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TORTS–NEGLIGENCE–DEFECTIVE DESIGN–DUTY OF A MANUFACTURER WHEN PRODUCT'S USE IS FORESEEABLE THOUGH UNINTENDED

Roy Evans, while driving his 1961 Chevrolet station wagon, was struck broadside by another car. The resulting impact collapsed the side of the automobile thereby killing Evans. A wrongful death action was commenced based on negligence, strict liability and warranty,[1] against General Motors, the company that designed and manufactured the automobile that Evans was driving. It was shown that decedent's automobile did not have the standard type of frame used in most other cars, known as a box frame, but rather used an "X" frame. Plaintiff contended that the use of an "X" frame did not adequately protect the driver against accidents of the type herein involved, as there were no side rails on the frame. The District Court dismissed the action on defendant's motion and the plaintiff appealed. The United States Court of Appeals affirmed the decision of the lower court, stating that General Motors had no duty to make its product safe for any unintended use. The court further stated that "[t]he intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur."[2] *Evans v. General Motors Corp.* 359 F.2d 823 (7th Cir. 1966).

The court, in the case at bar, does not specifically state the duty of a manufacturer, but implies that it is merely to make a product safe for its intended use. However, Judge Kiley, in the dissenting opinion, argues that the duty also includes the requirement that a product be safe for uses which are expected and foreseeable, even if not within the intended use of the manufacturer. This note will examine the manufacturer's common-law duty to the consumer in relation to injuries which may arise out of a design defect in the product.

The *Restatement of Torts* discusses a manufacturer's duty in Section 398, where it states there is a duty to design safely for "the uses for which it [the product] is manufactured."[3] Section 395[4] of the *Restatement*, al-

[1] The court in this case discounted the strict liability and warranty aspects of this action and proceeded to render its decision upon the theory of negligence. Consequently, this case note will concentrate only upon that area of negligence law discussed in the court's opinion.

[2] Evans v. General Motors Corp., 359 F.2d 823, 825 (7th Cir. 1966).

[3] RESTATEMENT (SECOND), TORTS § 398 (1965).

[4] "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer

though not dealing with the design and planning aspects of a product, sets out the same duty with respect to manufacturing. The court, in the *Evans* case, impliedly utilized this standard. The comments following Section 395 provide a better explanation of the nature and scope of a manufacturer's duty. Section 395 comment c states:

In order that the manufacturer of a chattel shall be subject to liability under the rule stated in this section, it is not necessary that the chattel be one the use of which is intended to affect, preserve, or destroy human life. The purpose which the article, if perfect is intended to accomplish is immaterial. The important thing is the harm which it is likely to do if it is imperfect.[5]

Comment j goes on to state:

The liability stated in this section is limited to persons who are endangered and the risks which are created in the course of uses of the chattel which the manufacturer should reasonably anticipate. In the absence of special reason to expect otherwise, the maker is entitled to assume that his product will be put to a normal use, for which the product is intended or appropriate; and he is not subject to liability when it is safe for all such uses and harm results only because it is mishandled in a way which he has no reason to expect, or is used in some unusual or unforeseeable manner.[6]

It can readily be seen that comment j does not limit the manufacturer's liability to injuries resulting from only intended use. Thus the *Restatement of Torts* takes into account that forseeable unintended uses of the product may be dangerous. In such a situation the *Restatement* places a duty on the manufacturer to warn of the pending peril or to use other reasonable means to guard against such danger. The proposition set forth by the *Restatement* appears to be supported by case law.

As early as 1927, in the case of *Davlin v. Henry Ford*,[7] the United States Court of Appeals held that a manufacturer had a duty ". . . to use reasonable care in employing designs, selecting materials, and making assemblies, in the construction of a tractor which would fairly meet any emergency of use which could reasonably be anticipated."[8] This reasoning was adopted by the Supreme Court of Washington in *Reusch v. Ford Motor Co.*[9] In this case the plaintiff's truck became mired in mud. In an attempt to remove the truck the engine was strained, causing sparks

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should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied." RESTATEMENT (SECOND), TORTS § 395 (1965).

[5] RESTATEMENT (SECOND), TORTS § 395, comment *c* at 327 (1965).

[6] RESTATEMENT (SECOND), TORTS § 395, comment *j* at 330 (1965).

[7] 20 F.2d 317 (6th Cir. 127).

[8] *Id.* at 319.

[9] 196 Wash. 213, 82 P.2d 556 (1938).

to be generated, which ignited the gasoline. Even though the plaintiff failed to recover due to lack of evidence, the court employed the rule in *Davlin* as a controlling standard which a manufacturer must follow.

