North Dakota Law Review

Volume 44 | Number 1 Article 8

1967

# Products Liability - Strict Products Liability - Absoluteness of Strict Liability in Tort

Richard McKennett

enterprise, should be absorbed as a cost of that enterprise. This loss is not to be shifted to a negligent defendant who under the common law doctrine of contributory negligence, would normally have an affirmative defense against such a transfer. This being the net result of the present decision, then, the overall effect is not only the weakening of the common law doctrine of contributory negligence, but also the erosion of the foundation upon which the concept of vicarious liability of a master rests.

DANIEL J. MCALEER

PRODUCTS LIABILITY — STRICT PRODUCTS LIABILITY — ABSOLUTENESS OF STRICT LIABILITY IN TORT—A customer who was injured when a soft drink bottle fell from a cardboard six-pack carton as she attempted to remove it from a shelf in a grocery store brought an action for personal injuries. Subsequently, the grocery store was awarded indemnity against the bottler for any sum it might be ordered to pay the customer. The court awarded plaintiff two thousand dollars on the new strict liability doctrine with one vigorous dissent attacking this new doctrine. *Kroger Co. v. Bowman*, 411 S.W.2d 339 (Kentucky 1967).

The Kentucky Supreme Court faced the problem of strict liability in tort and had to determine the extent of liability which a manufacturer is to be held in evidence of a defect in his product. In other words, whether or not to distinguish between the theory of absolute liability such as is found in cases dealing with ultra-hazardous activities[1] or dangerous animals[2] and the strict or "special" liability of a manufacturer to the ultimate user or consumer?

In the United States, the law of products liability has developed along various legal theories from the old doctrine of *caveat emptor* or "let the buyer beware." Until recently the notable characteristic of all these advancements toward increased seller's liability was that they required fault. The order of theories tending to increase the liability included: express warranty with privity; negligence in the absence of privity in inherently dangerous goods; express warranty without privity; and, lastly, implied warranty without privity. Since 1960, a few jurisdictions have taken a dras-

1. Boyd v. White, 128 Cal. App.2d 641, 276 P.2d 92 (1954).
2. Zarek v. Fredericks, 138 F.2d 689 (3rd Cir. 1943).

tic step in department from the fundamental principle requiring fault and by applying a new doctrine of strict liability in tort have advanced into the realm of products liability without fault.[3]

This historical trend toward the special liability of manufacturers has certain reasons. First, it is to do away with the requirement of privity of contract. The rule of strict liability "applies although the user or consumer has not brought the product from or entered into any contractual relation with the seller."[4] This necessity was produced by the impersonal nature of our modern economy. Secondly, the rule of strict liability "applies although the seller has exercised all possible care in the preparation and sale of his product."[5] This reasoning is exemplified in the California decision which stated that the manufacturer was responsible whether negligent or not.[6] This new doctrine develops the rationalization of many courts in implying warranty. It is an effort to escape the bounds of normal negligence law by seeking to help plaintiffs otherwise frustrated because of the difficult task of proving fault against a producer who often controls all of the sources of evidence. The main purpose of this new theory of liability, however, is to place the burden of accidental harm caused by products intended for consumption upon those who market them so that they may be treated as a cost of production against which liability insurance can be obtained.[7] The doctrine was extended from consumable goods to motor vehicles and other products,[8] where the defective condition made them unreasonably dangerous to the user since it was felt that the one creating the risk and reaping the profits should be liable,[9] instead of placing the overwhelming burden of the cost of such injuries on those least able to meet these consequences.[10]

The foregoing reasons for the imposition of strict liability upon the manufacturer of defective goods have merit, but there are consequences which are not so beneficial to our society. Liability without fault runs counter to the ordinary encouragement for care and safety; prior to this new doctrine our laws had a definite deterrent threat of liability upon the careless. Strict liability requires no negligence or fault as seen above and this would lead manufacturers to merely accept some losses and raise the cost

3. Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); Greenman v. Yuba Power Products, Inc., 59 Cal.2r 57, 377 P.2d 897 (1962); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963).
4. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
5. *Id.*
6. Vandermark v. Ford Motor Co., 61 Cal.2d 256, 391 P.2d 168 (1964).
7. RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).
8. 41 ALI Proceedings 349, 351 (1965).
9. Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965).
10. Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944).

of goods to cover them while, at the same time, relaxing their safety standards.

