
Torts - Strict Liability - Strict Liability not Applicable to Used Car Dealers Absent Actual Creation of Defect - Peterson v. Lou Backrodt Chevrolet Co., 61 Ill.2d 17, 329 N.E. 2d 785 (1975)

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cases of medical malpractice the legislature provided that a cause of action accrues from the time the negligence is discovered or should with reasonable diligence be discovered; however, the action must be brought within ten years of the date of the negligent act.⁴¹ By extending this statute to other areas of professional negligence, or by enacting a separate statute applicable to professional negligence cases other than medical cases, the legislature could achieve the purposes of the statute of limitations and maintain the flexibility of the balancing mechanism.

Diane Kosmach

Torts—Strict Liability—STRICT LIABILITY NOT APPLICABLE TO USED CAR DEALERS ABSENT ACTUAL CREATION OF DEFECT—*Peterson v. Lou Backrodt Chevrolet Co.*, 61 Ill.2d 17, 329 N.E. 2d 785 (1975).

Recently, the Illinois Supreme Court in *Peterson v. Lou Backrodt Chevrolet Co.*,¹ refused to extend strict liability to the used car dealer.² The case arose when the driver of a six-year-old used car hit two pedestrians, both minors, killing one and permanently injuring the other. Plaintiff sued under strict liability in tort, alleging that the automobile was not reasonably safe when sold by the used car dealer because it contained a defective braking system. The trial court dismissed the strict liability count on grounds that a strict liability cause of action requires an allegation that the defect existed when it left the manufacturer's control, not the used car dealer's.³

The appellate court reversed the trial court.⁴ It took the position that

41. ILL. REV. STAT. ch. 83, § 22.1 (1973).

1. 61 Ill.2d 17, 329 N.E.2d 785 (1975).

2. *Id.* at 20, 329 N.E.2d at 786. The complaint alleged that the used car was defective when sold by the dealer. It did not allege that the used car dealer caused the defect. For a discussion of this point see note 13 *infra*.

3. *Id.* at 19, 329 N.E.2d at 786. This ruling relies upon *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), the leading Illinois strict liability case.

Suvada stated the requisite standard of proof for the strict liability in tort of a manufacturer in a defective products case as proof that (1) injury or damage resulted from a condition of the product, (2) the condition was an unreasonably dangerous one, and (3) the condition existed at the time it left the *manufacturer's control*. 32 Ill.2d at 623, 210 N.E.2d at 188.

4. 17 Ill.App.3d 690,698, 307 N.E.2d 729,735 (2d Dist. 1974).

the doctrine of strict liability in tort as it has evolved in Illinois requires that strict liability be applied to used car dealers.⁵ It reasoned that the *Suvada* criteria of imposing strict liability upon the party "creating the risk and reaping the profit"⁶ applies not only to the party creating the defect; it also applies to the party that creates the risk of injury through placement of a defective product into the stream of commerce.⁷ Since the used car dealer does, in fact, place products into the stream of commerce, he should be liable for the risk of injury which these products create.⁸

The Illinois Supreme Court, in reversing, limited the scope of "creation of risk" as defined by the appellate court. The "creation of risk" was restricted to the actual creation of a defect.⁹ Therefore, it refused to require the used car dealer to assume the burden of defects caused by other parties.¹⁰ The court recognized that strict liability has also been imposed upon parties in the original distributive chain, even though they did not actually create the defect.¹¹ However, it reasoned that

5. *Id.* at 692-93, 307 N.E.2d at 731.

6. 32 Ill.2d at 619, 210 N.E.2d at 186.

7. 17 Ill.App.3d at 693, 307 N.E.2d at 731.

8. *Id.* The appellate court noted that its holding extending strict liability in tort to used car dealers was premised upon the policy considerations expressed in *Suvada*. 32 Ill.2d at 619, 210 N.E.2d at 186. The appellate court stated that while a used car dealer does not "create the risk" in the sense of that phrase's use within *Suvada* (*i.e.* the actual creation of a defect by the manufacturer), a used car dealer does place "motor vehicles into the stream of commerce in a manner not unlike that of a manufacturer or retailer." 17 Ill. App.3d at 693, 307 N.E.2d at 731.

