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MANUFACTURER'S NEGLIGENCE IN PRODUCTS LIABILITY CASES

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HISTORICAL BACKGROUND

During the past thirty-three years, Judge Cardozo's statement in *Ultramares Corp. v. Touche*,[1] "The assault upon the citadel of privity is proceeding in these days apace," has often been quoted in products liability cases. *MacPherson v. Buick Motor Co.*,[2] decided in 1916, was the case which began the great assault. The court therein held, Cardozo again writing: "If the nature of a thing is such that it is reasonably certain to place life or limb in peril when negligently made, it is then a thing of danger"[3] and the manufacturer should be held liable without the need for privity of contract. This early case left an indelible imprint upon the law of products liability. Although its doctrine was extended slowly, each decade has produced additional wreckage in the fortifications defending "the citadel." On the plaintiff's side, these extensions have included recovery of property damage[4] (even where it was caused by such chattels as animal food, involving no recognizable risk of personal injuries).[5] Protection has even been afforded to such persons beyond the original purchaser as his employees,[6] the members of his family,[7] subsequent purchasers,[8] and other users of the chattels.[9] Even bystanders[10] and others "in the vicinity of its probable use"[11] are now within the scope of protection. On the defendant's side, the doctrine has been broadened to include makers of component parts,[12] assemblers of parts,[13] those who put their names upon goods made by

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1 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

2 217 N.Y. 382, 111 N.E. 1050 (1916).

3 Id. at 389, 111 N.E. at 1053.

4 Gosnell v. Zink, 325 P.2d 965 (Okla. 1958).

5 Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (1954).

6 Rosebrock v. General Elec. Co., 236 N.Y. 227, 140 N.E. 571 (1923).

7 Baker v. Sears, Roebuck & Co., 16 F. Supp. 925 (S.D. Cal. 1936).

8 Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y.S. 131 (1915).

9 Lill v. Murphy Door Bed Co., 290 Ill. App. 328, 8 N.E.2d 714 (1937).

10 McLeod v. Linde Air Prods. Co., 318 Mo. 397, 1 S.W.2d 122 (1927).

11 Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

12 Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932).

13 Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942).

others,[14] sellers who were not and did not purport to be manufacturers at all,[15] repairmen who do work on the chattel[16] and, in most jurisdictions, contractors.[17] Given this increased coverage, it is now a general rule that negligence liability will be imposed upon any supplier of a chattel for remuneration.[18] However, gratuitous lenders, bailors and donors are still held to have no duty to inspect before delivery of the chattel. They are liable only for a failure to disclose those defects of which they have knowledge and which may make the product dangerous to a third person.[19]

An exception to the general rule occurs where the user, because of the experience of his profession, should have known of the danger. If so, the producer will not be held liable. This problem has often arisen with regard to the sale to physicians of medicine, supplies and equipment. The courts have been uniform in holding that the physician should have known the nature of the purchase and need not have been warned.[20]

This author recently participated in a case in which it was alleged that a blood bank had supplied blood without sufficient warning of the dangers to those who have had numerous transfusions. When the patient had a violent reaction, the trial court held that since the blood bank delivered blood to physicians and hospitals as ordered before the blood was administered to patients, it was the doctor, not the blood bank, who was under the duty to warn the patient. This case was not appealed, but was settled by the doctors who were sued jointly for negligence.

The Present Trend

In recent years circumstantial evidence has been increasingly deemed sufficient to establish negligence on the part of the manufacturer and the assembler whose name appears on the product. Although the maxim "*Caveat emptor*" is far from dead,[21] since 1915 the tide of the law has shifted increasingly toward protection of the buyer or "ultimate consumer." Indeed, with such products as new or used automobiles, it is now the manufacturer who must beware ("*Caveat venditor*") if his product proves defective. Suits against him have usually

[14] Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935).

[15] Jones v. Raney Chevrolet Co., 217 N.C. 693, 9 S.E.2d 395 (1940).

[16] Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932).

[17] Wright v. Holland Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932).

[18] Nelson v. Fruehauf Trailer Co., 20 N.J. Super. 198, 89 A.2d 445 (1952).

[19] Parker v. State, 201 Misc. 759, 105 N.Y.S.2d 735 (Ct. Cl. 1951).

[20] Johnson v. H. M. Bullard Co., 95 Conn. 251, 111 Atl. 70 (1920).

[21] But cf. Comment, Federal Regulation of False Advertising, 5 B.C. Ind. & Com. L. Rev. 704, 705 (1964).

been successfully prosecuted.[22] As Page Keeton, Dean of the University of Texas Law School, has pointed out,[23] "Liability of a manufacturer of a product may be imposed upon one of three theories: (a) negligence; (b) breach of implied warranty or breach of duty independent of the contract to provide a fit product without respect to fault; and (c) breach of an expressed warranty."