In recent years there has been a trend toward holding manufacturers liable for failure to give warning of danger that may arise when a product is put to a foreseeable though unintended use. In *Haberly v. The Reardon Company*,[10] plaintiff, a 12 year old boy, lost the sight of his eye. The injury resulted from plaintiff's father accidentally striking the child's eye with a paint brush with defendant's lye base paint on it. The court held the defendant had a duty to warn the purchaser of the danger, even though the foreseeable injury was beyond the intended use of the product.

The decision in *Spruill v. Boyle-Midway Inc.*[11] also provides a clear definition of a manufacturer's duty. In *Spruill*, the plaintiff's 14 month old infant died when he swallowed a small amount of red furniture polish. A decisive issue was whether or not plaintiff's use of the product was foreseeable. Here again the use of the product was beyond that intended by the manufacturer. The court settled the matter by stating:

> Intended purpose is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence. . . . [H]e (the manufacturer) must also be expected to anticipate the environment which is normal for the use of his product.[12]

One of the leading treatises on this subject[13] reiterates the view adopted by many courts and the *Restatement of Torts*. They state that:

> The maker of goods is bound to foresee and guard against only unreasonable risks which result from some use of the product which a reasonable manufacturer would anticipate as likely enough to be taken into account.[14]

Not only do they offer an example which directly applies to the *Evans* case, but the example also illustrates the foreseeability of an automobile accident. "Automobiles will almost surely be driven, sometimes at high speed, and often where other vehicles and pedestrians are present."[15] *Ford Motor Company v. Zahn*[16] directly supports this premise. The plaintiff was injured while riding in an automobile which made a sudden stop to avoid an accident. The thrust of the stop caused the plaintiff to be thrown

[10] 319 S.W.2d 859 (Mo. 1958).

[11] 308 F.2d 79 (4th Cir. 1962).

[12] *Id.* at 83.

[13] 2 HARPER & JAMES, THE LAW OF TORTS (1956).

[14] 2 HARPER & JAMES, *op. cit. supra* note 13, § 28.3.

[15] 2 HARPER & JAMES, *op. cit. supra* note 13, § 28.6.

[16] 265 F.2d 729 (8th Cir. 1959); *accord.* Roberts v. United States, 316 F.2d 489 (3d Cir. 1963); Bird v. Ford Motor Co., 15 F.Supp. 590 (D.N.Y. 1936); Eitchen v. Central Minnesota Power Cooperative Assn., 224 Minn. 180, 28 N.W.2d 862 (1947).

against the dashboard resulting in severe injury to his eye. The court held that it was a foreseeable risk that automobiles may crash. Statistics further illustrate this point. The data of the National Safety Council show that there is one motor vehicle death every eleven minutes and the equivalent of one injury every nineteen seconds. In 1964 there was a total of 47,000 deaths caused by motor vehicles. In fact in Illinois alone, there were 2,207 traffic deaths in 1964.[17]

The duty required of a manufacturer involves reasonable care to guard against foreseeable though unintended uses. It extends to those areas of peril, such as an automobile accident, that a manufacturer can readily foresee and anticipate. Once this has been established with respect to the manufacture of a product it must necessarily follow there is a correlative duty to prevent design defects.

The *Restatement of Torts* and case law hold that a manufacturer must employ due care in the designing (or planning stage) of a product. The defect alleged in the *Evans* case arose at the planning stage and not at the building stage.

> Negligent construction is carelessness in the actual building of a thing, such for example, as neglecting to put proper bracing in the wings of an airplane, or putting improper material or something of the sort.[18]

Improper or negligent design involves improper planning or a fault arising at the drawing board stage:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.[19]

Comment j of Section 395 of the *Restatement of Torts*[20] requires that a manufacturer must use due care in the design or plan of a product in order to avoid injury to the consumer. The majority of American jurisdictions support this idea,[21] and liability has been found for various types of design defects on many different items.

The Court, in *Carpini v. Pittsburgh & Weirton Bus Company*[22] found a manufacturer liable for the negligent design of pet-cocks that controlled

[17] NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 1965 Edition, 40, 41 (1965).

[18] Maynard v. Stinson Aircraft, 1940 U.S. Av. 71, 83.

[19] RESTATEMENT (SECOND), TORTS § 398, at 336 (1965).

[20] RESTATEMENT (SECOND), TORTS § 395, comment *f* at 328 (1965).

[21] AMERICAN LAW OF PRODUCTS LIABILITY §§ 2:59-2:69 (Hursh ed. 1961). See also, Annot., 76 A.L.R.2d 91 (1961).

[22] 216 F.2d 404 (3d Cir. 1954).

the air brake system of a bus. The pet-cock was designed to suspend from the frame of the bus. When the bus was fully loaded, the pet-cock was very close to the ground. The bus struck an object on the road which sheared off the pet-cock and caused the vehicle to crash. Liability was found despite the fact that the design had never before caused an accident.

