Torts: Liability of Manufacturer to Consumer for Defects in Manufacture of Articles

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RECENT DECISIONS


Not to allow free application by a creditor would unduly hamper business relations, the surety always having ample opportunity to protect itself. City of Marshfield v. McGeorge Gravel Co. v. United States Fidelity & Guaranty Co., supra. The burden of discovering the state of a contractor’s secured amounts should not be put on his creditors even though they received payment with knowledge that it is compensation for work covered by a surety bond. Mack v. Colleran et al., 136 N.Y. 617, 32 N.E. 604 (1892).

The exact question of the principal case apparently has not arisen in Wisconsin, and the views of the neighboring states are in conflict. At one time Minnesota held to the rule of free application regardless of knowledge. Jefferson v. Church of St. Matthew, supra. Yet where an agent had turned over certain money derived from Insurance contracts made under his agency wherein his faithful performance was assured and the company had applied the money to a prior agency contract, the Minnesota court has held that the funds must be applied to the assured agency contract. Merchants’ Ins. Co. v. Herber, supra.

But it has been since pointed out that any money remitted under an agency never does belong to the agent, and such cases are to be distinguished from those in which the money, regardless of source, is the debtor's own until paid to the creditor. Standard Oil Co. v. Day, supra; Radichel v. Federal Surety Co., 170 Minn. 92, 212 N.W. 171 (1927); Fidelity and Deposit Co. of Maryland v. Union State Bank of Minneapolis, 21 F. (2d) 102 (D. Minn. 1927).

While at one time Iowa held that where there was no direction by either creditor or debtor, the court would apply the fund to the unsecured claim, Cain v. Vogt, 138 Iowa 631, 116 N.W. 786 (1908), the law in both Iowa and Illinois today seems to be that all funds derived from an assured contract must be applied by the creditor to the assured debt. Sioux City Foundry & Mfg. Co. v. Merten, supra; Alexander Lumber Co. v. Aetna Accident & Liability Co., supra.

Michigan has rather generally held to the doctrine of free application, People v. Powers, supra, and where neither debtor nor creditor directs application, and the fund is applied to a general or open account, the court will make the application, usually applying the first payment to the oldest debt. Grasser & Brand Brewing Co. v. Rogers et al., supra.

In Georgia, the view of letting the creditor apply the fund to any debt regardless of source and regardless of knowledge is statutory: “When a payment is made by a debtor to a creditor holding several demands against him, the debtor has a right to direct the claim to which it should be appropriated. If he fails to do so the creditor has a right to appropriate at his election. If neither exercises this privilege the law will direct the application in such manner as is reasonable and equitable, both as to the parties and third persons. As a general rule the oldest lien and the oldest item in an account will be first paid, the presumption of law being that such would be the fair intention of the parties.” Civil Code of 1910 § 4316. Baumgartner v. McKinnon, supra.

RAYMOND A. HUEVLER.

Torts—Liability of Manufacturer to Consumer for Defects in Manufacture of Articles.—A hot water bottle was purchased from a dealer. As a result of a defect in the bottle, the plaintiff, a two-year old child at the time of the accident, was scalded by hot water. Action was brought in tort, against the manufacturer, to recover damages for personal injuries suffered. Held, the maker of
the bottle was not liable since there was no contractual relationship between the defendant and the plaintiff. The bottle was not an inherently dangerous article, but harmless in kind, and dangerous only by reason of a defect about which it appeared that the defendant knew nothing. *Smith v. Davidson Rubber Co.*, 35 N.E. (2d) 486 (Mass. 1940).

The manufacturer of an article of merchandise, which he puts on the market, is not responsible in damages to those who may receive injuries caused by its defective construction, but to whom he sustains no contractual relations, although by exercise of reasonable diligence he should have know of the defect, *Lebourdais v. Vitrified Wheel Co.*, 80 N.E. 482 (Mass. 1907). By reason of its wide application this rule has found three famous exceptions which are given lucid organization in the well-known case, *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (C.C.A. 8th, 1903). They are: (1) An act of negligence of the manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. (2) An owner's act of negligence which causes injury to one who is invited by him to use his defective appliance, upon the owner's premises, may form the basis of an action against the owner. (3) One who sells or delivers an article which he knows to be imminently dangerous to life or limb of another, without notice of its qualities, is liable to any person who suffers an injury therefrom, which might have been anticipated, whether or not there was any contractual relation between the parties. For detailed treatment of the liability of the manufacturer in these cases, see Seefeld, *Tort Liability of Manufacturers to Users of their Goods*, 25 MARQ. L. REV. 173 (1941).

