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TORTS—DOCTRINE OF STRICT LIABILITY MEETS A  
COMPARATIVE NEGLIGENCE STATUTE

Donald Dippel, a patron of the Sciano tavern, and two other men were moving a large coin-operated pool table to a position within the tavern where it could be used. While moving it, the front leg assembly collapsed and the table top fell on plaintiff's left foot, traumatically amputating two of his toes. Dippel then brought this action to recover for personal injuries against the table's manufacturer, sales distributor, owner-lessor, and Tony and Dottie Sciano, doing business as Tony and Dottie's Tavern, who leased the table and offered its use to its patrons for a fee. Plaintiff's third count was against the manufacturer and the sales distributor alleging breach of express and implied warranties of merchantable quality and reasonable fitness for the particular purpose of being utilized as a pool table and that plaintiff relied thereon as an ultimate user. The sales distributor demurred to this charge upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer for the reason that there was no privity of contract between the plaintiff and the sales distributor. On appeal, the Supreme Court of Wisconsin adopted the rule of strict liability in tort, for products-liability cases, as set forth in the *Restatement of Torts*.<sup>1</sup> The court concluded that the facts alleged to support the action on warranty would not be sufficient to constitute a cause of action within the newly adopted rule of "strict liability," and sustained the demurrer while granting leave to plead over. Wisconsin thereby became the sixth state in which the highest court has expressly adopted the rule of strict liability in tort as set forth in the *Restatement*, and the eighteenth state to so adopt the general doctrine of strict liability in tort.<sup>2</sup> *Dippel v. Sciano*, — Wis. 2d —, 155 N.W.2d 55 (1967).

<sup>1</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965): "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

<sup>2</sup> *Garthwait v. Burgio*, 153 Conn. 284, 289, 216 A.2d 189, 192 (1965); *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441, 446 (Ky. 1965); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 118 (Miss. 1966); *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1956); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967); *Dippel v. Sciano*, — Wis. 2d —, 155 N.W.2d 55 (1967). As to the status of the law in other jurisdictions adopting the doctrine of strict liability in tort, see CCH PRODUCTS LIABILITY REPORTER ¶¶ 4050-90; Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 794-798 (1966).

Although the doctrine of strict liability was adopted, the real significance of the court's opinion lies in the fact that the defense of contributory negligence was made available to the defendant. This defense was allowed because of a desire to utilize the Wisconsin comparative negligence statute,<sup>3</sup> and thereby accomplish what the court believed to be a socially desirable allocation of risks between the plaintiff-user or consumer and the defendant-seller. Since liability based upon negligence is essential to the operation of the statute, the newly adopted "strict liability" was treated as "negligence per se," for the purpose of applying the comparative negligence statute.

After noting the common law basis for requiring privity in an action for breach of warranty, express or implied,<sup>4</sup> the court referred to the cases of *Smith v. Atco Company*,<sup>5</sup> and *Strahlendorf v. Walgreen Company*.<sup>6</sup> The *Atco* case involved an action to recover damages for death and injury to mink allegedly caused by their coming into contact with a wood preservative manufactured by one defendant and sold by co-defendant. No privity of contract existed between plaintiff and defendants. The court held that "in a tort action for negligence against a manufacturer, or a supplier, whether or not privity exists is wholly immaterial."<sup>7</sup> While denying plaintiff's prayer for relief in an action against a retailer for injuries suffered when struck by a toy airplane, the *Strahlendorf* court indicated a possible revision in the prevailing law requiring privity of contract for recovery in an action based upon breach of implied warranty.<sup>8</sup> This gradual erosion of the principle of privity considered in conjunction with the conceptual difficulties attendant to the adop-

<sup>3</sup> Wis. Stat. § 895.045 (1965). "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

<sup>4</sup> *Winterbottom v. Wright*, 10 M. & W. 109, 112, 152 Eng. Rep. 402, 404 (1842), where the court, in holding that a third party could not maintain an action against the manufacturer of a mail-coach for injuries sustained due to the defective construction of the coach because the parties were not in privity, stated: ". . . if we allow this action it might be the means of letting in upon us an infinity of actions."

<sup>5</sup> 6 Wis. 2d 371, 94 N.W.2d 697 (1959).

<sup>6</sup> 16 Wis. 2d 421, 114 N.W.2d 823 (1962).

<sup>7</sup> *Smith v. Atco Co.*, 6 Wis. 2d 371, 383, 94 N.W.2d 697, 704 (1959).

