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Torts - Strict Liability - Application to Automobile Manufacturers and Dealers

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TORTS—STRICT LIABILITY—APPLICATION TO AUTOMOBILE MANUFACTURERS AND DEALERS

Chester Vandermark, the plaintiff, purchased a new automobile from an authorized Ford dealer. Following the general practice of the trade, the dealer made final adjustments on the car before making delivery. After six weeks of use, in which time Vandermark drove 1,500 miles, he lost control of his car due to defective brakes, and the resulting accident caused serious injuries to his sister and himself. Vandermark brought an action for breach of warranty and negligence against the Ford Motor Co. and the dealer. The trial court granted Ford's motion for a nonsuit on both causes of action and directed a verdict in favor of the dealer as to the warranty action on the ground that a clause in the contract of sale disclaimed liability for personal injuries. As to the negligence action, the jury returned a verdict in favor of the dealer. On appeal, the California Supreme Court affirmed the judgment on the negligence action but reversed it as to the warranty action, holding both defendants liable on the grounds of strict liability in tort for the damages caused by the defective automobile. *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

Prior to the appeal, but following the trial court's decision, the California Supreme Court handed down its decision in *Greenman v. Yuba Power Products, Inc.*,[1] imposing strict tort liability for defects on manufacturers. Vandermark urged that this theory controlled his case. The *Greenman* case held that ". . . the manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[2]

The importance of the *Vandermark* case is two-fold: it is the first case to follow the precedent set down by *Greenman* relative to manufacturers, and it extends the strict liability theory to retailers. Pertaining to this extension, the opinion in the *Vandermark* case reads as follows:

> [Retailers] are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. . . . In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. . . . Since [the dealer] is strictly liable in tort, the fact that it restricted its contractual liability to Vandermark is immaterial. Regardless of the obligations it assumed by contract, it is subject to strict liability in tort because it is in the business of selling automobiles, one of which proved to be defective and caused injury to human beings.[3]

[1] 59 Cal. 2d 57, 377 P.2d 897 (1962).

[2] *Id.* at 62, 377 P.2d at 900.

[3] Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 899, 391 P.2d 168, 171 (1964).

The authority for this extension of strict liability to the retailer is *Henningsen v. Bloomfield Motors, Inc.*,[4] in which the court held the dealer and the manufacturer liable under an implied warranty theory even though the driver of the automobile was not in privity with the dealer or the manufacturer, and the purchaser had signed the standard auto purchase contract which disclaimed liability for injuries caused by defects. The court held that the disclaimer of liability clause was void as it was contrary to sound public policy,[5] and that the burden on the retailer by applying strict liability was one of the hazards of doing business.

The theory of holding manufacturers and dealers strictly liable in tort avoids the difficulties which arise in an action for breach of warranty, for as Gillam points out, "a contract theory necessarily puts the source of the obligation, *not in the law*, but *in the deal* . . ."[6] and this results in attempts to avoid liability through a disclaimer clause. The *Vandermark* case avoids the disclaimer problem by stating that disclaimers relate only to limitation of contractual liability and not to tort. Strict tort liability also avoids other problems raised by the warranty theory, including defenses of lack of privity, lack of notice, and no sale. The issue in an action based on strict liability is whether the product was defective, and whether the defect was the proximate cause of the injury.

The public policy argument for strict liability in tort is based on the premise of spreading the burden of harm caused by defective products.[7]

4 32 N.J. 358, 161 A.2d 69 (1960). See Annot., 75 A.L.R.2d 1 (1960).

5 *Id.* at 404, 161 A.2d at 95: "we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity." See also *id.* at 408, 161 A.2d at 97: "we conclude that the disclaimer of an implied warranty of merchantability by the dealer, [is] violative of public policy and void." But see Williams v. Chrysler Corp., 137 S.E.2d 225 (W.Va. 1964), wherein the court held that a purchaser was in privity with the manufacturer for purposes of the disclaimer and barred liability. After this decision, West Virginia adopted the *Uniform Commercial Code,* and it would be interesting to conjecture as to the court's decision in light of *Uniform Commercial Code* § 2-302, dealing with unconscionable contracts or clauses of contracts. The *Williams* case did not consider the issues raised by the *Henningsen* case.

6 GILLAM, PRODUCT LIABILITY IN THE AUTOMOBILE INDUSTRY 62 (1960).

7 See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (concurring opinion of Justice Traynor): "[e]ven if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market"; Jacob E. Decker and Sons, Inc. v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942): "/l/iability in such case is not based on negligence nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life"; Chapman v. Brown, 198 F. Supp. 78, 104 (D. Hawaii 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962): "in situations where public policy

Such policy has two advantages, one an equitable argument, the other stemming from economic theory. It is unfair to make randomly-selected individuals bear the costs of the injuries caused by manufactured products.[8] Strict liability will spread the risks to society through the price of the product. In economic theory, the market system will arrive at the optimum allocation of resources in terms of consumer and factor-owner preferences only when the marginal social benefits of an activity are equal to the marginal social costs *and all benefits accure to the user and all costs to the producer.*[9] The harm arising from product defects is one of the costs of a particular activity. Strict liability in tort allocates these costs to the producing and distributing industries, thus making these industries bear the costs, rather than individual members of the public. This permits the market system to operate more efficiently in its task of allocating resources and maximizing total satisfaction.[10]

Lang[11] argues for strict liability and compulsory insurance as a solution to injury-causing activities, and further suggests that "damages payable should . . . as far as possible . . . be ascertainable by reference to a schedule

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as to a particular category of goods was strong enough, such public policy justified a departure from the strict wording of the statute. [If the lack of privity can be used] for food cases, because of public policy, by what reasoning can it be held that the barrier excludes allowance of the same remedy to other non-'buyers' as to whom the public policy of protection appears to be equally justified." See also Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964), wherein an excellent biography of cases on the development of product liability law appears in footnote 19, page 919–20.

