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Product Liability and the Meaning of Defect.

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PRODUCT LIABILITY AND THE MEANING OF DEFECT

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SOME GENERAL OBSERVATIONS

Most of the issues pertaining to the liability of manufacturers, and other sellers in the marketing chain, for physical harm arising from the dangerousness of products can be regarded as facets of two broad problems—the meaning of defect and the kind of misconduct on the part of users and others that will insulate a particular seller in the marketing chain from liability if the product is found to be defective. There are other issues, such as whether a manufacturer should be excused because (a) either the injury resulted from a risk that was scientifically unknowable prior to the injury or (b) the state of the art was, at the time of sale and prior to injury, such as to make it impossible or impractical to minimize a known or knowable risk. While these other issues are important, the tremendous amount of uncertainty regarding the two basic problems as to the meaning of defect and the effect of misconduct of others must be substantially reduced before there can be effective administration of justice with reference to claims in this area. Hardly any claims based on inherent risks in the way products are designed can be settled at present with any confidence of what the outcome of litigation would have been, and trial judges are faced with an impossible task of describing to the jury in any sort of intelligible manner the scope of the seller's responsibility in such cases.

It is respectfully submitted that a recent decision by the Supreme Court of California not only failed to clarify the meaning of defect, but rather added to the uncertainty. In *Cronin v. J.B.E. Olson Corp.*,[1] a 1-ton bread truck with built-in bread racks was involved in an accident. The body of the van contained three aisles along which there were welded runners extending from the front to the rear of the truck. Each rack held 10 bread trays from top to bottom and five trays deep. The trays slid forward into the cab or back through the rear door to facilitate deliveries. While the plaintiff, the driver of the bread

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1. 104 Cal. Rptr. 433 (1972).

truck, was attempting to pass a pickup truck ahead of him, the driver of the pickup made a sudden left turn, causing the pickup to collide with the bread truck, forcing the latter off the road and into a ditch. The evidence indicated that the loaded trays, driven forward by the abrupt stop and impact, struck the plaintiff in the back and hurled him through the windshield. The evidence further indicated that the loaded trays would not have struck plaintiff but for the fact that an aluminum safety hasp, located just behind the driver's seat and designed to hold the bread trays in place, broke.

At the trial, in *Cronin*, plaintiff's expert testified that the metal hasp broke because it was made of metal that was extremely porous and had a significantly lower tolerance to force than a nonflawed aluminum safety hasp would have had. The trial judge used instructions current at the time in California requiring findings by the jury, among other things, as a basis for recovery that the product (1) was defective, (2) was being used for the purpose for which it was designed and intended to be used, and (3) the injuries and damages complained of were proximately caused by the defect. It was defendant's contention that the charge was erroneous in failing to require a finding that the defect made the product "unreasonably dangerous."[2] The court held that while the manufacturer is not an insurer against harm resulting from the use of products as intended, the plaintiff meets his burden by proving there was a defect in manufacture or design of the product and such defect was a proximate cause of injuries.[3] While it would appear the result in the case is sound for reasons hereinafter stated, the difficulty is that no content was given to the concept of defect and this is vitally important when a plaintiff's theory is that a product, although fabricated and constructed as it was intended to be, subjected users or others to an inherent risk of harm that made the product defective. The court made the following observations:

> The result of the limitation [the unreasonably dangerous requirement], however, has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence.[4]
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> We can see no difficulty in applying the *Greenman*[5] formula-

2. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).
3. Cronin v. J.B.E. Olson Corp., 104 Cal. Rptr. 433, 442 (1972).
4. *Id.* at 441.
5. Greenman v. Yuba Power Prod., Inc., 27 Cal. Rptr. 697 (1963).