The appellate court's treatment of the "creation of risk" accomplishes two objectives. One, the business of selling used cars is brought within the policy objectives of strict liability as expressed in *Suvada* by stressing the risk of injury that arises when a business enterprise places products within the stream of commerce. Two, an allegation tracing the defect to the manufacturer's control is no longer necessary because the used car dealer's risk creation is analogous to that of a manufacturer or retailer.

9. 61 Ill.2d at 20-21, 329 N.E.2d at 786-87. The Illinois Supreme Court stated that one of the policy considerations for a manufacturer's strict liability in tort is the allocation of loss to those "who have created the risk and reaped the profit by placing the product in the stream of commerce." *Id.* at 20, 329 N.E.2d at 786-87. This consideration is distinguished by the court from those considerations which justify the imposition of strict liability upon the wholesaler and retailer. *See* note 11 *infra*.

10. *Id.* at 21, 329 N.E.2d at 787. The Illinois Supreme Court stated that the used car dealer is outside the "original producing and marketing chain." Since parties within that chain are protected by a right of indemnity, the court notes that ultimate liability will be imposed upon the party creating the risk. However, the court implies that such a right of indemnity is not readily available to the used car dealer since he is outside this chain and thus, would assume the burden of loss even though he did not create the risk.

11. *Id.* at 20, 329 N.E.2d at 787. The court notes that a "wholesaler or retailer who neither creates nor assumes the risk is entitled to indemnity" and concludes that "al-

liability upon wholesalers and retailers is justifiable for the following reasons: parties in the original distributive chain can influence the manufacturer as to the safety of a product, and, unless they assume the risk of injury, they have a right to indemnification from the manufacturer.¹²

Since it was not alleged by the parties in *Peterson* that the used car dealer created the defect, he could not be held primarily liable for the injuries.¹³ Therefore, the court implies that imposing liability upon him could only be justifiable if he had a right to indemnification from the party that created the defect.¹⁴ Because there were no allegations that the defect existed when it left the control of the manufacturer,¹⁵ or any subsequent holder, the used car dealer could not readily look to the party causing the defect for indemnification of his losses. The court suggests that it would be unfair to impose upon a used car dealer in these circumstances the burden of determining who in fact created the defect, the original manufacturer, wholesaler, retailer or other holders of the used car. Such a determination creates an impossible burden and therefore, the used car dealer would "in effect become an insurer against defects."¹⁶

In refusing to impose strict liability upon used car dealers, the Illinois Supreme Court ignores essential considerations underlying the imposition of such liability upon wholesalers and retailers. Strict liability exists to vindicate the injured plaintiff by shifting the burden of loss to the party responsible for the product's condition.¹⁷ Wholesalers and re-

though liability is imposed upon anyone who is engaged in the business of selling the product . . . the loss will ordinarily be ultimately borne by the party that created the risk." The Illinois Supreme Court ignored the case of *Galluccio v. Hertz Corp.*, 1 Ill. App.3d 272, 274 N.E.2d 178 (5th Dist. 1971), *appeal denied* 49 Ill.2d 575 (1973). In *Galluccio*, a bailor-for-hire, who placed leased motor vehicles into the stream of commerce, was held actionable upon strict liability in tort for injuries resulting from a defective condition of the leased vehicle during the specific rental period. Certainly, a bailor-for-hire is not within the "original producing and marketing chain," a distinguishing factor which the court in *Peterson* found to preclude extension of strict liability to used car dealers.

12. 61 Ill.2d at 20, 329 N.E.2d at 787.

13. *Id.* at 21, 329 N.E.2d 787. Since the complaint did not allege that the used car dealer created the defect, the court did not specifically decide the question of imposing strict liability upon the used car dealer that created the risk. However, in citing *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 344-45, 322 A.2d 440, 444 (1974) (used car dealer actionable upon strict liability in tort for injury resulting from his defective work, repairs or replacement of parts upon a used car prior to sale), the court suggests that it is in basic agreement with its holding.

14. 61 Ill.2d at 20-21, 329 N.E.2d at 787. See notes 9 and 11, *supra*.

15. *Id.*

16. *Id.* at 21, 329 N.E.2d at 787.