[8] For the drawbacks in relying on negligence and implied warranty theories to spread the burden, see Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960); and Keeton, *Products Liability–Liability without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963).

[9] See DUE, GOVERNMENT FINANCE 7–9 (1963). For an excellent discussion of the problems raised by social costs for the market system, see KAPP, THE SOCIAL COSTS OF PRIVATE ENTERPRISE 1–47 (1950).

[10] This is analogous to the theory behind Workmen's Compensation, wherein businesses are forced through an insurance premium to pay for the injuries to workers arising out of their activities. See Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 12 LA. L. REV. 231 (1952). *But see* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products–An Opposing View*, 24 TENN. L. REV. 938 (1957), wherein Mr. Plant argues that some marginal manufacturers would have to go out of business if they were held under strict liability: "In the case of an industry a substantial general addition to price may have a devastating effect upon marginal producers." (Plant, *supra* at 947) This objection is not valid, for if a firm can only stay in business by passing its costs on to the public in the form of random personal injuries, it should not stay in business, since the marginal social cost is exceeding the marginal social benefit. Professor Plant makes a number of other criticisms of strict liability, the most telling of which is the possible inhibitory effects of the doctrine on the willingness of businesses to bring out new products.

[11] Lang, *The Actvity-Risk Theory of Tort: Risk, Insurance, and Insolvency*, 39 CAN. B. REV. 530 (1961).

which would include complicated medical detail."[12] When the liability arises out of social and economic policy considerations rather than fault, the innocent victim or the innocent manufacturer or dealer should not be left to the vagaries of the jury—the one as to his recovery, the other as to his cost. This view is based on the reasoning that since broad social policy is to affix the liability, broad social policy should also affix the recovery. It seems that the logic of this theory might lead to a legislative determination of damages as is done in workmen's compensation.[13]

The *Greenman* and *Vandermark* theory has been adopted by the *Restatement of Torts* (Second), sec. 402A (Tent. Draft No. 10, 1964).[14] While the *Restatement* extends strict liability by including property damage, a recent California case, *Seely v. White Motor Co.*,[15] refused to extend the doctrine of *Greenman* and *Vandermark* to property damage because such was not the law in California. The court made no mention of the *Restatement* draft in its decision, but held that such was within the logical limits of strict liability. The case is now before the Supreme Court where they will adopt or repudiate this theory relative to property damage. It would appear that the logic of spreading the risk of loss—as first set down by Justice Trayner in his concurring opinion in *Escola v. Coca Cola Bottling Co.*[16] and restated by him in both the *Greenman* case and the *Vandermark* case—will lead inexorably to the full acceptance of the *Restatement* draft.

Although the judicial phraseology behind *Greenman* and *Vandermark* cases and the *Restatement* is supported by sound theory and many other authorities,[17] it has not yet been adopted in any state but California. Other states cling to a theory of implied warranty and attempt to achieve the effect of strict liability by relaxing or removing the requirement of privity. In *Goldberg v. Kollsman Instrument Corp.*,[18] the New York

12 *Id.* at 540.

13 See Atkins, *The Impact of the Growth of Enterprise Liability on the Theory of Damages in Accident Cases,* 20 LA. L. REV. 50 (1959).

14 RESTATEMENT (SECOND), TORTS § 402a (Tent. Draft No. 10, 1964): "(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. . . . (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 relationship with the seller."

15 228 Cal. App. 2d 851, 39 Cal. Rptr. 805 (1964).

16 24 Cal. 2d 453, 150 P.2d 436 (1944).

17 See Putman v. Erie City Mfg. Co., *supra* note 7, at 920 for a bibliography of the leading articles expounding the strict liability theory.

18 12 N.Y. 2d 432, 191 N.E.2d 81 (1963).

court came close to adopting the terminology of the California decisions when they said that strict tort liability was "surely a more accurate phrase"[19] but in phrasing the issue they asked whether an implied warranty runs to users of a product despite lack of privity. In *Suvada v. White Motor Co.*,[20] the Illinois court cited *Greenman* with approval and then followed the reasoning of New York in the *Goldberg* case. In *Wood v. Hub Motor Co.*,[21] and *Morrow v. Caloric Appliance Corporation*,[22] the *Greenman* case was cited, but implied warranty theories were followed. These examples show that courts which are faced with product liability questions are unable or unwilling to overcome the weight of tradition by accepting the strict liability concept.[23] Clearly, some action by the courts is necessary to eliminate the jumble of terminology which has arisen from the attempt to bring about strict liability out of the contract-based law of warranty.[24]

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[19] *Id.* at 437, 191 N.E.2d at 83.

[20] 51 Ill. App. 2d 318, 201 N.E.2d 313 (1964).

[21] 110 Ga. App. 101, 137 S.E.2d 674 (1964).

[22] 372 S.W.2d 41 (Mo. 1963).

[23] 79 Nev. 241, 382 P.2d 399 (1963).

[24] For some interesting procedural questions posed by the *Vandermark* case, see 48 MARQ. L. REV. 268, 272–3 (1964).