> tion to the full range of products liability situations, including those involving "design defects." A defect may emerge from the mind of the designer as well as from the hand of the workman.[6]

It is submitted, contrary to what is asserted by the Supreme Court of California, that lawyers in trying to settle cases, and trial judges, juries and appellate courts in fulfilling their respective roles in the litigation process will experience great difficulty until some content can be given to the concept *defective* in those situations where it is alleged that the product as designed and marketed was defective. The situation is productive of a vast amount of unnecessary litigation and an enormous amount of unnecessarily prolonged and protracted litigation at a time when every effort should be made to improve the administration of justice. It is unfortunate perhaps that Section 402A of the *Restatement (Second) of Torts* provides that as a basis for recovery it must be found that the product was both "defective" and "unreasonably dangerous,"[7] when as a matter of fact the term "unreasonably dangerous" was meant only as a definition of defect. The phrase was not intended as setting forth two requirements but only one, the notion being that the product was not defective for the purpose of shifting losses due to physically harmful events unless it was "unreasonably dangerous." However, even the term "unreasonably dangerous" needs further elaboration if it is to serve any useful purpose as a guideline for predicting results or as a standard to be used in the varying claims presented for disposition.

It was contended in behalf of a victim of Sabin oral vaccine that a maker should be regarded as guaranteeing that the drug was fit and safe for each and every user and not simply reasonably fit and reasonably safe for use by the public as a whole, but the court held that it was unwilling to make such a far-reaching change in the law.[8] The tortuous history of one of the lung cancer cases ended with the court disallowing such a contention made on behalf of the victim.[9] The

6. Cronin v. J.B.E. Olson Corp., 104 Cal. Rptr. 433, 442 (1972). Notwithstanding this statement, the court did recognize the difficulty. The court remarked in footnote 16 as follows: "We recognize, of course, the difficulties inherent in giving content to the defectiveness standard. However, as Justice Traynor notes, 'there is now a cluster of useful precedents to supersede the confusing decisions based on indiscriminate invocation of sales and warranty law.'" *See* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

7. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

8. Davis v. Wyeth Lab., Inc., 399 F.2d 121 (9th Cir. 1968).

9. Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969). Other opinions on that case were: 391 F.2d 97 (5th Cir. 1968); 325 F.2d 673 (5th Cir. 1963); 304 F.2d 70 (5th Cir. 1962).

three judges who dissented in that case observed that "[t]he one inescapable consideration is that a jury found as a fact that Mr. Edwin Green, Sr. died of primary cancer of the lung caused from smoking Lucky Strike cigarettes. . . . The decisive point is that when a jury so *found* there simply remained no further strict liability factual issue in the case."[10] The issue regarding the necessity for a showing of a defect was well stated by the Supreme Court of Oregon when it inquired in one of the MER/29 drug cases whether social justice requires that the price of drugs should include an amount sufficient to create a fund to compensate those who suffer unanticipated harm from the use of a beneficial product.[11] There has been a virtual unanimity of opinion on the proposition that the product must be defective as marketed in order to subject the manufacturer to liability. This is not to say that it would be untenable to have a much broader responsibility imposing liability on makers for harm resulting from inherent risks when the product was used as intended and there was no misconduct on the part of the user. The point is that if there is to be liability without respect to proof of a defect then courts would find it necessary to develop two strict liability systems—one for defective products and the other for good products. This is because a manufacturer would surely not be held liable for harm resulting from the negligent use of a good hoe, axe, drug or the like unless one wishes to shift virtually all accident costs to manufacturers. Seemingly the Supreme Court of California does not suggest that those victimized by nondefective products would have a recovery, even when the product was used appropriately. It simply rejects the notion that the product must be unreasonably dangerous to be defective, and then substitutes nothing in the place of that notion to give content to the term defective.

The change in the substantive law as regards the liability of makers of products and other sellers in the marketing chain has been from fault to defect. The plaintiff is no longer required to impugn the maker, but he is required to impugn the product. Simply stated, the product must be defective as marketed, and it may be defective as marketed for one or the other of at least three reasons: (1) It may have been fabricated or constructed defectively in the sense that the specific product was not at the time of sale by the maker or other seller in the condition that the maker intended it to be; (2) it may have been im-

10. Green v. American Tobacco Co., 409 F.2d 1166, 1167 (5th Cir. 1969) (dissenting opinion).

11. Lewis v. Baker, 413 P.2d 400 (Ore. 1966).

properly designed; and (3) purchasers and those who are likely to use the product may have been misinformed or inadequately informed, either about the risks and dangers involved in the use of the product or how to avoid or minimize the harmful consequences from such risks.[12] In so stating, it must be obvious that while different categories of defects are recognized, there has been no resolution of the ultimate question as to the meaning of defect.

