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THE LIABILITY OF A CONTRACTOR, MANUFACTURER, OR VENDOR TO THIRD PARTIES HAVING NO CONTRACTUAL RELATIONS.

By C. Stanley Perry, '18.

A, a manufacturer incorporates into a grinder machine an emery wheel obtained from another manufacturer, B. Upon receipt of the wheel from B, A does not test it and it is in fact defective. A sends out the grinder machine in charge of X, his agent, for demonstrating purposes. During a demonstration the wheel explodes injuring K, a spectator, who thereupon consults a lawyer as to his rights against A and B.

From this statement of facts three questions of importance arise. First, has K a cause of action against B, the original maker of the emery wheel? Second, has K a cause of action against A arising out of the facts as stated? Third, would K have a cause of action against A had the latter tested the emery wheel upon receipt of it from B?

There are no cases in Wisconsin in which this set of facts has been brought squarely before the court but the general principles ruling a disposition of the queries advanced are to be found in the case of Hasbrouck vs. The Armour Company, 139 Wis. 357, and have been cited with approval in the cases of Haley vs. Swift & Co., 152 Wis. 357 and Kerwin vs. Chippewa Shoe Mfg. Co., 163 Wis. 428.

The general rule governing the liability of manufacturers and vendors in cases such as the one under discussion is recognized by these Wisconsin cases to be:

"That a contractor, manufacturer or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of the articles which he handles."

A collection of the cases supporting this rule may be found in the case of Huset vs. Case T. M. Co., 120 Fed. 866.

The rule seems to be based upon consideration of public policy in that there would be no end of litigation if contractors or manufacturers were to be held liable to third persons for every
act of negligence in the construction of articles, after the parties to whom they have been sold have received and accepted them and also for the reason that when a manufacturer sells articles to wholesale or retail dealers or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture.

To the general rule as thus stated there are three well recognized exceptions. The first exception may be stated as follows:

"An act of negligence of a manufacturer or vendor which is imminently dangerous to human life and health and which occurs in the preparation or sale of articles like food and poisons whose primary purpose is to preserve, destroy or affect life and health is actionable by parties who have no contractual relations with the manufacturers or vendor. The liability here is of course provided that the injury might have been reasonably foreseen in the exercise of ordinary care."

The case of Thomas vs. Winchester, 6 N. Y. 397, is the leading authority supporting this exception to the general rule. The case of Haley vs. Swift & Company, 152 Wis. 357, also illustrates the doctrine of the first exception.

In the Swift case the complaint alleged that the defendant, a meat packer, carelessly and negligently sold and delivered to a local dealer to be by him sold at retail "certain adulterated link sausages which contained diseased, infected, putrid, decomposed and poisonous animal matter; that defendant knew or in the exercise of ordinary care ought to have known of its condition; that a portion of such sausage sold by the retailer was given to the plaintiff to eat and that he ate thereof and was thereby poisoned and injured in health." Our Supreme Court held in effect that the complaint stated a good cause of action under the exception to the general rule above noted.

The second exception is:

"That an owner who impliedly invites third parties to use defective machines or instruments manufactured or furnished by him is liable to them for injuries resulting from his negligence in the manufacture or care of them,"

and is perhaps best illustrated by the cases of Coughtry vs. Globe Woolen Company, 56 N. Y. 124, and Bright vs. The Barnett &
Record Co., 88 Wis. 299. In the latter case, by a contract with the defendant company, principal contractors for the erection of an elevator building, a fire extinguisher company was to construct and place in the building certain apparatus, and the defendant company was to furnish the staging required in the work. Through defendant’s negligence in placing a defective plank in the staging eighty feet above the ground, an employe using the scaffold was killed. It was held that the defendant was liable for such death although there was no privity or contract relation between it and the deceased, on the ground that it had impliedly invited him to use such staging, and also on the ground that the negligent use of the defective plank by the defendant was an act imminently dangerous to human life.