Yet another drawback of imposing strict liability is that it creates an unfair risk to the manufacturer, especially the one man ownership business. Our economy thrives on the technological advances made in product design which has historically been encouraged, but now the strict liability law will place all the risk of harm from such designs upon the producers and thus discourage such advancement.[11] Dean Prosser, one of the leading expounders of strict liability as a "risk spreader," saw its weaknesses when he said,

> Until we develop, a comprehensive system of compulsory insurance along the lines of workmen's compensation with rigidly limited damages . . . there will always be uninsured defendants, there will always be liability in excess of coverage, and there will be members of the group whose competitive situation does not permit them to pass on the cost of the insurance to their customers.[12]

Lastly, the lucrative ease with which attorneys could prove their cases, if strict liability of absolute quality were allowed, could lead to a very serious ethics problem.[13]

Turning now from the theoretical argument against a complete adoption of the theory of strict products liability as in absolute liability upon sellers and producers, especially in products not to be consumed, one must face the more practical problem of determining what defenses are left under the "special" liability which is imposed. Thus far the rule has been applied only to products sold in the condition, or substantially the same condition, in which it was expected to reach the ultimate user.[14] In a recent case the Supreme Court of Mississippi held that the manufacturer was not liable for damages caused since a heater was not expected to and did not reach the user "without substantial change in condition" where a safety valve was to be installed on the heater.[15] Closely related to this idea is that concerned with misuse of a product which is reflected in a Massachusetts case holding that there would be no liability where specific directions for use were ignored.[16] A manufacturer is entitled to the normal use of his product and

---

11. *Brief Opposing Strict Liability in Tort*, DEFENSE RESEARCH INSTITUTE 17 (1966).
12. Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099, 1121 (1960).
13. Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L. J. 343 (1965). This involves the temptations of bogus claims and inflation of legitimate ones when coupled with the contingent fee standard with obvious side affects of increased litigation load in many already overcrowded courts.
14. RESTATEMENT (SECOND) OF TORTS § 402A, comment p (1965).
15. State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966).
16. Taylor v. Jacobson, 336 Mass. 709, 147 N.E.2d 770 (1958).

no liability rule should negate this expectation,[17] for any product would be dangerous if recklessly used, such as the case of a car driven at an excessive speed.[18] A product need only be reasonably fit for the use intended.[19]

The defense lawyer may prove his client is not liable if he can show the product was delivered in a safe condition and that subsequent mishandling made it harmful.[20] The Mississippi court appeared justified in attributing the sole proximate cause of an explosion to the intervening failure of the contractor to install a necessary safety valve,[21] just as a case relied upon for precedent ruled that a processer's failure to follow the directions for use of a chemical compound to be added to cattle feed had presented the validity of the defense of intervening cause.[22] This issue was pointed out in an analogous case upon an alleged breach of implied warranty, where the Utah court noted that a supplier may rely upon a retailer of mettwurst to correctly cook the meat before sale and is not liable for a case of trichinosis contacted from the meat since the seller's failure was the sole cause of harm.[23]

Comments explaining the relevant section of the *Restatement on Torts* reflect the next obvious defense to special liability actions. There can be no contributory negligence relied upon when it consists merely in failure to inspect the product by the user or to further guard against a manufacturer's defect. It does, however, exist under the label of assumption of risk when the user "voluntarily and unreasonably" proceeds while knowing of the defect.[24] Furthermore, when a warning is given, the seller may reasonably assume that it will be read and heeded.[25] The New Jersey[26] and Illinois[27] courts which so avidly accepted this new doctrine of strict liability in tort have even substantially modified their position in recognizing the defense of contributory negligence. A federal court likewise has ruled that the failure to take a recommended patch test to determine whether a user of hair dye might be allergic to the product bars recovery when there is a reaction to it.[28] The extent of this procedure is shown by a North Carolina decision accepting contributory negligence as a defense in an