A determination of the proper scope for strict liability—including the questions as to the necessity for a showing of a defect and then the meaning of a defect—should begin with a brief survey of the reasons commonly given for strict liability. It has often been urged as a justification for strict liability that defects in products are more often than not attributable to fault, but it is difficult to prove. Therefore, it is said that a more efficient and just system would eliminate the necessity for proof of fault.[13] This argument assumes the necessity for a showing of a defect.

The reduction of the incidence of harm resulting from unsafe products is often stated to be a reason for the imposition of strict liability.[14] It would appear that the desire to reduce accidents justifies shifting losses to a maker only if he could have eliminated a danger that ought not to have existed. Consequently, liability should not be extended to makers for harm resulting from unavoidable injurious effects of highly desirable products, such as good penicillin, good cigarettes, or good whiskey. In addition, it is doubtful if strict liability does induce greater care than does negligence liability. Moreover, if strict liability does induce greater care, it can be argued that it will also tend to inhibit the development of new products. Thus, the importance of the development of new products may be a factor to be considered in establishing the limits of strict liability. This argues for the proposition that strict liability should not extend to nondefective products.

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12. *See* Keeton, *Products Liability*, PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE SIXTH JUDICIAL CIRCUIT OF THE UNITED STATES, 50 F.R.D. 319, 338 (1970).

13. *See* Noel, *Products Liability: Bystanders, Contributory Fault and Unusual Uses*, PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE SIXTH JUDICIAL CIRCUIT OF THE UNITED STATES, 50 F.R.D. 319, 321 (1970).

14. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J.); Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. REV. 1099, 1119 (1960).

It is argued in the third place that it is the frustration of consumer expectations that should constitute the basis for recovery.[15] If frustration of consumer expectations as to the nature and quality of a product were the only basis for shifting losses without fault, recovery would be limited to those harmed in damaging events attributable to risks of which consumers were unaware.

A fourth and perhaps the major reason ordinarily given for strict liability in this area is that those engaged in the manufacturing enterprise can serve effectively as risk distributors by accepting responsibility for accident losses attributable to the dangerousness of products as a cost of doing busness.[16] If this be accepted as the dominant reason, liability could conceivably be expanded to include harm from damaging events resulting from inherently dangerous characteristics of good products. But there are many other techniques for dealing with accident losses, and even if the notion of enterprise liability is accepted, users are often enterprisers, and obviously some of the risks of damaging events should be allocated to such enterprisers in preference to enterprisers who made the products that were being used. Employees who are injured in the course of their employment as a result of damaging events arising out of that employment have an assured recovery, albeit inadequate, and any compensation system as to product liability would take this into account. Indeed, a product liability scheme for dealing with accident losses occurring in the course of the use of industrial and commercial products need not logically be the same as that for products intended for use by the consuming public at large.[17]

MEANING OF DEFECT

Two theories of recovery and three distinct tests of defect have been employed by the courts in delineating the ambit of responsibility of a manufacturer in the absence of proof of negligence. The theories have,

15. *See* Keeton, *Products Liability—Inadequacy of Information,* 48 TEXAS L. REV. 398, 399 (1970). The position was taken in that article that while the obviousness of a danger is a highly relevant factor, it ought not necessarily to be conclusive in all situations. A great deal depends upon the sophistication of those who are intended to be users of a product.

16. The leading cases have given this as a primary reason. Greenman v. Yuba Power Prod., Inc., 27 Cal. Rptr. 697 (1962); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); Goldberg v. Kollsman Instr. Corp., 240 N.Y.S.2d 592 (1963).