Recent decisions involving an express warranty theory are attributable to the ingenuity of plaintiff's counsel in finding representations constituting express warranties in letters, in personal conversations by agents or manufacturers, on labels on the product, in brochures and in advertisements and commercials. These decisions indicate the judicial adoption of a policy requiring the manufacturer to stand behind his inducements to the public to buy.[24] Liability in cases not involving a breach of warranty theory of liability depends on proof of negligence. Generally, the main obstacle to recovery is not the substantive law relating to duty or causation, but it is the unavailability of sufficient evidence of negligence to establish a prima facie case. A theory of recovery based on a warranty, however, is not subject to this disadvantage. A user need merely show that an injury was sustained either in the course of his use or shortly thereafter, that the injury is attributable to the product and that this is a breach of the express or implied warranty.

The problem of a manufacturer's liability for physical harm suffered by a supersensitive or an allergic plaintiff has been presented with increasing frequency. Generally, mere proof of an injurious reaction is insufficient because the plaintiff may have had a temporary or unusual condition. The plaintiff must show not only that an appreciable number of people were allergic to some substance in the product, but also that the plaintiff was a member of this class. A recent case involving the use of a deodorant illustrates this dual requirement. The plaintiff, suing in negligence and fraud, proved that a certain number of people were allergic to the aluminum sulfate used in the product and that he suffered injuries from it. The court held that the plaintiff had no further burden in order to establish a prima facie case and that the burden then shifted to the manufacturer to justify his ignorance of the danger or to indicate that proper warnings and in-

[22] Chew, The Swing Grows for Products That Are Faulty, The National Observer, Jan. 14, 1963, p. 21, col. 3.

[23] Keeton, Products Liability, 49 Va. L. Rev. 676 (1963), citing Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) and Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

[24] See Bonowski v. Revlon, Inc., 251 Iowa 141, 100 N.W.2d 5 (1958) (suntan lotion) and the lung cancer cases[,] Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962) and Prichard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. (1961).

structions had been given.[25] Note that this type of negligence does not, of course, extend to a retail seller of the product.

The following test has been suggested: "A product is . . . fit for the general purpose intended, if a reasonable man with full knowledge of all the properties and the danger therein would continue to market the product because the utility of its use outweighs the dangers."[26] An example of the application of this rule is found in the polio vaccine case, where two innoculated children contracted polio because of the live and active poliomyelitis virus in the vaccine. The court properly imposed liability, finding that the vaccine was not wholesome and, therefore, neither merchantable nor fit for its intended purpose.[27] While there was no negligence in distributing the vaccine, since science had developed a method to remove the live virus from the vaccine, reasonable men would not continue marketing the vaccine unless the live virus were eliminated from it.

At this point, the rationale for holding the manufacturer of food and drugs to such seemingly strict (*i.e.*, without fault) liability may be questioned. Perhaps the best answer is found in Judge Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co.*:[28] "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."

A recent case illustrates the application of this socialistic concept.[29] A plaintiff who used a hair dye suffered a systemic reaction of an extremely violent nature. It was known that an ingredient in the defendant's product could cause allergic skin reaction in a number of people. The plaintiff had used this dye every six weeks for two and a half years. Doctors for both parties agreed that the plaintiff's dread disease was from an unknown cause, and that never before in medical history had this disease been associated with hair dye. The court held that a jury could have found that defendant's product caused plaintiff's injury. Another example of the standard of proof necessary under this modern concept of liability, founded upon manufacturer's ability to spread his losses, arose during a drilling operation in Texas. The plaintiff was injured when a charge of dynamite exploded prematurely. The dynamite was being handled by a fellow-servant who was killed. The particular charge was composed of three dif-

[25] Wright v. Carter Prods., Inc., 244 F.2d 53 (2d Cir. 1957) (makers of Arrid).

[26] Keeton, Products Liability—Current Developments, 40 Texas L. Rev. 193, 210 (1961).

[27] Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rep. 320 (1960).

[28] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944). See Hadley v. Hillcrest Dairy, Inc., 341 Mass. 624, 171 N.E.2d 293 (1961).

[29] Braun v. Roux Distrib. Co., 312 S.W.2d 758 (Mo. 1958).

ferent elements, each manufactured by a different defendant. Plaintiff was unable to prove any negligence and was unable to produce any evidence that any of the three elements were defective. The court held that the explosion spoke for itself, that it was enough to shift the burden of proof to defendants and that it raised a jury question as to whether one or more of them should be liable.[30]

The Requirement of Foreseeability of Danger

One of the most widely expanding areas in the field of products liability arises out of the manufacturer's duty to *warn*. The defendant's product may be perfectly made, but may still be dangerous to some consumers in either normal use or such abnormal use as is foreseeable. The defendant manufacturer is usually held to have a duty to warn the public of whatever danger there may lie in his product. Warning to the retailer is not sufficient; it must be delivered to the ultimate consumer. This duty to warn depends upon the foreseeability of the danger. Therefore, the typical defense is that the danger was not foreseeable and, consequently, the manufacturer's duty to warn against it did not arise.