17. See *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); Wade, *Strict*

tailers do not generally create the defect within a product. Yet their integral role in the distributive process requires their accountability in strict liability for injuries resulting from a defective condition.¹⁸ Because of the realistic capabilities of an ongoing business enterprise, the wholesaler or retailer is deemed capable of controlling the condition of the product either directly or indirectly through pressure upon the manufacturer.¹⁹

The power to control is equally available to the used car dealer. Therefore, characterizing the dealer as outside the initial distributive process clouds the issue by neglecting the essential control consideration.²⁰ Several avenues of control are available to the used car dealer. First, he has the choice of refusing to purchase or otherwise acquire a particular used car (and offer it for resale) when he believes it is unsafe.²¹ Second, his expertise permits him to detect serious defective conditions through reasonable inspection.²² Finally, the used car dealer, like the original retailer or wholesaler, is capable of influencing the manufacturer as to the motor vehicle's safety. The manufacturer has as intimate and important a business relation with the used car dealer as with the parties in the original distributive process. The used car business enlarges the market for the automobile industry's products. More automobile parts are manufactured and sold through the increased reintroduction of used cars into the stream of commerce. Also, by reintroducing used cars into commerce, the used car dealer promotes the reliability of a particular model while providing free advertising to the manufacturer. Clearly, the used car dealer occupies a bargaining position against the manufacturer as strong as the wholesaler's or retailer's.

The Illinois Supreme Court neglects the similarity between parties in the original distributive chain and the used car dealer, and instead bases its decision primarily upon the differences in accessibility to indemnification from the party actually responsible for the defect.²³ The court wrongfully assumes that a primary consideration in expanding strict liability to include distributive parties is that these parties could be

Tort Liability of Manufacturers, 19 Sw. L.J. 5,20-21 (1965).

18. 61 Ill.2d at 20, 329 N.E.2d at 787. See also *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339,344, 247 N.E.2d 401,404 (1969); *Sweeney v. Matthews*, 94 Ill.App.2d 6, 13-14, 236 N.E.2d 439,442 (1st Dist. 1968).

19. See *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d at 344, 247 N.E.2d at 404; *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256,262-63, 391 P.2d 168, 171-72, 37 Cal.Rptr. 896,899-900 (1964).

20. 61 Ill.2d at 20, 329 N.E.2d at 786.

21. See 17 Ill.App.3d at 697, 307 N.E.2d at 734.

22. *Id.*

23. See notes 9-10 *supra*.

readily indemnified.²⁴ The difficulty or facility in obtaining indemnity has been a negligible consideration in extending strict liability to wholesalers and retailers.²⁵ Primary concern is with providing an injured plaintiff with an available defendant upon whom the initial loss could be justifiably placed.²⁶ Since a wholesaler or retailer is in a position to both profit from the distribution of a product, and control the condition, he should shoulder some of the responsibility for injuries in the event the product proves defective.²⁷ That the ultimate loss would or would not be borne by the party responsible for the defect did not deter the imposition of strict liability upon the wholesaler or retailer.²⁸ Prior court decisions suggest the interest in permitting the plaintiff a true remedy for his injuries outweighs the interest of the wholesaler or retailer to indemnity.²⁹

The used car dealer's role in controlling the condition of the used car, and profiting from its distribution justifies the imposition of initial loss upon him.³⁰ Through the distribution of these used cars, the dealer

24. 61 Ill.2d at 20, 329 N.E.2d at 787. The court suggests that since the used car dealer would encounter great difficulty in determining which of the many parties holding the defective vehicle actually created the defect, he should not be saddled by strict liability. *Id.* at 21, 329 N.E.2d at 787.

25. In neither the *Dunham* case nor the *Sweeney* case, *supra* note 18, was the wholesaler's or retailer's access to indemnity forwarded as a justification for their strict liability in tort. Notwithstanding that a right to indemnity exists against the party in the distributive chain who created the risk, *see Suvada*, 32 Ill.2d at 624, 210 N.E.2d at 189, this consideration was negligible in extending strict liability to wholesalers and retailers. Aside from a right of indemnity, the costs of assuring an injured plaintiff maximum protection can be adjusted through the course of a continuing business relationship between a manufacturer and a wholesaler or retailer. *See Vandermark v. Ford Motor Co.*, 61 Cal.2d at 262-63, 391 P.2d at 172, 37 Cal.Rptr. at 900.