17. *See* Keeton, *Products Liability—Some Observations About Allocation of Risks,* 64 MICH. L. REV. 1329, 1334 (1966).

of course, been those of implied warranty and strict liability in tort.[18] Often, appellate courts have approved and authorized charges on both theories. Indeed a charge to the jury in a product liability case is often a conglomerate of three theories—negligence, implied warranty and strict liability in tort. Such charges are often unintelligible even to a sophisticated lawyer unless he has specialized on this subject, and certainly they are so to a lay jury. Our supreme courts should arrive at *a* theory of recovery to the exclusion of all others. Trial judges cannot under the present state of the law be criticized for being unable to submit a product liability case to a jury in a satisfactory manner. This situation emphasizes the fact that lack of efficiency in the administration of justice is often due to the complexities and ambiguities of the substantive law rather than to either court organization or court procedures. The fact that litigants, especially plaintiffs, want as a matter of tactics to employ all three theories is not at all decisive.

Two of the three tests used by the courts to identify a defect can be attributed largely to the fact that many courts used warranty theories initially in arriving at strict liability. The first of the three tests follows.

A product is defective if it is not reasonably fit for its intended (ordinary) (or reasonably foreseeable) purposes.[19] This unfitness test was without doubt devised primarily as a basis for deciding when purchasers could recover from sellers for intangible financial and commercial losses resulting from the fact that the purchasers' expectations as to what the product would do were frustrated. It is useful and practical in dealing with claims for damages based on a lack of efficacy of the product to meet the needs of those who are purchasers. In that type of case it is not enough to show in the absence of an express

18. Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969) (warranty); Greenman v. Yuba Power Prod., Inc., 27 Cal. Rptr. 697 (1962) (discussing both theories); Williams v. Brown Mfg. Co., 261 N.E.2d 305 (Ill. 1970); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (warranty); Mendel v. Pittsburg Plate Glass Co., 305 N.Y.S.2d 490 (1969) (discussing both theories); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. Sup. 1967) (tort).

19. Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946) (cleaning fluid not intended for use in the eye); Hardman v. Helene Curtis Indus., Inc., 198 N.E.2d 681 (Ill. Ct. App. 1964) (inflammable hair spray used on dress); Shaw v. Calgon, Inc., 114 A.2d 278 (N.J. Super. Ct. 1955) (used dishwasher product for venetian blinds); Ringstad v. Magnin & Co., 239 P.2d 848 (Wash. 1952) (inflammable dress worn near stove). *See* UNIFORM COMMERCIAL CODE § 2-314(2). The code provision is as follows: "Goods to be merchantable must be at least such as . . . (c) are fit for the ordinary purposes for which such goods are used." *See* Keeton, *Torts, Annual Survey of Texas Law*, 27 SW. L.J. 1 (1973).

warranty that the product was not as good as it was expected to be. It must frustrate the purchaser's purpose, and his purpose must have been either a purpose for which the product was designed or intended, unless the seller was made aware of the buyer's special purpose and the latter was relying on the seller. It was never intended to be a test for ascertaining when a maker would be liable for damages incurred by those who were physically harmed. This is apparent from the fact that the Uniform Commercial Code provides for recovery of damages for physical harm *as consequential damages* from a breach of warranty and only then if that damage proximately results from the breach of warranty.[20] This means at the very least that physical harm from such unfitness must be reasonably foreseeable. For reasons that will be stated hereafter this is a circuitous route to saying that the product is unreasonably dangerous. A characteristic of a product that makes it both unfit and dangerous is another way of saying that it is unreasonably dangerous as that term is defined hereafter.

The second test commonly used is one that is set forth in one of the commentaries to Section 402A of the *Restatement (Second) of Torts*.[21] This was written in the early stages of the development of strict liability theories and at a time when the courts were relying largely on concepts utilized in arriving at liability on a warranty theory. Indeed the black letter of the *Restatement* section limited strict liability to consumers, and the idea was that harm must flow from a characteristic that frustrated consumer expectations. While the term "unreasonably dangerous" was employed in the black letter, it was defined in the commentary as being *dangerous to an extent* beyond that which would be reasonably contemplated by intended (and reasonably foreseeable) purchasers. This does speak to the issue—the dangerousness of the product. But it is a nebulous test—a vague and a very imprecise one—because the ordinary consumer cannot be said to have expectations as to safety regarding many features of the complexly made products that are purchased, such as the risk of fire from the way gasoline tanks are designed and installed in cars or the magnitude of the risks of cars overturning and the like.

