁹ The American Law Institute feels that such products, which because of a lack of time and opportunity for sufficient medical experience are "quite incapable of being made safe for their intended or ordinary use," are not defective or unreasonably dangerous so long as they are properly prepared and accompanied by proper directions and warnings.²⁰ This is an apparent rejection of *Gottsdanker v. Cutter Laboratories*,²¹ in which the manufacturer was held liable for defective polio vaccine.

The second major question which presents itself is: Must the product be "defective" at the time it leaves the manufacturer's hands? Many cases will arise in which further processing of a product sold before it comes into the hands of the consumer is expected to occur. In stating that the manufacturer has a non-delegable duty to make its products free from dangerous defects, *Vandermark* applies a concept rarely used in personal tort law.²² However, a similar use of the notion of non-delegable duty has been recently expressed in a New York case: "[T]here are some breaches of duty which create a continuing condition of hazard to users, very much like an enjoined nuisance, which may ground a cause of action short of the harm having yet occurred."²³ Such a product may in effect become a "traveling nuisance."

The bone of contention in the cases involving unfinished products is: Has the responsibility for discovery and prevention of the defect

¹⁵ *Ibid.*

¹⁶ 154 So. 2d 169 (Fla. 1963).

¹⁷ *Id.* at 170, 173.

¹⁸ 317 F. 2d 19 (5th Cir. 1963).

¹⁹ RESTATEMENT (SECOND), TORTS §402a, comment *k* (Tent. Draft No. 10, 1964).

²⁰ *Ibid.*

²¹ 6 Cal. Rptr. 320 (Ct. App. 1960).

²² 57 C.J.S. *Master and Servant* §591 (1948); 28A WORDS AND PHRASES 339 (1955) ("nondelegable duty").

²³ *Singer v. Walker*, 250 N.Y.S. 216 (1964).

been transferred to the intermediate party who is expected to finish the processing? *Vandermark* states that the manufacturer has a non-delegable duty to see that the product is fit for use.²⁴ However, *Tentative Draft No. 10* expressly refrains from commenting on liability for unfinished products.²⁵ Pertinent here are the component-parts cases, which offer the same problem of shifting responsibility in converse fashion.²⁶ In both situations, the defect can be traced to the actions of a third party. In *Ford Motor Co. v. Mathis*,²⁷ the car manufacturer was held liable for injuries caused to the plaintiff by a defective dimmer switch supplied to Ford by an independent manufacturer. The court applied section 400 of the *Restatement*, which provides that "one who puts out as his product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."²⁸ *Vandermark*, in effect, turns these component parts cases inside out. Query: Does *Vandermark* extend the principle of non-delegable duty to all who traffic in commodities, in spite of the fact that they have in no way contributed to the potential defect?

There are several other interesting questions posed by *Vandermark*. Did the fact that the retailer assumed the obligation of making the final inspection enter into the decision of the court to hold the retailer strictly liable? Has the problem of circuitous actions been solved, or can the retailer, sued by an injured plaintiff, sue the manufacturer in indemnity or something akin to it? Can the manufacturer, sued by an injured plaintiff, sue the retailer, or join him as a co-defendant and force him to share the burden? Will all the sellers involved in the eventual sale of a defective product be liable *inter sese* for a portion of the damages, presumably as joint-tortfeasors?

Finally, while it is apparent that under strict liability fault has no application to manufacturers, it certainly retains defensive applicability because the liability is strict, not absolute. Assumption of risk will in all likelihood be the leading defense in those jurisdictions that adopt strict liability.²⁹ However, what would be the leading defense in Wisconsin?³⁰ The Wisconsin Supreme Court has abolished the defense of

²⁴ 37 Cal. Rptr. at 899, 391 P. 2d at 171.

²⁵ RESTATEMENT (SECOND), TORTS §402a, comment p (Tent. Draft No. 10, 1964).

²⁶ See Keeton, *Products Liability—Current Developments*, 40 TEXAS L. REV. 193 (1961).

²⁷ 322 F. 2d 267 (5th Cir. 1963).

²⁸ RESTATEMENT, TORTS §400 (Supp. 1948).

²⁹ Keeton, *supra* note 9, at 873.

³⁰ Wisconsin still requires privity in breach-of-implied-warranty cases, but notice of its impending abolishment was given in *Strahlendorf v. Walgreen*, 16 Wis. 2d 421, 435, 114 N.W. 2d 823, 831 (1962), when the court stated that while privity was a requisite, "this does not mean that this court will adhere to the rule forever. . . . [W]e do not deem the instant case a proper one in which to give consideration to this question." Thus, Wisconsin is fully aware of the liberalizing trend evolving around it, but given the "proper case," it is sheer speculation as to how far the court will go in light of *Tentative Draft No. 10* and recent decisions such as *Vandermark*.

assumption of risk in all cases except those of express consent.³¹ Therefore, the only similar alternative would be contributory negligence. However, under the comparative negligence statute³² contributory negligence is no longer a complete bar to recovery, but must be compared with the negligence of the defendant.³³ But how can fault be compared with non-fault? The defense of contributory negligence is only applied when the defendant, as well as the plaintiff, has been negligent.³⁴ Yet, at the same time, justice demands that a plaintiff should be barred from recovery when he has proceeded willfully or negligently to use a product and suffered injury, after he has discovered the defect and is aware of the danger. It is interesting to ponder how Wisconsin would solve this problem.

In summation, the advent of strict liability has come upon the courts very rapidly, and more decisions can be expected in the near future. Dean Prosser has stated that "with the exception of the change in the law with respect to prenatal injuries, this is the most radical and spectacular development in tort law during this century."³⁵ Yet, strict liability is not a panacea. In reality, it probably raises as many problems as it solves. The assuagement, however, lies in the fact that strict liability in tort stands a good chance of being uniformly adopted by the courts. Universal agreement on a single theory of liability will serve to ameliorate and mollify the existing confusion resulting from a multitudinous variety of bases on which liability is currently founded.

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Sales: Uniform Commercial Code: Section 2-318 and Its Effect on the Requirement of Privity—Plaintiff, employed as manager of a hotel, personally purchased from a state liquor store, on behalf of his employer, four bottles of champagne produced and bottled by the defendant corporation. The wine was intended for use and consumption by the guests of the hotel. While plaintiff and other employees were preparing to serve the wine, a cap from one suddenly ejected and hit the plaintiff in the eye, resulting in a serious injury. The trial court determined that the suit was barred because of lack of privity between the parties. On appeal, in *Yengtzer v. Taylor Wine Co.*,¹ the Supreme Court of Pennsylvania held that the employee was a buyer under sec-

³¹ *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W. 2d 14 (1962) (host to guest in automobile), extended to all situations involving "tacit assumption of risk" in *Gilson v. Drees Bros.*, 19 Wis. 2d 107, 120 N.W. 2d 63 (1959).

³² WIS. STAT. §331.045 (1961).

³³ *Nelson v. Hanson*, 10 Wis. 2d 107, 102 N.W. 2d 251 (1959).

³⁴ RESTATEMENT, TORTS §467 (1934).

³⁵ RESTATEMENT (SECOND), TORTS, Note to Institute §402a (Tent. Draft No. 10, 1964).

¹ 414 Pa. 272, 199 A. 2d 463 (1964).