17. Malorino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1965).
18. Drummond v. Gen. Motors Corp. (Civil No. 771-098) (Cal. Dist. Ct., 4th Dist. 1966).
19. Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 199 A.2d 826 (1964).
20. RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965).
21. State Stove Mfg. Co. v. Hodges, *supra* note 14.
22. E.I. Du Pont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So.2d 249 (1954).
23. Schneider v. Suhrmann, 8 Utah2d 35, 327 P.2d 822 (1958).
24. RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).
25. *Id.* at comment j.
26. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).
27. Brandenburg v. Weaver Mfg. Co., 222 N.E.2d 348 (Ill. App. Ct., 4th Dist. 1967).
28. Pinto v. Clairol, Inc., 324 F.2d 608 (6th Cir. 1963).

action brought in tort law while denying it in a warranty action in the same case.[29]

The special liability rule, it must be emphasized, applies only to defective products, and the burden of proof that the product was in a defective condition at the time it left the seller's hands is placed upon the plaintiff.[30] Thus, plaintiff was barred from recovery from designer for an accident resulting in the scalding of a child because it was ruled that there was not sufficient proof of a defect in design in the water system.[31] An Illinois court denied recovery for an injury to a child who was severely cut when she fell under a power mower made by defendant since there could be proven no actual design defect.[32] A Missouri decision held that a design, openly and obviously dangerous, cannot be the basis for strict liability because the user should have realized the danger and avoided it.[33] The theory also does not require a perfectly safe product since some products by nature are dangerous in given circumstances, such as the anti-rabies vaccine developed by Pasteur.[34] The product must be unreasonably dangerous to a consumer and harmful in such a way that the user would be unaware of the defect.[35] A product, therefore, bearing a warning that it is safe for use if the warning is followed, is not defective or unreasonably dangerous.[36] Since such defenses as these have been applied successfully in actions of products liability the point is well taken that strict liability in tort is, indeed, a misnomer as the Mississippi court has realized.

North Dakota has been advancing toward the acceptance of complete liability of the producer or seller of goods. In 1931, the Supreme Court indicated that privity was required in both express and implied warranty actions and also established a need for fault.[37] The policy, however, of doing away with the need of privity was revealed in a 1965 suit to recover for an injury sustained due to a defectively designed potato harvester in which the court held that a manufacturer had a duty to warn any user, even in the absence of privity, about any danger inherent in the chattel.[38] The court required only reasonable care, relying on the NORTH DAKOTA CENTURY CODE that "[e]very person is bound without contract to abstain from injuring the person or property of another."[39]

29. Walker v. Hickory Packing Co., 220 N.C. 158, 16 S.E.2d 668 (1941).
30. RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965).
31. Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965).
32. Murphy v. Cory Pump & Supply Co., 47 Ill. App.2d 382, 197 N.E.2d 849 (1964).
33. Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343 (Mo. 1964).
34. RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965).
35. *Id.* at comment i.
36. *Id.* at comment j.
37. Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931).
38. Lindenberg v. Folson, 138 N.W.2d 573 (N.D. 1965).
39. N.D. CENT. CODE § 9-10-01 (1961).

In 1963, the increased burden of liability to sellers and producers was forecast in a federal decision in an action for breach of implied warranty which stated that privity was no longer required although the action was dismissed for lack of proof of negligence or fault.[40] This trend has culminated in the North Dakota Supreme Court decision holding that a plaintiff in a products liability action may maintain the action based upon an implied warranty or an action in negligence even in the absence of privity.[41]

North Dakota, as it has eliminated the requirement of privity even in implied warranty actions, has now progressed as far as it should. The elimination of the privity requirement to a certain degree of remoteness is a good and necessary modernization in legal doctrine to meet the needs of our impersonal society. However, a word of caution — to eliminate the requirement of fault is wrong. Any products liability action where the seller or manufacturer is held liable for harm caused by a defective product should be justified only upon proof of fault or negligence. The many defenses mentioned herein should be allowed just as they should be in a negligence action.

RICHARD MCKENNETT

40. U.S. Rubber Co. v. Bauer, 319 F.2d 463 (8th Cir. 1963).
41. Lang v. Gen. Motors Corp., 136 N.W.2d 805 (N.D. 1965).