26. *See Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill.App.2d 315,334, 229 N.E.2d 684, 693 (4th Dist. 1967), *aff'd*, 42 Ill.2d 339, 247 N.E.2d 401 (1969); *Vandermark v. Ford Motor Co.*, 61 Cal.2d at 262, 391 P.2d at 171, 37 Cal.Rptr. at 899.

27. *See Vandermark v. Ford Motor Co.*, 61 Cal.2d at 262-63, 391 P.2d at 171-72, 37 Cal.Rptr. at 899-900.

28. *See* note 25 *supra*.

29. *See* note 26 *supra*; *Sweeney v. Matthews*, 94 Ill.App.2d 6,13-14, 236 N.E.2d 439,442 (1st Dist. 1968).

30. The imposition of strict liability upon a used car dealer would not necessarily subject him to absolute liability. A limiting factor upon the liability of a used car dealer is required proof of an "unreasonably dangerous" condition of the used car causing the injury. In *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (Law Div. 1975) (used car dealer liable upon strict liability in tort for injury resulting from safety defect of used tractor unit), the New Jersey Superior Court discusses the useful purpose which proof of the "unreasonably dangerous" condition may serve to limit the imposition of an unfair burden upon sellers of used products. 133 N.J. Super. at 286-94, 336 A.2d at 68-73. *See also Cornelius v. Bay Motors, Inc.*, 258 Ore. 564, 574-77, 484 P.2d

perpetuates the risk of injury from a defective motor vehicle.³¹ As to indemnity, the burden imposed upon parties in the distributive chain to seek the creator of the defect should likewise be imposed upon the used car dealer.³² The relative difficulty in obtaining indemnification is a consideration; however, in view of the used car dealer's position in the commercial market, it should not outweigh the need for effective remedies to an injured plaintiff.

Mark Spadaro

Workmen's Compensation—Compensable Injuries—INJURIES ARISING OUT OF PERSONAL DISPUTES MAY BE WORK-RELATED AND THEREFORE COMPENSABLE—*Converters, Inc. v. Industrial Commission*, 61 Ill.2d 218, 334 N.E.2d 155 (1975).

In order for an employee to qualify for workmen's compensation benefits, his injuries must arise out of and in the course of employment.¹ By

299, 304-06 (1971) (jury verdict for defendant used car dealer that defect in seven-year-old used car was not "unreasonably dangerous" upheld as proper under doctrine of strict liability in tort).

31. A 1973 survey of the used car market indicates that there are more than 100 million used cars in the United States. N.Y. Times, Oct. 30, 1973, at 57, col. 7. The auto industry estimates sales of 25 million used cars in 1974, including private trading. N.Y. Times, Dec. 28, 1974, at 31, col. 4. In 1973, sales of new automobiles by domestic and foreign manufacturers were approximately 11,433,325. N.Y. Times, Jan. 7, 1975, at 43, col. 3. This figure dropped to 8,856,884 in 1974. N.Y. Times, Jan. 7, 1975, at 43, col. 3. In addition, dealers at United States-Canadian wholesale auctions purchased 1.5 million used cars. N.Y. Times, Dec. 28, 1974, at 35, col. 6-7. Apparently, used motor vehicles acquired by dealers account for a conservative 13% of annual sales by domestic and foreign manufacturers. (This percentage is based on 1973 statistics and does not include trade-ins to dealers.)

32. Such a burden would not be unreasonable. Liability resulting from defects discoverable upon reasonable inspection or otherwise within the dealer's control, should rest with the dealer as part of an obligation to provide a reasonably safe car. See 61 Ill.2d 17,22, 329 N.E.2d 785,787 (Goldenhersh, J., dissenting).

Liability for defects beyond the scope of the dealer's control, such as structural or metallurgical defects traceable to the manufacturer, should ultimately rest with that party. But, in the interest of protecting the injured plaintiff, the used car dealer should be liable initially for the loss. This would not prejudice the dealer because through the process of strict liability indemnity the used car dealer could shift the burden of ultimate loss to the distributive party responsible for such defect if he chose to do so.

1. See ILL. REV. STAT. ch. 48, §§ 138.1 *et seq.* (1975).

The heart of every compensation act, and the source of most litigation in the compensation field, is the coverage formula. Forty-two states, and the Long-