In deciding the principle case, the Massachusetts court devoted itself religiously to the old rule demanding a contractual relationship between the plaintiff and the manufacturer, and saw no place for the case in any of the three exceptions. The adherence of the courts to this statement of the law, and their interpretations of what articles fall into the exceptions, vary in the several states. However, the increasing scope of articles coming under the exceptions has been repeatedly pointed out by the courts. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F., 696 (1916). There, in discussing the first exception to the general rule as expounded in one of the earliest cases, *Thomas v. Winchester*, 6 N.Y. 397 (1852), which made a manufacturer of drugs liable to a third party to the contract for negligently placing a false label on a bottle of poison, the court, in the person of Justice Cardozo, said, “Whatever the rule in *Thomas v. Winchester* may have once been, it no longer has that restricted meaning. A scaffold (*Devlin v. Smith*, 89 N.Y. 470 (1882)) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (*Statter v. Ray Mfg. Co.*, 195 N.Y. 478 (1909)) may have within itself if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water (*Torgeson v. Schultz*, 192 N.Y. 156 (1908)) . . . We hold then that the principle of *Thomas v. Winchester* is not limited to poison, explosives, and things of like nature, to things which in the normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser,
and used without new tests, then irrespective of contract, the manufacturer
of this thing of danger is under a duty to make it carefully."

However, the Massachusetts court has either been tardy or ultra conserva-
tive in departing from the strictest construction of the rules in question.
"Danger is inherent when it is due to the nature of an article and not a defect
in an article naturally harmless; but the dangerous quality is none the less
inherent because it is brought into action by some external force." Farley v.
Standard Pyroroloid Corp., 171 N.E. 639 (Mass. 1930). In this case the court
excluded from the class of inherently dangerous articles those things which
become dangerous to human life because of a defect.

The trend in Wisconsin is pointed out in the Flies v. Fox Bros. Buick Co.,
196 Wis. 196, 218 N.W. 855 (1928). "A tendency appears in some recent cases
to extend the class of inherently dangerous articles, so as to include not only
those that in their ordinary state are dangerous to health and safety, such as
poisons and explosives, but also those that are reasonably certain to place life
and limb in peril because of negligent preparation." Thus the Wisconsin court
takes the modern view by saying that a manufacturer who places a manufac-
tured article in trade and commerce, not inherently dangerous, but because of
its negligent construction, imminently dangerous to lift and limb, is liable to
one who sustains injuries by reason of such negligent construction. Bright v. The
Barnett & Record Co., 88 Wis. 299, 60 N.W. 418 (1894); Coakley v. Prentiss-
Wabers Stove Co., 182 Wis. 94, 195 N.W. 388 (1923). The Wisconsin court was
able to hold that boiler tubes which burst under normal pressure eight days
after installation in a furnace were things of danger if negligently made, Marsh
Wood Products Co. v. Babcock and Wilcox Co., 207 Wis. 209, 240 N.W. 392
(1932), while the Massachusetts court insisted that a kitchen hot water tank
is not an article recognized as inherently dangerous to life or property, relieving
(Mass. 1929).

Perhaps the most heartening force which can be lent to the better sense of
the Wisconsin doctrine comes from a case decided in the U. S. Circuit Court
of Appeals, Reed and Barton Corp. v. Maas, 73 F. (2d) 359 (C.C.A. 1st, 1934).
The plaintiff a Wisconsin resident, was severely burned when a coffee urn,
purchased from a Massachusetts manufacturer, spilled its boiling contents over
her when a negligently constructed support gave way. The case finally reached
the federal court where the defendant contended that under the Massachustts
law a manufacturer owes no duty to a third party in case of an article not
inherently dangerous, citing the Lebourdais case, supra, and Windram Manu-
the plaintiff showed that under the law of Wisconsin the manufacturer of an
article is liable for any injury due to his negligence in manufacture, where the
article is not inherently dangerous, but due to the negligence in manufacture is
likely to cause injuries even if properly used, Bright v. Barnett and Record Co.,
supra; Miller v. Mead Morrison Co., 166 Wis. 536, 166 N.W. 315 (1918); Flies
v. Fox Bros. Buick Co., supra. The appellate court held that the rule applied
in the federal courts is not contra to that in Wisconsin and New York, citing
Huset v. Case Threshing Machine Corp., supra; Keep v. National Tube Co.,
154 Fed. 121 (C.C., D. N.J., 1907); Johnson v. Cadillac Motor Co., 261 Fed. 878
(C.C.A., 2nd 1919).

It is not difficult to see the similarity between the principal case and the
Reed Barton case, supra. In the light of the decisions in these various cases
one can not help but conclude that Massachusetts is adhering to a wornout
principle, which refuses to recognize a changing world where a manufacturer is no longer dealing directly with the users of his goods, but must, of necessity, contemplate that parties who are strangers to the contract will use his product. It seems to the writer that the rule of the Wisconsin and New York courts states a policy which is more in accord with the present social and economic realities.

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