

Torts - Strict Liability of Manufacturer

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ever, *Brown v. Crocker*²³ presented the question whether damages should be available to the owner of a chattel for mental anguish resulting from an intentional injury to it. Prior to this case the answer seemed clearly to be that damages could not exceed the value of the chattel,²⁴ for monetary awards on the basis of sentimental value have not been allowed in Louisiana.²⁵

It is submitted that relief for mental anguish should have been denied in the instant case for several reasons: defendant lacked special knowledge that plaintiff's son would suffer extraordinarily; the mental anguish resulted from conduct which did not primarily affect the minor son's person; and intentional injury to chattels does not warrant damages for mental anguish suffered by the owner.

Byron Kantrow, Jr.

TORTS — STRICT LIABILITY OF MANUFACTURER

Plaintiff was injured while properly using a combination power tool purchased by his wife from a retailer as a gift for him. He sued the retailer and manufacturer of the power tool for damages, and recovered from the manufacturer on evidence submitted under allegations of negligence and breach of express warranties.¹ Defendant manufacturer contended an action for breach of express warranty would not lie because of absence of

23. 139 So.2d 779 (La. App. 2d Cir. 1962).

24. RESTATEMENT, TORTS, Explanatory Notes § 46, comment *d* at 24 (Tent. Draft No. 1, 1957): "5. *A* intentionally breaks a valuable vase owned by *B*, knowing the act is certain to distress *B*. *B* suffers severe emotional distress. Although *A* is liable to *B* for conversion of the case [vase], his conduct is not so extreme or outrageous as to make *A* liable to *B* for the emotional distress."

25. *Huskey v. Maryland Cas. Co.*, 53 So.2d 180, 181 (La. App. 2d Cir. 1951); ("We think the law is well established to the effect that a monetary award cannot be justified on the basis of sentimental value."); *Lack v. Anderson*, 27 So.2d 653, 657 (La. App. 2d Cir. 1946) ("The actual value of the photograph is all that plaintiff can recover although we realize that no monetary value can adequately compensate him.").

1. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 899 (Cal. 1963). Plaintiff did not recover from the retailer. Plaintiff's expert witnesses "testified that inadequate set screws were used to hold parts of the machine together so that normal vibrations caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe." The court commented that it could not be determined whether the jury's verdict was based on the negligence or warranty cause of action or both, and said: "The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith. The jury could also reasonably have concluded that statements in the manufacturer's brochure were untrue, that they constituted express warranties, and that plaintiff's injuries were caused by their breach." *Ibid.*

timely notice by plaintiff as required by statute. On appeal, the California Supreme Court answered this contention by stating liability under the facts of this case need not be predicated on breach of warranty, but is a species of absolute liability in tort. *Held*, when a manufacturer places an article on the market, knowing that it is to be used without inspection for defects, he is strictly liable in tort if it proves to have a defect that injures a human being. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

Manufacturers' liability for defective products has been predicated upon two actions, tort and breach of warranty. The landmark case of *Macpherson v. Buick Motor Co.*,² a tort action, extended the liability for injury caused by a defective product to any article dangerous because of its negligent construction and, beyond the immediate purchaser, to any third person foreseeably injured by the product.³ Under the *Macpherson* doctrine the injured plaintiff must still establish a lack of reasonable care — an onerous burden when facts relative to manufacturing are not readily available.⁴

2. 217 N.Y. 382, 111 N.E. 1050 (1916).

3. *Id.* at 389, 111 N.E. at 1053 (1916). Judge Cardozo said: "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 then 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. . . . There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective." Prior to *Macpherson* the tort action was based on the theory that "a supplier of chattels is under a duty to the person supplied to exercise reasonable care to see that the goods are safe for their intended use." PROSSER, TORTS 491 (2d ed. 1955). As this restricted liability to the person immediately supplied, nineteenth and twentieth century cases developed exceptions to the theory that the buyer was the only one protected so that now a supplier or fabricator "may be liable for harm to the person or property of a third person who may be expected to be in the vicinity of the chattel's probable use, if he has failed to exercise reasonable care to make the chattel safe for the use for which it is supplied." This liability to third persons originally extended only to injury from articles "inherently dangerous," such as food, drugs, explosives, etc. *Id.* at 497.

