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Products Liability—Strict Tort Liability—Liability of a Manufacturer for Economic Loss.—Seely v. White Motor Co.

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In selecting the method to be employed in determining the extent of any special benefit, it appears unrealistic to attempt to determine the cost of a comparable service. Actually the benefit measured by this test would be the expense and inconvenience involved in travel to the next nearest library, hardly a significant benefit. Nor does it appear that the erection of a library in a neighborhood would be an income producing improvement. While it might be a limited factor in determining the fair rental value of an apartment building, this would apply only in certain situations. It thus appears that if indeed a library does confer any special benefit, it will best be reflected in property resale value. The determination of amount under this standard will be properly left to the appraisers.

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Products Liability—Strict Tort Liability—Liability of a Manufacturer for "Economic Loss."—*Seely v. White Motor Co.*[1]—The plaintiff purchased a truck from a dealer under a conditional sales contract. The truck had been manufactured by the defendant who made the following express warranty:

> The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof. . . .[2]

Upon taking possession of the truck, the plaintiff found it to be unsatisfactory because of a violent bouncing effect known as "galloping." For nearly a year thereafter, the dealer, acting under the guidance and direction of the manufacturer, attempted unsuccessfully to remedy this defect. Subsequently, the brakes failed and the truck was extensively damaged when it overturned in a non-collision accident. After the plaintiff had repaired this damage, he notified the dealer that he would make no more payments on the contract. The dealer consequently repossessed the truck and resold it for an amount greater than the deficiency.

The plaintiff commenced this action against the manufacturer[3] both for the damages "related to the accident," namely the cost of the repairs,[4] and for the damages "unrelated to the accident," the amount paid toward the purchase price and the profits which had been lost because the truck had been unfit for normal use.[5] The trial court entered judgment for the plaintiff for these "unrelated damages" which had arisen independently of the accident as a result of the defendant's breach of its express warranty.[6] Re-

[1] 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

[2] Id. at 20, 403 P.2d at 148.

[3] The trial court granted plaintiff's motion to dismiss without prejudice to his action against the dealer. Id. at 20, 403 P.2d at 148.

[4] Id. at 19-20, 403 P.2d at 147-48.

[5] Id. at 20, 403 P.2d at 148.

[6] Ibid.

covery was denied, however, as to the cost of the repairs because the trial court found that there had been no showing of a causal relationship between the defect and the accident.[7] Both parties appealed and, in affirming, the supreme court HELD: failure to replace defective parts as required by an express warranty constitutes a breach which renders the manufacturer liable for all the damages naturally arising therefrom.[8]

The holding and rationale of the instant case are significant only insofar as they are based upon routine warranty theory rather than upon the doctrine of strict liability.[9] Two distinguished jurists wrote lengthy dicta, however, as to the proper applicability of the strict liability rule, and it is these dicta which are to be considered here. Chief Justice Traynor, writing for the majority, explained why the case did not fall within the strict liability rule[10] adopted in *Greenman v. Yuba Power Prods., Inc.*,[11] and Justice Peters, while concurring in the result, argued that the *Greenman* rationale should have been the basis of recovery here.[12] There are literally hundreds of articles[13] in the field of products liability dealing with the history[14] as well as the merits[15] of the many theories of recovery which have

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[7] Ibid.

[8] Ibid.

[9] The court had no difficulty in finding that the defendant had made express representations to the plaintiff and that his failure to replace the defective parts was a breach of warranty. Plaintiff's continued demands that the defect be cured were held to have adequately discharged his obligation to give notice and, simultaneously, to have given the defendant ample opportunity to perform. Since the warranty was express, there was no problem of a lack of privity. Id. at 20, 403 P.2d at 148, citing Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954).

The only significant phase of the majority position which is tenuous is its finding of "reliance" by the plaintiff. Id. at 20, 403 P.2d at 148; see Cal. Civ. Code § 1732. At the trial, the plaintiff conceded that he had been unaware that the defendant had given the warranty and that he had relied wholly upon the dealer. The majority held that this reliance was adequate inasmuch as the plaintiff had relied upon the warranty. In his concurring opinion, Justice Peters disagreed on the ground that a purchaser does not rely upon a "mere scrap of paper," but he relies upon a party who will carry out the obligations of the warranty. Supra note 1, at 24-25, 403 P.2d at 152-53.