The Wisconsin Supreme Court in the Hasbrouck case, supra, speaking through Timlin J., has stated the third exception to the general rule as follows:

"A manufacturer or dealer who puts out, sells and delivers without notice to others of its dangerous qualities, an article which invites a certain use and which article is not inherently dangerous, but which by reason of negligent construction he knows to be imminently dangerous to life and limb when used as it is intended to be used, is liable to any person suffering an injury therefrom which injury might have been reasonably anticipated."

It is evident that an ordinary emery wheel is not an imminently dangerous instrument or machine. But it is equally clear that it may easily become so by reason of defective composition if placed in such a position as to be affected by such a defect in construction. Such a position is a state of rapid revolution when combined with other parts into a machine, for in such case unless the emery wheel is free from defect it is apt to burst when revolved beyond its limit of cohesion. An explosion under such circumstances would render the machine imminently dangerous to persons then in its immediate vicinity. Granting this, we come to the first query arising on our statement of facts.

Can a mere spectator of the demonstration of the grinder wheel machine recover from the original manufacturer of the defective part? We consider that there is absolutely no privity of contract between K and B here. Therefore unless the case
can be brought under one of the three exceptions to the general rule before noted, K has no cause of action against B.

The first exception does not apply because a grinder machine cannot be considered as an article whose primary purpose is to preserve, destroy or affect human life and health.

The second exception which is based essentially upon the "implied invitation to use" theory more nearly covers our situation but the cases upon which the doctrine of this exception is based do not present situations closely analogous to our preliminary statement of facts for in all those cases the so-called implied invitation is extended to employees of persons in a contract relation with the defendant. Our case is the injury of a total stranger to the manufacturer. And there is here no implied invitation to the plaintiff to use the grinder machine.

The third exception is in general based upon a foundation of tort involving fraud and deceit rather than negligence. Actual knowledge of the existence of the defect with an intent to willfully conceal such defect seems to be the foundation of liability as expressed in the cases which are authority for the third exception to the rule. It has been so held in the cases of Kuelling vs. Lean Mfg. Co., 183 N. Y. 78; Peaslee-Guilbert Co. vs. McMathes, Admx., 146 S. W. (Ky.) 770; and Heizer vs. Kingsland & Douglass Mfg. Co., 110 Mo. 605.

We hold therefore that B, the original maker of the emery wheel, cannot be held liable to K for the latter's injury.

The case of Lebourdais vs. Vitrified Wheel Co., 194 Mass. 341, 80 N. E. 482, which is closely in point affords authority for our conclusion as to the first query. In the Lebourdais case an employee injured by the bursting of an emery wheel sued the manufacturer of the wheel which had been purchased by the plaintiff's employer on the open market. The declaration alleged that the wheel burst because of its defective condition and that when the manufacturer sold the wheel he knew or in the exercise of ordinary care should have known of the defect, its unsafe condition and the manner and purposes of using the same. But the court held the complaint insufficient to charge the manufacturer with liability for the injuries received and the decision embodies the following language:
"The manufacturer of an article of merchandise which he puts upon the market ordinarily 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 he should have known of the defects. If such an extended liability attached where no privity of contract exists, it would include all persons however remote either in person or property injured by his carelessness, and manufacturers as a class would be exposed to such far reaching consequences as to seriously embarrass the general prosecution of the mercantile business. In the usual course of trade upon making a sale as the article passes from the control or ownership of the maker it is held that when these cease his liability should also be considered as ended."

The recent case of Cadillac Motor Car Co. vs. Johnson, 221 Fed. 801, is also authority for our conclusion. The court in that case held in effect that a manufacturer of automobiles which purchased the wheels used in its automobiles, was not liable to an injured person who purchased an automobile manufactured by it from a dealer, and who had no contractual relationship with it— for its negligent failure to discover that one of the wheels used was defective, since while one who manufactures articles inherently dangerous is liable to third parties injured by such articles, unless he exercises reasonable care, one who manufactures articles dangerous only if defectively made is not liable to third parties for injuries, except in case of willful injury or fraud.