As a practical proposition, the courts have had little or no difficulty in applying the foreseeability theory. A typical case arose when a plaintiff applied a balm to his chest, put on his pajamas, lighted a cigarette, and was injured by the flash flame resulting from the ignition of vapors accumulated between his chest and the pajama tops. There was no warning on the label and the balm would not ignite at an ordinary temperature. The evidence proved that the fire was possible only because of the air space between the pajamas and the plaintiff's body. The court held that the manufacturer should have known that the consumer would smoke while wearing clothing and that he therefore had a duty to warn of the explosive nature of the fumes of his product.[31]

Of course, liability is easily cast upon the makers of such products as a threshing machine, which had over its blades a catwalk of such thin metal that a man of normal weight caused its collapse;[32] a party dress that burst into flame upon the slightest touch of a cigarette;[33] a grinding wheel which flew apart while revolving at the prescribed speed[34] and a refrigerator which gave off carbon monoxide.[35] All of these examples are taken from cases which permitted recovery because the inherent dangers appeared in the course of the usual use of the

[30] Dement v. Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960).
[31] Martin v. Benque, Inc., 25 N.J. 359, 136 A.2d 626 (1957).
[32] Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903).
[33] Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1944).
[34] Tomao v. A. P. DeSanno & Son, Inc., 209 F.2d 544 (3d Cir. 1954).
[35] Beadle v. Servel, Inc., 344 Ill. App. 133, 100 N.E.2d 405 (1951).

product. It is not hard to find many other examples where the foreseeability is clear and liability thus logically follows. It has been held that when a plaintiff establishes

> that a manufacturer-defendant's product is dangerous in its ordinary use, and that no warning of its danger was given, a presumption of defendant's knowledge of this danger arises, and this presumption with, of course, proof of causation and injury, completes the plaintiff's *prima facie* case. . . . [I]t is up to the manufacturer-defendant to come forward, if he can, with exculpatory evidence of its faultless ignorance of the dangers of its product to those who might use it.[36]

With this use of the foreseeability rule, a manufacturer must have a far-reaching imagination. He will not be free from liability by issuing a warning to the retailer, if the retailer does not pass it along to the ultimate consumer. There are many cases, however, which are complicated and technical, and where foreseeability rests in a dim twilight zone. As yet unresolved is the question: If the product is safe for most persons, must a manufacturer also take cognizance of the idiosyncracies of the remaining few?

The Duty to Warn and Direction for Use

The Federal Hazardous Substance Labeling Act[37] was enacted in 1960 and is administrated by the Food and Drug Administration in the Department of Health, Education, and Welfare. The law is aimed at the proper labeling of any product that is toxic, corrosive, irritant, strongly sensitizing, flammable, or which generates pressure through heat, combustion or other means. Laws relating to insecticides, fungicides and rodenticides, passed years ago, also require proper labeling. The duty to warn and the duty imposed under the direction for use depend upon the foreseeability of danger to the user. The labels of highly toxic substances are required to bear two words, "DANGER—POISON," printed in type no smaller that the largest on the label. A skull and crossbones must also appear either in red or a contrasting color.

A problem arises with respect to those users who are allergic to certain ingredients contained in the manufactured product. This problem is illustrated by the case of a manufacturer who sold 82 million jars of a deodorant and received 373 complaints of dermatitis. The court held that the formula need not be altered, but that there was a definite duty to warn "those few persons who it knows cannot apply the

[36] Sylvania Elec. Prods., Inc. v. Barker, 228 F.2d 842, 849 (1st Cir. 1955).
[37] 74 Stat. 372 (1960), 15 U.S.C. §§ 1261-73 (Supp. IV, 1959-62).

product without serious injury."[38] In the court's opinion, the defendant's argument based on the improbability of injury bowed to plaintiff's superior argument for the necessity of giving notice. Of course, if the manufacturer has actual (as opposed to merely imputed) knowledge of the harmful characteristics of any ingredient, he has a clear duty to warn.