It is unlikely that the result here would be significantly altered by the application of the Uniform Commercial Code rather than the controlling Sales Act. The court's reasoning on the matter of reliance would probably yield the same conclusion as to the Code's "basis of the bargain." Compare U.C.C. § 2-313 (Cal. Commercial Code § 2313), with Uniform Sales Act § 12 (Cal. Civ. Code § 1732). Moreover, the measure of damages should not be significantly different under the Code as Comment 1 to § 2-714 (Cal. Commercial Code § 2714) points out that "in general this section adopts the rule of the prior uniform statutory provision for measuring damages . . . , but goes further to lay down an explicit provision as to the time and place for determining the loss." Finally, both the Sales Act § 49 (Cal. Civ. Code § 1769) and the U.C.C. § 2-607 (Cal. Commercial Code § 2607) require the buyer to give notice to the warrantor within a reasonable time after he knows or should know of the breach.

[10] Supra note 1, at 22-23, 403 P.2d at 150-51.

[11] 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

[12] Supra note 1, at 25-29, 403 P.2d at 153-57.

[13] For the years 1961-1965, the Index to Legal Periodicals lists 202 articles under "Products Liability."

[14] See, e.g., Llewellyn, On Warranty of Quality, and Society, 36 Colum. L. Rev. 699 (1936).

[15] See, e.g., Prosser, The Assault upon the Citadel, 69 Yale L.J. 1099 (1960).

been advanced.[16] The focus of this note, however, is not upon what theory ought to be adopted but, rather, upon the refinements and distinctions which can be made by a jurisdiction which has already opted for the strict liability doctrine.

In the *Greenman* case, a consumer brought an action for personal injuries against the manufacturer of a defective power tool. The California Supreme Court held that the plaintiff's failure to give notice as required by the Sales Act[17] was not a bar to his action.[18] In effect, the court held that when a consumer is injured by a defective product, the manufacturer of that product will be held strictly liable in tort without regard to any rules of warranty. Justice Traynor wrote for a unanimous court that

> . . . rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.[19]

In order to better understand the implications of the instant case, however, a different approach to *Greenman* is necessary.

The court, in *Greenman*, was forced to make what is essentially a policy decision. Given the task of providing an effective remedy for the injured consumer or ultimate user of a defective product, the court rejected traditional warranty theory as ill-suited for the "purpose."[20] Stated in the most basic terms, the court made the value judgment that the strict liability doctrine would produce fewer unjust and anomalous results. It is beyond question, however, that the rule chosen is susceptible of greater differentiation and refinement so that the frequency of such undesirable results will be diminished still further. This, then, is the fundamental consideration presented in the instant case: How broadly should the doctrine of strict liability be applied in order to include all deserving plaintiffs while simultaneously excluding the maximum number of plaintiffs with tenuous or fraudulent claims? Put in less abstract terms, the question facing the court in the instant case was: For what purpose is liability imposed here; that is, should the *Greenman* rule be applied in the absence of personal injury?

Justice Traynor indicated a willingness to extend the *Greenman* rule to cover physical damage to personal property, but he declined to apply it to such damages as lost profits and the purchase price, which he classified as "economic loss."[21] The application of this position in the instant case means that if the plaintiff had been able to establish the causal relationship between the defect and the accident, he would have recovered the cost of

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[16] For a collection of 29 such theories, see Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 153-55 (1958).

[17] Cal. Civ. Code § 1769.

[18] Greenman v. Yuba Power Prods., Inc., supra note 11, at 61-62, 27 Cal. Rptr. at 699-700, 377 P.2d at 899-900.

[19] Id. at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.

[20] Ibid.

[21] Supra note 1, at 23, 403 P.2d at 151.

the repairs under the doctrine of strict liability;[22] *absent a warranty*, however, he could not return the vehicle and demand the refund of his purchase price.[23] Broadly speaking, then, Justice Traynor has sought to limit the potentially undesirable effects of the strict liability rule by narrowly defining the kinds of damages to which it applies.

Justice Peters, on the other hand, contended that a distinction drawn on the basis of kinds of damages is invalid and arbitrary. The main thrust of his position is that the majority have examined the causal chain running from the existence of a defect to the expenditure of money by the consumer and have chosen to base their qualifying distinction upon an *intermediary* link.[24] If the defect in an article causes a personal injury which leads to a financial loss, the plaintiff can recover. If, however, the same defect in the same article should only destroy its utility and thus cause a financial loss, this same plaintiff could not recover except on a warranty. Justice Peters argued essentially that any distinction between these two causal chains must be made at the source since, he contended, the effect of *Greenman* was to exempt *all consumer transactions* from the rules of warranty. Once a particular sale can properly be characterized as a *consumer transaction*, damages for *any* loss caused by a defect are recoverable under strict tort liability.