<sup>8</sup> *Strahlendorf v. Walgreen Co.*, 16 Wis. 2d 421, 435, 114 N.W.2d 823, 831 (1962). "When this court declared by footnote in *Smith v. Atco Co.* [*supra* note 7] that Wisconsin requires privity in breach-of-implied-warranty cases, it was merely stating the then present status of our law. This does not mean that this court will adhere to this rule forever, regardless of the persuasiveness of the arguments made, or authorities cited, in favor of changing it. However, we do not deem the instant case a proper one in which to give consideration to this question."

tion of a theory of strict liability whose remedy is one of "warranty,"<sup>9</sup> persuaded the *Dippel* court to adopt the strict-liability-in-tort doctrine.

Aware of the fact that the issue presented by the case was resolved with the adoption of a theory of strict liability and consequent rejection of the privity requirement,<sup>10</sup> the court further held, by way of dictum, that the defense of contributory negligence would be available to the defendant.<sup>11</sup> In order to accomplish this unique result the court first stated that "the liability imposed is . . . akin to negligence per se."<sup>12</sup> Since the Wisconsin comparative negligence statute<sup>13</sup> has been interpreted to permit plaintiff's failure to exercise ordinary care for his own safety to be compared with negligence per se,<sup>14</sup> the court felt this failure on plaintiff's part could also be compared to this newly adopted liability because it is akin to negligence per se. Under the rule promulgated in *Osborne v. Montgomery*,<sup>15</sup> the violation of a standard of care fixed by statute or decision may be treated as negligence as a matter of law.<sup>16</sup> Since section 402A of the *Restatement* was adopted by the *Dippel* decision, it has become a standard of care the breach of which

<sup>9</sup> The court's opinion contains a quotation from Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966), wherein the common avenues available to the defendant permitting him to avoid liability in warranty are set out. While these problems were considered by the court to be prohibitive to the adoption of a warranty theory of liability, this is true only in the sense that the legal profession has applied contract rules to an action for breach of warranty. It would seem that in most jurisdictions an action would lie in tort for breach of warranty even though the parties have not dealt with one another. See PROSSER, TORTS § 97 at 679 (3d ed. 1964); Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415 (1911). But in *Pierce v. Carey*, 37 Wis. 232, it was held that in an action on a simple warranty the only remedy was *ex contractu*, whereas an action *ex delicto* would lie for breach of a fraudulent warranty.

<sup>10</sup> "While this discussion of contributory negligence, assumption of risk and comparative negligence may be obiter dicta because those issues are not before us on this appeal, we deem that a reference to the problem is appropriate as a guide for the trial of this case in the event it is tried upon the theory of special liability of the seller of products for physical harm to user or consumer as set forth herein." *Dippel v. Sciano*, — Wis. 2d —, —, 155 N.W.2d 55, 65 (1967).

<sup>11</sup> *Id.* at —, 155 N.W.2d at 63.

<sup>12</sup> *Id.* at —, 155 N.W.2d at 64.

<sup>13</sup> WIS. STAT. § 895.045 (1965).

<sup>14</sup> *Hales v. City of Wauwatosa*, 275 Wis. 445, 82 N.W.2d 301 (1957); *Dinger v. McCoy Transp. Co.*, 251 Wis. 265, 29 N.W.2d 60 (1947).

<sup>15</sup> 203 Wis. 223, 234 N.W. 372 (1931).

<sup>16</sup> *Id.* at 240, 234 N.W. at 378. "In all those cases where it is said that, the performance of the wrongful act being admitted, the defendant is guilty of negligence as a matter of law or that the act is negligent *per se*, the case is one which admits of no question as to reasonable anticipation or foreseeability. These cases are those in the main where the act amounts to a violation of a standard of care fixed by statute (ordinance) or previous decision."

will be treated as negligence per se for the purpose of applying the comparative negligence statute.

While neither comment *n* of section 402A<sup>17</sup> nor Dean Prosser,<sup>18</sup> the Restatement reporter, share the court's opinion that contributory negligence should be allowed as a defense to the liability established by section 402A, it does not appear that either envisioned the possibility of limiting rather than precluding liability when the plaintiff's negligence contributed to his injury. The function of the comparative negligence statute is to diminish the plaintiff's damages in proportion to the amount of his own negligence.<sup>19</sup> If plaintiff's negligence is equal to or greater than defendant's negligence, only then will recovery be denied.<sup>20</sup>