4. This burden may be alleviated by resort to *res ipsa loquitur*, but the use of this doctrine is extremely limited due to the defendant manufacturer surrendering exclusive control of the injurious product before it reaches the plaintiff. Furthermore, the problem of determining whether the product was injuriously defective when leaving the manufacturer is prevalent whether *res ipsa loquitur* is resorted to or not. "The conditions usually stated as necessary for the application of the principle of *res ipsa loquitur* are three: (1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." PROSSER, TORTS 201 (2d ed. 1955). Plaintiff's recovery on this theory is limited by the product passing through many hands —

The second means of reaching manufacturers is through an action for breach of warranty, originally a tort action now assimilated into the law of sales.⁵ Warranty is based on a sales transaction; liability attaches by reason of the sale rather than because the defendant is the manufacturer of the defective product.⁶ Because of this inherent restriction an action in warranty does not embrace instances of gift or loan which occur when a manufacturer distributes free samples. Warranty implies reliance, if not on express advertising, at least on the assumption a particular manufacturer's product can be safely used for the

wholesaler, retailer, etc.—on its way to the ultimate consumer or injured third person. The defendant may still rebut the inference of negligence when the doctrine is used, so that the plaintiff, from a standpoint of strategy, usually has to introduce affirmative evidence of negligence. *E.g.*, *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, 441 (1944) (Coca Cola bottle exploded in plaintiff's hand; court allowed recovery on inference of negligence arising from application of doctrine of *res ipsa loquitur*). Justice Traynor, author of the opinion in *Greenman*, concurred in *Escola* and said: "It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that the manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly." *Id.* at 464, 150 P.2d at 441. The problem of product mishandling between manufacturer and plaintiff remains, however. What would amount to a defense of intermediary mishandling under the strict liability theory of the instant case is open to question. Some help in resolving this question may be obtained from Justice Traynor's concurring opinion in *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 523, 203 P.2d 522, 528 (1949). There he was discussing the impropriety of *res ipsa loquitur* instructions in a bottle-exploding case, but added: "It is therefore necessary to decide whether the bottler's strict liability extends not only to defects existing when he relinquishes control, but also to defects that arise as a result of normal handling thereafter." *Id.* at 530, 203 P.2d at 532. "The bottler's duty to the public is to provide a product that will safely withstand normal marketing procedures before it reaches the consumer." *Id.* at 531, 203 P.2d at 533. Louisiana has followed the development in the other American jurisdictions in negligence. *Walker v. General Motors Corp.*, 115 F. Supp. 267 (W.D. La. 1953); *Ortego v. Nehi Bottling Works*, 199 La. 599, 6 So.2d 677 (1941); *Miller v. New Zealand Ins. Co.*, 98 So.2d 544 (La. App. 2d Cir. 1957); *Day v. Hammond Coca-Cola Bottling Co.*, 53 So.2d 447 (La. App. 1st Cir. 1951). Note, 4 LA. L. REV. 606, 609 (1942): "It seems necessary, therefore, to conclude that, as a practical matter, the presence of foreign substance in the beverage raises an almost irrebuttable presumption of negligence. It is difficult to draw any real line of distinction between the result that is obtained by applying this type of negligence doctrine and that result which would be obtained by applying the implied warranty doctrine." For a detailed analysis of *res ipsa loquitur* see Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70 (1941).

5. PROSSER, TORTS 493-96 (2d ed. 1955). Having thus acquired a contract character, a warranty action has traditionally required privity between the injured party and the party charged. However appropriate this privity requirement may be when a party is protecting his transactional interest and is seeking to get the benefit of his bargain, it gives difficulty when the action is to recover damages for personal injuries caused by a defective product.

6. Cf. RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 7, April 7, 1961). Although this section deals with strict liability, it is the liability of a seller, not a manufacturer. Comment *m* reflects the warranty inheritance.

purpose sold.⁷ In warranty actions to recover for injuries caused by defective food, drink, and chattels designed for intimate bodily use, the courts have resorted to various fictions to obviate the contract requirement of privity.⁸ Recently, however, the re-

7. This presents an additional obstacle to recovery under warranty by one not expected to use the product. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.04(2)(c) (1960); Comment, *Implied Warranties—The Non-Food Cases*, 27 Mo. L. REV. 194, 211-13 (1962). These discussions indicate that the injured bystander might be protected, but only at the expense of further distortion of the warranty theory. Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (implied warranty reached those whose use was reasonably to be anticipated). Applying this reasoning to the instant case, it can be seen that a small child is not a reasonably anticipated user of a power tool, but might certainly be injured by a defective one.