The third and final test which I suggest to be the appropriate one is as follows: A product is defective if it is unreasonably dangerous as

20. UNIFORM COMMERCIAL CODE § 2-715.

21. RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* (1965). This was the test that was used in the charge to the jury in C.A. Hoover & Son v. O.M. Franklin Serum Co., 444 S.W.2d 596 (Tex. Sup. 1969).

marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed.[22] Under the heading of benefits one would include anything that gives utility of some kind to the product; one would also include the infeasibility and additional cost of making a safer product. As the Court of Appeals for the Fifth Circuit has said, "[D]emanding that the defect render the product unreasonably dangerous reflects a realization that many products have both utility and danger."[23]

An excellent illustration of this is presented in *Metal Window Products Co. v. Magnusen.*[24] In that case, judgment was rendered for plaintiff in the trial court on both negligence and strict liability theories. The product was a sliding glass door installed in an apartment. The door constituted the rear entrance to the apartment and was the same type used in other apartments of the building. Plaintiff attended a cookout at the apartment. Plaintiff had gone back and forth through the door when it was open several times but the last time she started through, the door had been closed and she struck it. It was urged that the door was defective as designed and marketed because of the absence of any decals or warnings that would put a person on notice when the door was closed. The court held that the door was not unreasonably dangerous as a matter of law and three factors were stressed—the utility of transparency, the obviousness of the danger, and the ease with which users could supply decals to guard against the obvious risk involved. The desire for a view, the gracious and spacious concept and the feeling that transparency gives to being outdoors and yet indoors are esthetic considerations that cause people to want glass doors, even with the risk that is inherent in them.[25] I would hope that decisions of this nature will produce instructions to the jury asking the jury to make this kind of evaluation of products, and that trials are simplified by way of eliminating negligence theories and other tests such as those mentioned above.

In *Cronin*, the hasp or locking device was not as suitable for its pur-

22. Ross v. Up-Right, Inc., 402 F.2d 943, 946 (5th Cir. 1968); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 850 (5th Cir. 1967). *See also* Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5, 15 (1965); Keeton, *Products Liability—Inadequacy of Information,* 48 TEXAS L. REV. 398, 403 (1970).

23. Ross v. Up-Right, Inc., 402 F.2d 943 (5th Cir. 1968).

24. 485 S.W.2d 355 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ).

25. *Id.* at 358.

pose as it was intended to be, and furthermore it was not as safe as it would have been had it been constructed and fabricated as intended. Danger was reasonably foreseeable, and there was no redeeming feature—no beneficial purpose to be served by having metal that was porous, containing holes, pits and voids. Therefore, the product was unreasonably dangerous as a matter of law and this would be true of virtually any fabrication or construction defect. But if defect is to be a requirement, it is submitted that there is no way to avoid a risk-benefit analysis in passing upon designs. If a court wishes to depart from the requirement of a defect—and as stated heretofore, some may think that this should be done—then it is submitted that a maker could be held liable for harm resulting to anyone in any case even in the absence of a defect if, but only if, proper care was exercised in the use of the product and no one else can be found who could be regarded as culpably responsible for the damaging event. That would be a rather far-reaching step, but it would be a method for riskspreading when no one can be found who was culpably responsible.

It will be noted that the test suggested for a defect makes no allowance for the fact that the maker was excusably ignorant of the risk that caused the product to be defective. Whether or not the scientific unknowability of the risk should be a roadblock to recovery is another question. If it is, then as the Supreme Court of California suggests, strict liability as to design defects is virtually a myth. This is not to say that negligence should be a prerequisite to recovery when the claim is based on the ground that the product was improperly designed. It is only to say that the courts must face the issue squarely and decide whether or not negligence is or is not to be a prerequisite to recovery.

As for products intended for industrial and commercial use, fault might well be a prerequisite to recovery, especially in the light of two other liability-without-fault schemes applicable to users of those products—the workmen's compensation system for the protection of employees and the abnormally dangerous activity doctrine applicable in most jurisdictions that protects bystanders in many situations.