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NOTES**LIABILITY OF THE MANUFACTURER TO THE
ULTIMATE CONSUMER**

This article is a discussion of manufacturer's liability to the ultimate consumer¹ based upon the theories of negligence, strict liability in tort, and warranty under the uniform Commercial Code.

NEGLIGENCE

Manufacturer's liability in negligence is determined by the general principles of negligence.² The consumer must show that the product was defective as a result of the manufacturer's negligence and that this defect caused the injury.³

The standard of care imposed upon the manufacturer is the standard of care that a reasonably prudent person in the position of the manufacturer would exercise in designing,⁴ producing,⁵ and warning⁶ in order "to avoid unreasonable risk of harm from use of his products by those likely to be exposed to the risk."⁷

¹Ultimate consumer is defined as any person who consumes or uses a product or obtains the benefit of the product. See RESTATEMENT (SECOND) OF TORTS (hereinafter referred to as RESTATEMENT) §402A comment J.

²Gilliam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 144 (1957-58). Originally privity was required in order to recover under negligence. *Winterbottom v. Wright*, 10 M. & W. 109, 11 L.J. Ex 445 (1842). Three exceptions were developed to this harsh rule. The first was if the product was inherently dangerous. The second was if the plaintiff was an invitee and the third was if there was a fraud or willful misrepresentation present. See *Huset v. The Case Threshing Machine Co.*, 120 F. 865, 57 C.C.A. 237, 51 L.R.A. 303 (1903). A further exception was developed in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 11 N.E. 1050, 1916 F.L.R.A. 696, 1916, C. Ann. Cas. 440 (1916). The requirement of privity was dissolved where the product if negligently made was certain to place life in danger. This last exception became the general rule allowing the liability of the manufacturer to be determined by principles of general negligence regardless of notions of privity. See *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E. 2d 693, 700 (1964); *Baumgartner v. National Cash Register Co.*, 146 M. 346, 406 P.2d 686 (1965).

³See James, *Products Liability*, 34 TEX. L. REV. 49, 68-73 (1955).

⁴Negligence in design is one aspect of manufacturer's negligence. James, *Products Liability, id.*, at 50, states that "The maker of an article for sale or use by others must use reasonable care and skill in designing it and in providing specifications for it so that it is reasonably safe for the purposes for which it is intended, and for other uses which are foreseeably probable." See *Garbutt v. Schechter*, 167 Cal. App. 2d 396, 334 P.2d 225 (1959) (manufacturer negligent in designing chrome chair which tipped when rather heavy woman sat in it).

⁵James, *supra* note 3, at 66, states the following standard of care in manufacturing the product: "The maker of an article for sale or use must be reasonably careful to prevent dangerous conditions in it caused by a miscarriage in the manufacturing process. This duty calls for reasonable skill and care in the process of manufacturing and for reasonable inspection to discover defects." See *Trowbridge v. Abrasive Co. of Philadelphia*, 190 F.2d 825 (3rd Cir. 1951) (manufacturer liable for failure to utilize various tests in determining internal flaws).

⁶Professor James, *supra* note 3, at 55-56, states that the manufacturer is under a duty to give "reasonable warning or instructions for safe use where the prudent maker would foresee that a condition or propensity of the product is not likely to be fully known and appreciated by those using it, and that some use to which the article is likely to be put will be unreasonably dangerous." See *Tomao v. A.P. De Sanno & Sons*, 209 F.2d 544 (3rd Cir. 1954) (manufacturer liable for failure to warn that a grinding wheel will disintegrate at a speed faster than 6000 rpms).

⁷James, *supra* note 3, at 49.