Traditionally, contributory negligence has been held not to constitute a defense to strict liability.<sup>21</sup> Since Wisconsin permits contributory negligence as a defense to negligence per se,<sup>22</sup> the distinguishing features of these two theories of liability must be explored to determine if any inconsistencies arise from the present holding that contributory negligence can be a defense in part or in whole to strict liability. Strict liability exists whenever defendant is held responsible for his conduct regardless of his fault.<sup>23</sup> But, this is not to say that he is liable for any injury to the plaintiff that might occur while he is using the product. Such liability would be that of an insurer and would require the term "strict" to be interpreted in its absolute sense. Because of the necessity of proving the product was "in a defective condition unreasonably dangerous . . ." <sup>24</sup> when it left the hands of the seller, liability is "strict" only in the sense that the defendant's negligence need not be proven. It is no longer material that the seller was not responsible for, nor knew or had reason to know of, the defective condition which was unreasonably dangerous to the plaintiff. The sale of such a product will be treated as negligence regardless of the degree of care exercised by the seller. This is precisely the same analysis involved when a safety statute is found to have been violated.<sup>25</sup>

<sup>17</sup> RESTATEMENT (SECOND) OF TORTS § 402A comment *n* at 356 (1965).

<sup>18</sup> Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 840 (1966).

<sup>19</sup> Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

<sup>20</sup> Frei v. Frei, 263 Wis. 430, 57 N.W.2d 731 (1953).

<sup>21</sup> PROSSER, TORTS, § 78 (3d ed. 1964).

<sup>22</sup> *Supra* note 14.

<sup>23</sup> Prosser, *supra* note 21, § 74.

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>25</sup> If plaintiff is a member of the class to be protected and defendant's violation is a substantial factor in the causation of the resulting injury, liability will be found. Van Pool v. Industrial Comm'n, 267 Wis. 292, 64 N.W.2d 813 (1954); Reuhl v. Uszler, 255 Wis. 516, 39 N.W.2d 444 (1949); Edwards v. Kohn, 207 Wis. 381, 241 N.W. 331 (1932).

In a concurring opinion in *Dippel*, Justice Hallows argued that liability should be imposed solely in terms of negligence per se, and the court should have adopted the rationale of *Nelson v. Hansen*<sup>26</sup> and *Wurtzler v. Miller*.<sup>27</sup> These were both dog-bite cases wherein an owners liability statute<sup>28</sup> was interpreted. In the *Nelson* case the court held:

We are inclined to the rationale that [the statute], did not create a new cause of action or impose a new liability on owners of dogs by eliminating the basis of negligence, but merely dispensed with the necessity of proving *scienter* in cases where the injury is done by a dog because of a mischievous trait or propensity.<sup>29</sup>

But isn't this the same test used to determine strict liability? "In strict liability, except for the element of defendant's *scienter*, the test is the same as that for negligence."<sup>30</sup> Therefore, liability that is labeled "negligence," but does not require proof of *scienter*, does not differ from what the *Restatement* refers to as "strict."

The legal purist would contend that the strict liability of the defendant is not negligence, notwithstanding any similarity with the concept of negligence per se, and therefore cannot be compared with the contributory negligence of the plaintiff. When the defendant is not negligent, the negligence of the plaintiff cannot be said to contribute. This reasoning is faulty because it depends on the assumption that the plaintiff's contribution is merely to the negligence of the defendant, rather than to the injury sustained. The aggregate of the negligence is then said to be the cause of the injury. "It seems more reasonable to assume that contributory negligence means negligence which contributes to the injury, rather than to the sum total of negligence which results in injury."<sup>31</sup> In other words, this argument can be avoided by saying that plaintiff's negligence may be called contributory if it contributes to his injury. In the case of *Taylor v. Western Casualty and Surety Co.*,<sup>32</sup> plaintiff was walking across a highway when he was struck by an automobile operated by defendant and insured by co-defendant. The test for comparison of negligence was set out as follows: "Once it has been established that each has been negligent, it is then the jury's function to weigh their respective contributions to the result . . . ."<sup>33</sup> It seems, therefore, that not only the degree of negligence of the plaintiff and defendant is compared, but the con-

<sup>26</sup> 10 Wis. 2d 107, 102 N.W.2d 251 (1960).

<sup>27</sup> 31 Wis. 2d 310, 143 N.W.2d 27 (1966).

<sup>28</sup> Wis. Stat. § 174.02 (1965).

<sup>29</sup> *Supra* note 26, at 119, 102 N.W.2d at 258.

<sup>30</sup> Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965).

<sup>31</sup> Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 689 (1934).

<sup>32</sup> 270 Wis. 408, 71 N.W.2d 363.