Any attempt to evaluate Justice Peters' position must, of course, depend upon the construction of "defect" and of "consumer." When Justice Traynor considered the question of the defect, he stressed that recovery on the basis of strict liability here would render the manufacturer ". . . liable for business losses of other truckers caused by the failure of its trucks to meet the specific needs of their businesses, even though those needs were communicated only to the dealer."[25] This would undoubtedly be true if "defective" were defined in terms of "fitness for a particular purpose,"[26] but Justice Peters pointed out that "defective" must properly be defined in terms of "merchantability."[27] It is this definition of "defective," he

[22] Id. at 24, 403 P.2d at 152.

[23] Id. at 23, 403 P.2d at 151.

[24] Id. at 25-26, 403 P.2d at 153-54.

[25] Id. at 22, 403 P.2d at 150.

[26] Id. at 28, 403 P.2d at 156; see, e.g., U.C.C. § 2-315 which provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

[27] Supra note 1, at 28, 403 P.2d at 156; see, e.g., U.C.C. § 2-314 which provides:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
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> (2) Goods to be merchantable must be at least such as
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> (a) pass without objection in the trade under the contract description; and
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> (b) in the case of fungible goods, are of fair average quality within the description; and
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> (c) are fit for the ordinary purposes for which such goods are used; and

argued, which will adequately protect against a too sweeping application of the strict liability rule.[28] Conceding that such a construction may be difficult to implement in particular cases, it must be noted that this same difficulty inheres in any attempt to distinguish between a warranty of merchantability and a warranty of fitness for a particular purpose.

The second and more perplexing problem encountered in appraising Justice Peters' position involves the definition of the class of plaintiffs to which it would be applied. How will the courts decide who is a consumer? While Justice Peters conceded that this was a "close case," he would classify this plaintiff as an "ordinary consumer . . . [since] he was the final link in the marketing chain, having no more bargaining power than does the usual individual who purchases a motor vehicle on the retail level."[29] In his view, then, a person who purchases a product for use, and thus terminates the marketing chain, is a consumer, and all his remedies flow from strict tort liability rather than from the rules of warranty.

While this ordinary consumer test is superficially attractive, a deeper analysis is essential to an accurate evaluation of its validity. Conceding that Justice Peters is correct that any distinction must be drawn on the basis of the nature of the transaction, it is submitted that a distinction expressed in terms of damages can flow directly from just such a transactional dichotomy. This is to say that a distinction may be drawn *within* a transaction, for the transaction may be separated into its component elements. When the consumer goes to buy goods on the basis of personal utility, he is ordinarily seeking to break even—to get his money's worth. When, however, this same consumer considers the purchase of this same product in terms of commercial utility, he is seeking something more than value for value—he is seeking it as a means to a profit.

Given this distinction, it is not unreasonable to conclude that when the buyer is engaged in this commercial element of the transaction, he ought to bear the risks of doing business.[30] Admittedly, he may not have the same "bargaining power" available to use in dealing with them, but they are nonetheless the same risks borne by all who engage in a commercial enterprise.[31] What is suggested here is simply that a denial of recovery for "economic losses" is but a facile manner of expressing a distinction based upon the discrete elements of a single transaction. The better approach would not deny recovery to consumers for certain kinds of losses but would merely recognize that, properly defined, *consumers* do not suffer this kind of harm. On the other hand, small businessmen would not be entitled to

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

[28] Supra note 1, at 28, 403 P.2d at 156.

[29] Id. at 29-30, 403 P.2d at 157-58.

[30] Cf. id. at 23, 403 P.2d at 151.

[31] Cf. id. at 23-24, 403 P.2d at 151-52.

assert their lack of "bargaining power" as a ground for pursuing this non-commercial remedy. In the instant case, then, the plaintiff was properly restricted to the rules of warranty for his recovery because his losses arose from the commercial side of the transaction. In terms of *Greenman*, the "purpose," or more precisely the reason, for which liability is imposed here is the law's enforcement of an obligation freely undertaken. What is suggested here, then, is that Justice Peters' view can be implemented, without the "horrible consequences" predicted by the majority, if, but only if, the terms are clearly and precisely defined. It is submitted that Justice Peters has resolved the problem of "defective" but that the critical question of a proper construction of "consumer" has not received a satisfactory response.