The Pittsburgh-Des Moines Steel Company[23] was brought to trial for its negligent design of a compressed air tank. The new design was for a cylindrical tank instead of the usual spherical shape. When compressed gas was injected into the tank it exploded killing the plaintiff. Negligent design was a prime issue and the defendant was held liable. As early as 1927 the United States Court of Appeals[24] said that a manufacturer's ". . . duty was to use reasonable care in employing designs, selecting materials and making assemblies. . . ."[25] Product design may thus lead to liability in negligence, that is, if the design is defective and if the defect leads to injury. Moreover, as pointed out above, liability is found even though the injury was caused while the product was being put to an unintended but foreseeable use.[26]

In the instant case, *Campo v. Scofield*[27] is cited to support the position that the product need only be fit for its intended purpose. This case which the court adopted does not necessarily apply to the situation in the case at hand. In *Campo,* the court was faced with a situation where a worker put his hand in a machine used to shear off the tops of onions. The machine was obviously dangerous. The court stated that there is no liability on the part of a manufacturer if a person using the machine is aware of the risk and assumes it. This was not the factual situation in the *Evans* case. It is not disputed that a manufacturer can foresee the possibility that one can cut his finger on a knife, but that is a danger that can be perceived by all, and steps can be taken to avoid the cut.

A defect in the design of an automobile is of another nature. The defect is latent, the driver knows he may get into a collision and so does the manufacturer. However, the manufacturer is the only one who can foresee that the side of the car may collapse upon impact because it was designed with an "X" frame.

[23] Moran v. Pittsburgh-Des Moines Steel, 183 F.2d 467 (3d Cir. 1950).

[24] Davlin v. Henry Ford, *supra* note 7.

[25] *Id.* at 319.

[26] *Accord:* Goullon v. Ford Motor Co., 44 F.2d 310 (6th Cir. 1930); Northwest Airlines v. Glenn L. Martin, 224 F.2d 120 (6th Cir. 1955); United States Radiator v. Henderson, 68 F.2d 87 (10th Cir. 1933); Noel v. United States Aircraft, 342 F.2d 232 (D. Del. 1963); Brooks v. Allis Chalmers, 163 Cal. App. 20, 329 P.2d 575 (1958); Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 79 N.W.2d 688 (1956).

[27] 301 N.Y. 468, 95 N.E.2d 802 (1950).

In conclusion the court could have easily found that the dissent, as stated by Judge Kiley, exemplifies the current trend. But, whether or not the majority of American jurisdictions will adopt this view remains a matter of conjecture.

Philip Wolin

ZONING—AUTHORITY OF MUNICIPALITY TO DEFINE FAMILY

The owner of a house located in a single-family residence district leased the premises to four unrelated young men. Claiming that the dwelling was not being used as a single-family residence within the meaning of its zoning ordinance, the city of Des Plaines brought suit to enjoin occupancy by the lessees. The injunction was granted by the circuit court, holding that the lessees did not constitute a family within the meaning of the Des Plaines zoning ordinance. Upon appeal, the Supreme Court of Illinois reversed, finding that the enactment of a zoning ordinance which so defined family as to prohibit the occupancy of this dwelling by four unrelated men was beyond the authority delegated to the city by the Illinois General Assembly's enabling statute.[1] *City of Des Plaines v. Trottner,* 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

The need for zoning has been recognized since early Roman Law,[2] and as it exists today, "It consists of a general plan to control and direct the use and development of property in a municipality or a large part of it by dividing it into districts according to the present and potential use of the properties."[3] While single-family residence zoning is a familiar, perhaps universal characteristic of zoning ordinances, questions relating to the precise definition of the word "family" have not been involved in Illinois zoning decisions.[4] Although various criteria have been employed by Illinois municipalities to define family in their zoning ordinances,[5] the *Trott-*

[1] ILL. REV. STAT. ch. 24, § 11-13-1 (1965).

[2] YOKLEY YOKLEY, ZONING LAW AND PRACTICE, § 1-3 (3rd ed. 1965).

[3] State v. Huntington, 145 Conn. 394, 399, 143 A.2d 444, 447 (1958). Reaffirming the definition in the text as it first appeared in Miller v. Town Planning Commission, 142 Conn. 265, 269, 113 A.2d 504, 505 (1956).

[4] City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

[5] Section 1 of the Rockford, Illinois zoning ordinance defines a family as follows: "Any number of individuals living and cooking together on the premises as a single housekeeping unit." Similar definitions appear in the zoning ordinances of Ottawa, Quincy, Wilmette and Skokie, Illinois. In contrast, the ordinances of Winnetka and Oak Park define a family as a group of individuals "related by blood or marriage." Maywood, Illinois Zoning Ordinance, Art. 11, § 2(15) (1952) permits a family to consist of unrelated persons, but in no event, in such a case, shall the group be more