8. *E.g.*, *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961) (hula skirt); *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So.2d 313 (1944) (canned food); *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); *Markovitch v. McKesson & Robbins*, 106 Ohio App. 265, 149 N.E.2d 181 (1958) (home permanent); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913). See RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 7, April 7, 1961). PROSSER, TORTS 508 (2d ed. 1955) lists various devices used to obviate privity and cites cases. They include: fictitious agency of the intermediate dealer for the consumer's purchase, an imaginary assignment to the dealer of the producer's warranty of fitness for the purpose, a third-party beneficiary contract made with the dealer for the benefit of the consumer, and a warranty "running with the title" as in the case of conveyances of land. The most common device used is representation, the courts implying that the catarracts of advertising constitute an implied warranty of wholesomeness or fitness for use existing between the manufacturer and consumer. *Miller v. Louisiana Coca-Cola Bottling Co.*, 70 So.2d 409 (La. App. Or. Cir. 1954); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Markovitch v. McKesson & Robbins*, 106 Ohio App. 265, 149 N.E.2d 181 (1958); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 88 A.L.R. 521 (1932). Louisiana has also followed the development of other American jurisdictions in use of the warranty theory. Murray, *Implied Warranty Against Latent Defects: A Historical Comparative Law Study*, 21 LA. L. REV. 586 (1961): "It has been shown that in the fourteenth century implied warranty was not contractual in nature, but rather it was spoken of as a part of delict. It would appear that many modern courts have unconsciously made the full circle of reasoning and have returned to the original basis of liability. This approach seems somewhat remarkable when one considers that tort liability is usually based upon some aspect of a 'fault,' while in a breach of warranty case the questions of negligence, due care and fault are irrelevant. If the goods have some latent defect, the vendor is liable even though he did not know of and had no means of ascertaining the existence of the defect.

"When one considers the vendor's liability for consequential damages (*e.g.*, injury to the person or property of the vendee or strangers to the sales transaction) it becomes apparent that this whole concept of an implied warranty against latent defects is now a hybrid of the law of sales and tort, and while the courts talk about contracts they are really talking about tort." See also Comment, 22 LA. L. REV. 435 (1962), which discusses the propriety of use of warranty without privity in civil law and difficulties caused by a non-advertising manufacturer. Louisiana warranty cases use the articles dealing with the redhibitory action. LA. CIVIL CODE arts. 2520-2540 (1870). Although they do not provide for damages when the seller does not know of the defect, the courts have allowed damages when the seller is also the manufacturer on the theory that the manufacturer is presumed to know of the defect. *Id.* art. 2545 (1870); *Doyle v. Fuerst & Kraemer*, 129 La. 838, 56 So. 906, 40 L.R.A. (N.S.) 480 (1911) (food); *George v. Shreveport Cotton Oil Co.*, 114 La. 498, 38 So. 432 (1905) (cottonseed oil cake).

quirement of privity has been eliminated in other areas;⁹ the trend is toward not requiring privity if the plaintiff was reasonably expected to be a consumer.¹⁰

The holding of the instant case does not restrict a plaintiff to either a tort or warranty theory, but affords him some leeway in choice of the more appropriate action.¹¹ Its primary significance lies in its imposition of strict liability in tort on the manufacturer who makes a defective product and places it on the market, knowing it is to be used without inspection for defects.¹²

9. *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (8th Cir. 1960) (surgical pin); *Goodrich v. Hammon*, 269 F.2d 501 (10th Cir. 1959) (tire); *Continental Copper & Steel Industries v. E. C. "Red" Cornelius, Inc.*, 104 So.2d 40 (Fla. App. 1958) (electric cable); *Spence v. Three Rivers Supply*, 353 Mich. 120, 90 N.W.2d 873 (1958) (cement building blocks—property damage allowed); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (automobile); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 569 (1959) (truck tractor).

10. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), involving an action by automobile buyer's wife and buyer for damages sustained by the wife while she was driving an allegedly defective automobile shortly after its purchase. In a long and well reasoned opinion the court discussed privity, and express and implied warranties, refusing to permit the manufacturer and dealer to disclaim, due to express warranty, responsibility for any defect not covered thereby. The court said: "Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer." *Id.* at 379, 161 A.2d at 81. The court stresses that a manufacturer who puts a new automobile in the stream of trade and promotes its purchase impliedly warrants that it is reasonably suitable for use, and this warranty accompanies the automobile into the hands of the ultimate purchaser. This warranty extends also to members of the purchaser's family and to other persons occupying or using the automobile with his consent since their use is reasonably to be anticipated.

11. The holding does not state that strict liability in tort is the exclusive remedy. Consideration can be given to the advantages or disadvantages of use of tort theory rather than warranty. Notes 5-9 *supra* indicate some disadvantages of warranty. Additionally, under traditional sales law, the seller can disclaim or negative warranty, and if this is not allowed when there is physical injury, the court is obliged to announce that the disclaimer or limitation of an express warranty is void as against public policy. *Cf. Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed note 10 *supra*.