In this respect, consider the hypothetical case posed by Justice Peters at the close of his opinion.[32] According to his reading of the majority opinion, a housewife who bought a refrigerator with such a defect as to render it useless would have no remedy against the manufacturer except on an express warranty. Such a result is not easily defended, and under his position in the instant case, Justice Peters would grant recovery to the homeowner. This was basically the case presented in *Santor v. A & M Karagheusian, Inc.*[33] wherein a homeowner bought carpeting from a retailer who later went out of business. The carpeting was defective and the homeowner brought an action for its value against the manufacturer. The New Jersey Supreme Court affirmed a judgment for the plaintiff based upon a breach of an implied warranty of merchantability notwithstanding the lack of privity. The court went on to say, however, that the recovery could have been based upon strict tort liability despite the fact that no one had been physically injured:

> As we have indicated, the strict liability in tort formulation of the nature of the manufacturer's burden to expected consumers of his product represents a sound solution to an evergrowing problem, and we accept it as applicable in this jurisdiction. And, although the doctrine has been applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective, we reiterate . . . that *the responsibility of the maker should be no different where damage to the article sold* or to other property of the consumer is involved. . . . In this era of complex marketing practices and assembly line manufacturing conditions, restrictive notions of privity of contract between manufacturer and consumer must be put aside and the realistic view of strict tort liability adopted.[34] (Emphasis added.)

Justice Peters cited this opinion in support of his position while the majority, in effect, rejected *Santor* as wrongly decided.[35] Under the approach sug-

[32] Id. at 30, 403 P.2d at 158.

[33] 44 N.J. 52, 207 A.2d 305 (1965).

[34] Id. at 66, 207 A.2d at 312, citing Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962).

[35] The majority felt that the decision should have been based solely on the defendant's representations that the carpeting was Grade #1. Supra note 1, at 23, 403 P.2d at 151.

gested in this note, however, *Santor* is inapposite because the plaintiff in the instant case cannot properly be characterized as a consumer.

It is quite possible, then, that a good deal of the difficulty on the question of damages can be attributed to the equation of the terms "economic" and "commercial." While consumers do have "economic losses," they cannot, by definition, suffer "commercial losses." This terminology would preserve the fundamental effect of *Greenman* which recognized that ". . . the liability is not one governed by the law of contract warranties but by the law of strict liability in *tort*."[36] (Emphasis added.)

Under traditional tort theory, the "harm" is an independent step between the causative force (here the defect) and the ultimate "economic loss." Ordinarily, then, the diminished utility of a defective product would not be classified as this kind of tortious harm. Under the approach suggested here, however, it is enough that the "economic loss" results directly from the presence of the defect. This kind of result might appear to many to be undesirable or perhaps unjustifiable. It is submitted, however, that a consistent and orderly application of the rationale of *Greenman* can yield no other. An aversion to this result might well be grounds to resist any adoption of the strict liability doctrine. It should not, however, be grounds to apply the doctrine according to an evaluation of the needs of various plaintiffs. The meaning of "defect" and of "consumer" can certainly be drawn narrowly, but they ought not to be drawn artificially. If, then, the definition of "defective" is restricted to goods which are truly unmerchantable and if the term "consumer" is defined according to the nature of the transaction and not according to a judicial appraisal of "bargaining power," the *Greenman* rule can safely be given its natural effect. One who buys goods for commercial use or resale must look solely to the rules of warranty for his remedy if the goods are defective. On the other hand, one who buys for personal use will not be restricted to a warranty action but he will be entitled to pursue the non-commercial remedy of strict tort liability for all the damages caused by a defect. The effect of the approach suggested here is simply to give to the consumer an alternative remedy on the ground that he is often prejudiced by the technical rules of warranty. The warranty rules which are necessary for the orderly conduct of commercial affairs will thus not leave the "non-commercial" plaintiff entirely without a remedy.

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Trade Regulation—Section 5 of Federal Trade Commission Act—"Free" Articles.—*FTC v. Mary Carter Paint Co.*[1]—Mary Carter manufactures and sells paint. For ten years it advertised, as its permanent policy, that for every can of paint purchased, it would give the buyer a "free" can of equal quality and quantity. Prior to this advertisement, however, it had never sold

[36] Greenman v. Yuba Power Prods., Inc., supra note 11, at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.

[1] 382 U.S. 46 (1965).