The next issue concerns the adequacy of the warning. Mere listing of the ingredient naphtha on the label of a solvent was held not to be an adequate warning that the solvent was highly explosive.[39] Despite the common sense argument that "Where there is smoke there is fire," an admonition that the user should keep a smoke-making machine away from the face does not suffice to warn him of the danger of flame.[40] The legend, "Caution Do Not Inhale Flames," was held insufficient to warn of the dangers of carbon tetrachloride where the prominently displayed trade name of the product was "SAFETY-KLEEN."[41] When a plaintiff read the caveat on the label "VOLATILE SOLVENT—VAPOR HARMFUL—Use with adequate ventilation—avoid prolonged or repeated contact with skin" and sued after being poisoned while using the fluid, the court held that this solution, containing carbon tetrachloride, was so toxic that the jury could find the warning inadequate.[42] A label on a cement-base paint read "Caution: Inasmuch as the alkalinity of Bondex may be irritating to tender or sensitive skin, it is advisable to use a paddle for mixing." The plaintiff lost the use of one eye when his father accidentally brushed it with paint. It was held that the warning could be construed by the jury as "as assurance that the only danger in the use of Bondex was that it might have a slightly irritating effect upon a tender skin after prolonged contact."[43]

Of equal importance in this area are the pamphlets or directions for use which accompany the product. "The fact that directions are overlooked or not meticulously followed does not relieve the manufacturer of the duty to warn of latent dangers common to a class of articles."[44] The facts in the case from which this statement is quoted are most interesting. "Tag," a new spray, was designed to control and eliminate from apple orchards a fungus called "scab." The plaintiff, after applying this spray to his famed Albemarle County orchard to eradicate the fungus from his trees, lost his entire crop. It was proved

38 Wright v. Carter Prods., Inc., supra note 25.

39 Standard Oil Co. v. Lyons, 130 F.2d 965 (8th Cir. 1942).

40 Larramendy v. Myers, 126 Cal. App. 2d 636, 272 P.2d 824 (1954).

41 Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945).

42 Tampa Drug Co. v. Wait, 103 So. 2d 603 (Fla. 1958).

43 Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).

44 McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 853, 75 S.E.2d 712, 718 (1953).

that when applied to heavily infected trees, "Tag" caused the leaves to drop, resulting in the destruction of the fruit. The defendant contended it had discharged its duty to warn, and that the loss was occasioned by the plaintiff's failure to follow directions properly. The jury awarded plaintiff damages; the state supreme court affirmed. The plaintiff, never conceding that he had failed to follow the directions, stressed the ambiguities in the literature. The court held that the warning must be directed toward those dangers which are reasonable and foreseeable, including hazards to the object itself, and that *deviations from the directions are themselves a foreseeable contingency.*

CONCLUSION

The plaintiff's task is made easier by use of the doctrine of res ipsa loquitur or circumstantial evidence to prove the defendant's negligence. Where res ipsa loquitur is the method of proof relied upon, the accident must be one that would not normally occur without negligence, and where the instrumentalities, forces and conditions that are the likely source of the trouble were under the management and control of the defendant.[45] Since a particular fact may be inferred from another fact, a plaintiff is not even required to identify or prove the conduct which was the proximate cause of the injuries sustained or that it was unreasonable.

Despite the availability of these liberal methods of proof, it is still held that where the danger is apparent, there is ordinarily no duty to warn.[46] Whether the plaintiff is to be charged with knowledge of the danger must be determined by reference to the experience of the class of persons most likely to use the product.[47] Thus a cement product may be dangerous when distributed to an average household consumer, who is not familiar with the dangers of lime.[48] A similar preparation, distributed to those in the building trade, who know of lime's caustic qualities, needs no accompanying warning.[49] The modern trend is to require a manufacturer to warn the customers of familiar hazards and even to anticipate the forgetfulness of customers expected to use the product.[50]

Although this comment includes the leading cases in the area, there are many others reaching similar results. The cases were selected because of the generally known product involved. The manufacturer's

[45] Sitta v. American Steel & Wire Div., 254 F.2d 12 (6th Cir. 1958).

[46] Nisbida v. E. I. Du Pont de Nemours & Co., 245 F.2d 768 (5th Cir. 1957).

[47] Parker v. State, 280 App. Div. 191, 112 N.Y.S.2d 693 (1952), holding that physicians should know the nature of their purchases of medical supplies and need not be warned of possible dangers.

[48] Haberly v. Reardon Co., supra note 43.

[49] Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 115 A.2d 731 (1959).

[50] Abbott Labs. v. Lapp, 78 F.2d 170 (7th Cir. 1935).

duty to warn depends upon the foreseeability of the danger, whether known or unknown, for it is felt that the experts who manufacture or assemble products *should* know all the possible dangers of its use. One of the most widely expanding areas of products liability arises out of the duties to warn and to promulgate adequate direction for use. This area has been aptly called "A New Frontier,"[51] in our American jurisprudence.

[51] Condon, Products Liability—A New Frontier, 2 Federation of Insurance Counsel (1961).