In order to prove the necessary causal relation between the negligent creation of the defect and the injury, circumstantial evidence is often employed.⁸ Sufficiently disproving the explanations of other possible causes of the injury, the consumer must establish that the injury most probably resulted from the manufacturer's negligent act.⁹

Superseding intervening conduct of the consumer or of the intermediate vendees will relieve the manufacturer of liability.¹⁰

Although the consumer has the action in negligence at his disposal, the protection extended to the consumer by this action is very inadequate. He must show the negligent act of the manufacturer which is usually impossible since the manufacturer has possession of all the factual evidence.¹¹ The consumer is forced to rely upon the theory of *res ipsa loquitur* whose great complexities and difficult application add an extra burden to the consumer's already heavy burden.¹² In addition the manufacturer is usually capable of proving that he utilized all reasonable precautions and thereby precluding recovery by the consumer under negligence.¹³ The consumer is forced to bear the total loss. Negligence provides a thin shield of protection against the massive machinery of industry.¹⁴

STRICT LIABILITY

Under this doctrine a manufacturer is strictly liable in tort when he places a defective¹⁵ product on the market which causes injury to the ultimate consumer.¹⁶ A product is considered defective when it is un-

⁸Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 993 (1962); Gillam, *supra* note 2, at 145.

⁹PROSSER, *TORTS* 223 (3rd ed. 1964).

¹⁰Gillam, *supra* note 2, at 146, states that the manufacturer is liable for any foreseeable negligence on the part of an intermediate seller. Generally the manufacturer is liable for the failure of a seller or handler in the distributive chain or the consumer to inspect for possible defects or to protect against such. See Noel, *Products Liability of a Manufacturer in Tennessee*, 22 TENN. L. REV. 985, 993 (1953); *Ford Motor Co. v. Waggoner*, 183 Tenn. 392, 192 S.W.2d 940 (1946) (conscious awareness of the risk by the dealer in not installing hood latch that was sent by the manufacturer and ordered installed relieved the manufacturer of liability); *Tomicich v. Western-Knapp Engineering Co.*, 25 St. Rep. 695 (D. Mont. 1968) (manufacturer of a conveyor belt not liable since the plaintiff-operator deliberately exposed himself to an appreciated danger in removing mud from the sheaves).

¹¹Gillam, *supra* note 2, at 146.

¹²PROSSER, *TORTS* 218 (3rd ed. 1964). Generally the plaintiff in utilizing *res ipsa loquitur* has the difficult task of proving that the manufacturer has control of the factors which produced the accident. See Noel, *Products Liability in Tennessee*, *supra* note 10, at 995. For an example of the difficulty of *res ipsa* see *Jangula v. United States Rubber Co.*, 147 M. 98, 410 P.2d 462 (1966).

¹³Gillam, *supra* note 2, at 146.

¹⁴Gillam, *supra* note 2, at 153, illustrates the deficiency of the negligence action by enumerating 29 different ways that the courts have attempted to circumvent the privity requirement in a warranty action under the *Uniform Sales Act* in order to bring the action in contractual warranty rather than negligence.

¹⁵A product is defective when, at the time it leaves the seller's hands, it is in a condition not contemplated by the consumer and is unreasonably dangerous to him. See the RESTATEMENT §402A *comment g*.

¹⁶RESTATEMENT §402A; *Sweeney v. Mathews*, 94 Ill. App.2d 6, 236 N.E.2d 439 (1968); *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 277 P.2d 897 (1963); *Dippel v. Sciano*, 37 Wis.2d 543, 155 N.W.2d 55 (1967). Strict liability in tort historically developed from an extension of the liability imposed in food products to all other products. See *Greenman v. Yuba Power Products, Inc.*, *supra*, at 700; *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965). The development is discussed in Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*,

STRICT LIABILITY

reasonably dangerous to the user or to any of his property within the zone of danger.¹⁷

The standard to be applied to determine if the product is dangerous is that of an ordinary consumer who purchases it with knowledge common to the community.¹⁸

A product may be rendered defective by the manufacturer's failure to give adequate warning of its dangerous propensities.¹⁹ A federal court attempting to apply Montana law, but without any Montana precedent held a drug manufacturer strictly liable for failure to provide warning that adults could contract polio from its vaccine that was administered in a community clinic.²⁰