The decision in the case of Statler vs. Ray Mfg. Co., 195 N. Y. 478, which would seem to be contra to our conclusion may be distinguished from the fact that there the defective instrument (a hotel coffee-urn) was of an inherently dangerous nature. A grinder machine is not.

We come now to a consideration of our second query. Upon the facts as stated has K a cause of action against A? Liability under the general rule as heretofore stated might be invoked on the ground that K is by invitation in a contractual relation with the defendant, A. A decision of this point would furnish the basis for an interesting discussion. But without attempting to decide that question in this article, we do hold that A is liable to K for breach of the simple duty of care owed by A to every
one who may be in danger from the operation of A's grinder machine during a demonstration.

In the case of Necker vs. Harvey, 49 Mich. 577, 14 N. W. 503; defendant, a manufacturer, was in possession of and engaged in testing a defective elevator which fell during such test and seriously injured the plaintiff, an employee of the company owning the building in which the elevator was situated. The court speaking through Cooley, J., said:

"When a manufacturer is in possession of and is testing his own machinery, he owes to every one who may be in danger from it the duty of proper care, and if he exposes anyone to danger from his carelessness in handling or in construction, he must answer for the consequences. The duty of care under such circumstances is not a contract duty, but a duty imposed by the common law, and the contract is only important as it evidences the degree of care which must be observed."

The principle here stated is the one which should govern the answer to our second query. The principle is in effect affirmed by the decision in the case of Wood vs. Sloan, 148 Pac. (N. M.) 507, in which an exhaustive discussion of the doctrines presented in this article may be found.

It is therefore evident that if the manufacturer A did not test the emery wheel upon receipt of it from B, he did not exercise the degree of care in inspecting his machinery which should have been used before sending out upon the road for demonstration purposes, machinery from the operation of which the natural and probable consequence of defective construction would be injury to any persons who were in close proximity to the machine at the time of the accident. It may be argued that even if the manufacturer A did not himself test the wheel, yet if he could show that the original maker of the wheel subjected it to factory tests before delivering it to A, such fact would relieve A from the liability of testing it upon receipt from B. The weight of authority is however against such a contention. The case of Boston Woven-Hose & Rubber Company vs. Kendall, 59 N. E. 627 (Mass.) is authority for our decision on this last point.

As to what kind of test would be necessary or sufficient under the circumstances is a question of fact for the jury but the Su-
preme Court of the United States has held in the case of Richmond & Danville Ry. vs. Elliott, 149 U. S. 266, 37 L. Ed. 728, that it is not necessary to tear the article to be tested to pieces and that subjecting the article to the ordinary tests used in the particular business in which it is intended to be used is sufficient. And in the case of Torgeson vs. Schultz, 192 N. Y. 156, which was an action to recover damages for the loss of plaintiff's eye caused by the bursting of a bottle of aerated water when placed in contact with ice, the court held that the defendant bottle manufacturer might be reasonably held chargeable with knowledge that it was customary, especially in hot weather to place siphons charged with aerated water in contact with ice, and that in view of this fact, a jury might reasonably find that the tests applied to such bottles should be such as to render it tolerably certain that they would not explode when thus used.

From our answer to the second question it follows naturally that our answer to the third query, as to A's liability having tested the emery wheel before incorporating it into his grinder machine, must be that A is not liable.

Ordinary care is all that is required of A under the circumstances set forth by our statement of facts. If upon receipt of the emery wheel, A had thereafter proceeded to subject it to the usual tests applicable to such an instrument to detect the presence of a latent defect in construction or composition, as for example causing the wheel to be revolved at a speed one-third higher than it would be subjected to in ordinary usage, that is all that A can be expected to do in the exercise of ordinary care and any injury resulting from an explosion of a wheel so inspected and tested, if not held to be an accident for which no one is to blame, must at least be considered as a "remote possibility, an extraordinary occurrence and an unusual consequence" which a person in the exercise of ordinary care "cannot be expected to foresee and provide against." Hasbrouck vs. Armour & Company, 139 Wis. 357.