<sup>33</sup> *Id.* at 411, 71 N.W.2d at 365.

tribution to the result, or injury, is also compared.<sup>34</sup> Hence the argument that plaintiff's contributory negligence can contribute only to defendant's negligence and not to the injury suffered has not been accepted in Wisconsin jurisprudence.

Whether the label attached to the liability involved be one of negligence or of strict liability, the underlying principle of risk allocation should be determinative in any decision concerned with the availability of plaintiff's misconduct as a defense. This approach has been advocated by Dean Page Keeton as follows:

The mere fact that contributory negligence, except when it involves deliberate exposure to known danger, does not bar recovery when one is injured by an abnormally dangerous activity does not mean that the same precise rule should be applicable to the activity of manufacturing and marketing all kinds of products. Because the central problem is that of allocating risks, whether contributory negligence of a particular kind should deprive the injured party of recovery cannot be satisfactorily answered on the basis of the label given to the nature of the strict liability. It can best be solved on the basis of policy considerations regarding the allocation of risks, untrammelled by rules and principles applicable to commercial losses or to physical harm resulting from negligence or abnormally dangerous activities.<sup>35</sup>

The allocation of risks, which the court determined to be socially desirable, was paramount to any possible inconsistency of terminology in the *Dippel* opinion. The comparative negligence statute was felt to be the best vehicle to carry out that policy.

A further step taken by the court to advance its notion of a fair allocation of risk involved the virtual abrogation of the defense of assumption of risk in products liability cases. Expressed in the negative, the court stated: "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence."<sup>36</sup> But what of the plaintiff whose conduct might ordinarily be designated assumption of risk even though it would not constitute a failure to exercise reasonable care for one's own safety?<sup>37</sup> To hold that such a plaintiff will be barred from recovery while another who did not exercise reasonable care for his

<sup>34</sup> Campbell, *Wisconsin Law Governing Automobile Accidents—Part II*, 1962 WIS. L. REV. 557, 570.

<sup>35</sup> P. Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 ILL. L.F. 693, 698.

<sup>36</sup> *Supra* note 10, at —, 155 N.W.2d at 64.

<sup>37</sup> Such a possibility has been pointed out in *Meyer v. Val-Lo-Will Farms, Inc.*, 14 Wis. 2d 616, 111 N.W.2d 500 (1961); *Scory v. Lafave*, 215 Wis. 21, 254 N.W. 643 (1934). See generally Prosser, *supra* note 21, § 67; Annot. 82 A.L.R.2d 1218 (1962).

own safety is allowed to recover<sup>38</sup> may bring about an undesirable result. While assumption of risk may still be asserted as a defense, the court's language makes it clear that if at all possible, it will be treated as contributory negligence. General dissatisfaction with the doctrine has resulted in a substantial restriction of its availability in all types of actions in Wisconsin.<sup>39</sup>

The court's decision will have its greatest immediate impact on the various members of the distributive chain other than the manufacturer. Since Wisconsin had already eliminated the defense of privity in an action for negligence, the application of the doctrine of *res ipsa loquitur* usually resulted in a finding of negligence by the jury—if the manufacturer was the defendant. Negligence on the part of the wholesaler or retailer could be proved only in an exceptional case. Liability is now imposed on any seller, if his business is the sale of such a product, and it leaves his hands "in a defective condition unreasonably dangerous." A plaintiff who is injured by such a product manufactured by a financially uncertain or insolvent company can now look to the retailer which may well be a large corporation capable of compensating him in full.

While the rejection of "warranty" as a theory of liability has the advantage of avoiding the traditional defenses such as disclaimer and plaintiff's failure to give notice of breach, the adoption of strict liability in tort will necessarily involve a vast amount of litigation to fully define the law.<sup>40</sup>

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<sup>38</sup> All plaintiff need prove is that his negligence in assuming the risk was not equal to or greater than defendant's negligence. *Frei v. Frei*, 263 Wis. 430, 57 N.W.2d 731 (1953).

<sup>39</sup> See, *Dippel v. Sciano*, *supra* note 10; *McConville v. State Farm Mutual Automobile Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962); *Colson v. Rule*, 15 Wis. 2d 387, 113 N.W.2d 21 (1962); *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 76 N.W.2d 355 (1956); *Wis. STAT. § 895.37* (1965).

<sup>40</sup> The caveat to section 402A is but an indication of the many questions yet to be resolved: "The Institute expresses no opinion as to whether the rules stated in this Section may not apply (1) to harm to persons other than users or consumers; (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or (3) to the seller of a component part of a product to be assembled." *RESTATEMENT (SECOND) OF TORTS § 402A* (1965).