Where the only damage that the consumer has incurred is a loss of the bargain or that the goods were sub-standard in quality, strict liability is not generally applied.²¹

The injured consumer must prove the necessary causal relation by establishing that the injury resulted from the defective product and that the product was defective when it left the manufacturer's control.²² This is usually accomplished by the utilization of circumstantial evidence to produce sufficient evidence that there was a greater probability that the defect was in the product at the time it left the manufacturer's control and that the defect caused the injury.²³

Strict liability of the manufacturer, like negligence, can be relieved by superceding intervening conduct on the part of the consumer or intermediate vendees.²⁴ If the intervening conduct consists merely in a failure to discover the defect in the product or a failure to guard against the

¹⁷RESTATEMENT §402A comment d; Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 821-822 (1966). See *Gherna v. Ford Motor Co.*, 55 Cal. Rptr. 95, 246 Cal. App. 2d 639 (1966) (manufacturer strictly liable for damage to a car which resulted from a fire caused by a defective wiring system).

¹⁸RESTATEMENT §402A comment i.

¹⁹RESTATEMENT §402A comment j; Prosser, *The Fall*, *supra* note 17, at 811.

²⁰*Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968).

²¹Prosser favors denial of recovery under strict liability for such loss. Prosser, *The Fall*, *supra* note 17, at 822. See *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (allowing recovery for loss in value of a carpet due to defective quality); *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) (Expressly disapproving of the Santor case, the court refused to apply strict liability where a truck did not perform to the expectations of the purchaser.); *State v. Campbell*, 442 P.2d 215 (Ore. 1968) (refusal to apply strict liability where there was a loss of profits due to defective seed).

²²*Sweeny v. Mathews*, *supra* note 16, at 442.

²³Prosser, *The Fall*, *supra* note 17, at 842-846.

²⁴Prosser says that the rule applicable in negligence should be also applied in strict liability. Prosser, *The Fall*, *supra* note 17, at 826.

possibility of its existence, rather than a voluntary, conscious, unreasonable encountering of a known risk, the manufacturer will not be relieved from liability.²⁵

There is a question as to whether or not a bystander within the zone of danger, such as a pedestrian injured by a defective automobile but who cannot be classified as a consumer, may recover under strict liability.²⁶ Such liability has been applied and there appears no reason for not allowing such application.²⁷

Strict liability substantially provides more effective protection for the consumer than a negligence action. The burden of proving and establishing the specific negligent act of the manufacturer is eliminated. Strict liability greatly enhances the consumer's chances of obtaining compensation for an injury sustained from the use of a product produced and distributed without proper regard for consumer safety.

RECOVERY UNDER THE UNIFORM COMMERCIAL CODE

All remedies under the *Uniform Commercial Code* are limited to buyers or third-party beneficiaries of buyers who obtain the goods as buyers.²⁸ In order for a consumer in this category to recover against the manufacturer, he must show the existence of an express warranty,²⁹

²⁵O.S. Stapely Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Sweeny v. Mathews, *supra* note 16; Barth v. B.F. Goodrich Tire Co., 71 Cal. Rptr. 306, 74 Cal. Rptr. 752 (1968). *But see* Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 168 (1964) (manufacturer held liable for failure or incorrect servicing of a new car by the dealer).

²⁶The *Restatement* expresses no opinion. RESTATEMENT §402A *comment o*.

²⁷Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965) (parked car with defective transmission rolled over embankment striking bystander and killing him; strict liability allowed).