COH PRODUCTS LIABILITY REPORTS § 3225 (1963): "Disclaimers and exculpatory clauses purporting to absolve a tortfeasor for negligence are generally recognized as valid under the rule that persons are free to contract or agree to what they please. Such agreements are strictly construed so as to favor the imposition of liability, particularly where there is a great disparity of bargaining power between the parties. Disclaimers of warranty are generally held ineffective to bar action alleging negligence."

If a disclaimer is made in an arms-length transaction involving a used car, should the disclaimer be void as against public policy if someone is injured as a result of a defect in the car? The same kind of questions arise if the disclaimer is made for a product, insecticide, or power mower, which must be used in a particular way or which will involve some risk even if not defectively made. Again, it is generally required that prompt notice of breach of warranty be given. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 19.05 (1961). There may be rare instances where the reasonably prompt notice comes after the prescriptive period for a tort action. *Cf. Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961).

12. Legal writers, impressed by the difficulty of proving negligence and the

This strict liability attaches if injury to the plaintiff occurred while using the product as intended and as a result of a defect in design and manufacture of which plaintiff was not aware and which made the product unsafe for its intended use. Although the imposition of strict liability in tort clears the log-jam of proof of negligence and eliminates ambiguities inherent in breach of warranty, the injured party must still show a defect in the product when it left the manufacturer as well as use of the product as it was intended to be used. Further, although the nature of the product may no longer be important, it seems that without some measure of foreseeability of injury from a defect, the manufacturer would not be liable. Thus, if the product would not be dangerous for normal use, even though defective, there would be no liability.¹³ These remaining restrictions protect against the specter of a torrent of frivolous suits against the manufacturer.

This decision takes another step toward protecting the plaintiff, handicapped in his efforts to prove negligence or breach of

inequality between the manufacturer and the consumer, recognize that the manufacturer can insure against strict liability and charge premiums as a cost of doing business. Several have urged the result reached in *Greenman*, with various policy reasons given for imposition of the strict liability. Hobbs, *Product Liability — Legal Battleground of the 1960's*, 23 ALA. L. REV. 14 (1962); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Comment, *Implied Warranties — The Privity Rule and Strict Liability — Legal Battleground of the 1960's*, 23 ALA. L. REV. 14 (1962); Prosser, 13. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 8.03 (1961). This can be illustrated by the example of a feather pillow with a defective seam. If the seam splits, causing a severe allergic reaction to one with an allergy to feathers, this would not seem to be a foreseeable injury. This is explained by CCH PRODUCTS LIABILITY REPORTS § 3100 (1963): "To impose liability upon manufacturers and sellers of injury-causing products, injury resulting from their use must have been reasonably foreseeable or expectable. Liability cannot be imposed for remote eventualities."

"Injuries traceable to allergy or unusual susceptibility on the part of the person injured are ordinarily not compensable, the theory being that the manufacturer or seller is entitled to assume that a product will be put to a normal use by a normal user. A reasonable seller is not ordinarily expected to foresee an allergy and to anticipate harmful consequences therefrom. There is support, however, for the view that peculiar susceptibility is not a defense where the product sold has a tendency to affect injuriously an appreciable number of persons, although they cannot be designated as within the class of normal persons." *Id.* at § 3125. Cf. *Macpherson v. Buick Motor Co.*, 217 N.Y. 382, 289, 111 N.E. 1050, 1053 (1916). Judge Cardozo said: "It is possible to use almost anything in a way that will make it dangerous if defective." Presumably, plaintiff also must show the product was defective when it left the manufacturer and was not rendered so by mishandling thereafter.

See note 3 *supra*. Mishandling is not mentioned in the case probably because it seems the defect here was not one attributable to mishandling. Whether some measure of mishandling of a product already defective when it left the manufacturer will be considered an intervening act is problematical. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 11.04 (1960).

warranty in an age of manufacturing and distribution on a national and international scale. It extends the rationale of *Macpherson v. Buick Motor Co.*¹⁴ by enlarging the duty of reasonable care to one of almost absolute responsibility for defective products which cause injury. A recent Louisiana case, though decided on the basis of negligence and though not using *res ipsa loquitur*, sets the standard of care so high as to admit of the possibility of reaching the result in *Greenman* in future product liability cases in Louisiana.¹⁵

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14. 217 N.Y. 382, 111 N.E. 1050 (1916).

15. *Samaha v. Southern Rambler Sales, Inc.*, 146 So. 2d 29 (La. App. 4th Cir. 1962).