²⁸UNIFORM COMMERCIAL CODE [hereinafter cited UCC] §2-102 states that the scope of Article Two "applies to transactions in goods." Although the term "transactions in goods" is not defined, it presumably refers to the Code concept of a sale. Sections 2-313 on express warranty and 2-315 on fitness for a particular purpose are couched in terms of "seller" and "buyer." Section 2-314 on implied warranty of merchantability states that such warranty "is implied in a contract for sale" which is entered into by the merchant "seller." All warranties are given as to the quality and condition of goods. Section 2-106(1) defines a sale as "...the passing of title from the seller to the buyer for a price." Section 2-103(1)(a) defines a "buyer" as "...a person who buys or contracts to buy goods." In the same section, a "seller" is defined as "...a person who sells or contract to sell goods." Section 2-318 states: "A seller's warranty... extends to any natural person who is in the family or household of his *buyer* or who is a guest in his home . . ." (emphasis provided). This language suggests that only a "buyer" is entitled to the protection of the warranty and that the warranty is only given by the immediate seller. *See* Donovan, *Recent Developments in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 18-19 MAINE L. REV. 181, 198 (1967).

²⁹Under § 2-313 an express warranty is created by an "affirmation of fact or promise" made by the "seller" to the "buyer" regarding the quality of the article sold. There is no requirement of formal words such as "guarantee" or "warranty." The buyer does not have to rely upon the affirmation, promise, or description if it is "part of the basis of the bargain." *See* Klien v. Asgrow Seed Co., 54 Cal. Rptr. 609, 246 Cal. App.2d 498 (1966) (advertising held to constitute an express warranty and actionable by the ultimate consumer).

implied warranty of merchantability,³⁰ or an implied warranty of fitness for a particular purpose.³¹ Such warranties are subject to disclaimer.³² Next he must establish the breach of such warranty and the resulting damage. Finally, the consumer is required to give notice of the breach.³³

Even though the consumer has established the necessary elements for recovery under the *Uniform Commercial Code*, he may be barred from recovery by lack of privity between him and the manufacturer.

Historically, privity was a necessary requirement for an action in warranty.³⁴ The Code expresses no opinion as to the requirement of privity between the manufacturer and the consumer.³⁵ The question is left open to the underlying case law of the jurisdiction.³⁶ The Montana court has not yet been faced with the question of the requirement of privity under the *Uniform Commercial Code*.³⁷

³⁰Section 2-314(2) establishes six detailed standards for determination of merchantability. "Generally speaking, merchantability means that the goods must be (a) of a quality comparable to that generally accepted in the market under the name or description by which they are sold, and (b) reasonably fit for their 'general' or 'ordinary' purposes." Donovan, *Recent Developments, supra* note 28, at 203.

³¹In order to establish that there is an implied warranty of fitness for a particular purpose, the purchaser must show that "the seller at the time of contracting has reason to know the buyer's special purpose" and that the buyer "is relying on the seller's skill or judgment" or "the circumstances are such that the seller has reason to realize the purpose intended and the reliance exists." UCC § 2-315 *comment 1*.

³²Section 2-316(1) provides that language or conduct tending to negate or limit an express warranty "is inoperative to the extent that such construction is unreasonable." Also, the section provides that an implied warranty of merchantability can be excluded if it contains the word "merchantability" and if written it must be conspicuous. Also, language such as "as is" or "with all faults" in spite of the requirement that the term "merchantability" be used in order to exclude an implied warranty of merchantability excludes all implied warranties. Section 2-316 also states that there is not an implied warranty to defects which a reasonable examination would have revealed when the consumer has examined the goods or refused to examine them. But such disclaimers may be subject to § 2-302 and may be declared "unconscionable" and, therefore, unenforceable. See UCC § 2-302 *comment 1*.

³³Section 2-607(3)(a) requires that the buyer give notice of a breach of warranty to the seller within a reasonable time "or be barred from any remedy." This requirement of notice has been circumvented in some instances by extending the duration of a reasonable time to whenever the consumer gives notice or by refusing to have such a requirement of the plaintiff is one of the third-party beneficiaries under §2-318. See *Tomezuk v. Town of Cheshire*, 26 Conn. Supp. 219, 217 A.2d 71 (1965); Donovan, *Recent Developments, supra* note 28, at 229.

³⁴Gilliam, *supra* note 2, at 131, 148. See WILLISTON, SALES §§ 195-197; PROSSER, TORTS § 83 (2nd ed. 1955).

³⁵UCC § 2-318 *comment 3*.

³⁶*Picker X-Ray Corp. v. General Motor Corp.*, 185 A.2d 919 (D.C. Mun. Ct. 1962); *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963); *Henry v. John W. Eshleman & Sons*, 209 A.2d 46 (R.I. 1965); *Leach v. Wiles*, 429 S.W.2d 823 (Tenn. Ct. App. 1968).

³⁷As expected, the Montana court has not yet been faced with the question of extending privity under the UCC beyond the basic "seller"- "buyer" relationship. There has been dicta to the effect that privity should not be a defense to a breach of warranty. See *Jangula v. United States Rubber Co.*, *supra* note 12, at 115. For an argument based upon the UCC and the statutory duty previously imposed upon producers of food (R.C.M. §74-321) suggesting that there is Montana precedent for the abrogation of privity see Pedersen, *Products Liability and Privity*, 27-28 MONT. L. REV. 221, 230 (1967).

CONCLUSION

Without entering into the debate as to whether strict liability in tort and warranty recovery under the *Uniform Commercial Code* are one and the same,³⁸ the consumer has three different theories upon which to predicate manufacturer's liability. Strict liability in tort is the only one which provides a modicum of consumer protection. It does not require the establishment of the specific act of negligence of the manufacturer that destroys most negligence actions. Nor is it entangled with the problems of privity, notice, or disclaimer as is the *Uniform Commercial Code*. Strict liability has a broader coverage of protection. The *Uniform Commercial Code* is limited to buyers and members of the buyer's family or household and guests in the buyer's home whereas strict liability extends to all users and consumers plus bystanders.

In terms of pure allocation of loss, the manufacturer who has great financial resources can absorb the loss better than the individual consumer. The manufacturer is in a better position to distribute the loss among the entire class of consumers by passing the cost of insurance on to the consumer.

Nineteen states have already adopted strict liability in this area.³⁹ Three federal courts have accepted it in absence of state law.⁴⁰ The 9th Circuit Court of Appeals applying Montana law but without any precedent stated that the Montana court would probably:

... adopt the views set forth below [strict liability under Restatement § 402A] on the manufacturer's duty to warn of dangers in 'nondefective' but potentially harmful products.⁴¹

It is urged that the Montana court join in this wave of decisions and adopt the doctrine of strict liability in products liability and extend to the consumer at least a modicum of protection for injuries sustained from the use of today's manufactured products.

RON A. BENDER

³⁸See Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code; A Commentary on Jurisprudential Eclipse, Pigeonholes and Communication Barriers*, 17 WES. RES. L. REV. 5 (1965); Littlefield, *Some Thoughts on Products Liability Laws A Reply to Professor Shanker*, 18 WES. RES. L. REV. 10 (1966).

³⁹Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969); O.S. Stapely Co. v. Miller, *supra* note 25; Greenman v. Yuba Power Products, Inc., *supra* note 16; Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A.2d 418 (1967); Royal v. Black & Decker Mfg. Co., 205 So.2d 307 (Fla. Dist. Ct. App. 1967); Suvada v. White Motor Co., *supra* note 16; Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W. 2d 441 (Ky. Ct. App. 1966); McCormack v. Hanks-craft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966); Santor v. A. & M. Karagheusian, Inc., *supra* note 21; Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 431, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965); Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Olney v. Beaman Bottling Co., 220 Tenn. 459, 418 S.W.2d 787 (1967); Dippel v. Sciano, *supra* note 16.

⁴⁰Schenfeld v. Norton, 391 F.2d 420 (10th Cir. 1968); Greeno v. Clark Equipment Co., 237 F. Supp. 427 (N.D. Ind. 1965); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (D.S.D. 1967).

⁴¹Davis v. Wyeth Laboratories, *supra* note 20 at 127.