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Tort: Recovery by a Bystander in Strict Liability

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TORT: RECOVERY BY A BYSTANDER IN STRICT LIABILITY

The contemporary trend toward consumer protection in the law is well illustrated by the extension in a growing minority of courts of strict tort liability to manufacturers and retailers for injuries caused by their defective products to non-user and non-consumer third parties. Former defenses such as a lack of privity of contract and the absence of a warranty running with the defective product, which once thwarted an injured bystander possessing a theoretically valid complaint, are no longer available to a defendant manufacturer or retailer. The courts are beginning to view, more realistically, the old rules as mere historical preoccupations with the law of commercial transactions and are basing their new concepts on public policy considerations.

This judicial activism is demonstrated in the case of *Caruth v. Miriani*,[1] in which the Arizona Court of Appeals reversed on rehearing its previous refusal to extend protection to injured bystanders. The case presented a typical third party product liability problem. Due to inherently defective brakes, the defendant's new 1964 Buick struck the plaintiff's automobile in the rear. As there was no question of contributory negligence on the part of the plaintiff, the only issue presented was whether or not the applicable law permitted recovery against the manufacturer, General Motors, and the retailer, Young Buick. In its decision reversing and remanding the judgment that had been rendered in favor of the manufacturer and retailer, the court pointed out that all states which have adopted the theory of strict tort liability have extended its protection to bystanders when confronted with the appropriate factual situation.[2] The court found that neither the lack of privity nor the absence of any agreement

[1] 11 Ariz. App. 192, 463 P.2d 83 (Ct. App. 1970), *rev'g* 10 Ariz. App. 277, 458 P.2d 371 (Ct. App. 1970).

[2] 11 Ariz. App. at 194, 463 P.2d at 85.

between the plaintiff and the defendants could defeat the former's valid complaint and stated that concepts applicable to the law of contracts and sales, which are relationships assumed by agreement, are foreign to strict liability in tort which is imposed by law for reasons of public policy.

As strict tort liability is founded on the public policy that the cost of injuries resulting from a defective product should be borne by the manufacturer that placed the product on the market, there is no basis for limiting the class of plaintiffs to consumers since the risk of harm from the defective product exists for bystanders and passersby as well as for the purchaser or user.[3] In fact, in *Elmore v. American Motors Corp.*,[4] the California Supreme Court recognized that bystanders should be entitled to even greater protection than the consumer where the injury to the bystander is reasonably foreseeable since the purchasers and users have an opportunity, which the bystander does not, to inspect the product for defects an to limit their purchases to articles produced by reputable manufacturers and sold by reputable retailers.

The landmark case of *Greenman v. Yuba Power Products, Inc.*[5] established that the purpose of strict tort liability is to make the manufacturer, rather than the injured persons who are powerless to protect themselves, bear the cost of injuries which result from the marketing of defective products. In its opinion the court stated that ". . . a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[6]

Several years later, in *Vandermark v. Ford Motor Co.*,[7]

[3] Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).
[4] 70 Cal. App. 2d 578, 583, 75 Cal. Rptr. 652, 657, 451 P.2d 84, 89 (1969).
[5] 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).
[6] *Id.* at 60, 27 Cal. Rptr. at 700, 377 P.2d at 900.
[7] 61 Cal. 2d 256, 37 Cal. Rptr. 986, 391 P.2d 168 (1964).

the same court for similar reasons held that liability should also be extended to the retailer of a defective product:

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.[8]

Since the retailer is in a position to exert pressure on the manufacturer, he can also play an important role in assuring that the marketed product is free of defects. Extending strict liability to both the manufacturer and retailer affords maximum protection to the injured party and works no hardship or injustice on the defendants since they can adjust the costs of the protection between themselves.[9] Thus, these public policy considerations outweigh the fear expressed on the first appeal in the *Caruth* decision of "impaling the middleman on the sword of liability."[10]

The fundamental desire of the recent trend of expanding strict liability coverage and a major tenet of the underlying public policy is to achieve maximum protection for the bystander by discouraging the marketing of defective products. This is best accomplished, not only by holding the manufacturer liable, but also by imposing on the other members of the distributive chain the responsibility for marketing those defective products which cause injury to human beings. The social policy that underlies strict tort liability resolves itself into a simple balancing of the public interest as to who should bear the loss.[11] Is it to be the injured member of the public or the parties who are in the chain of placing defective goods on the market? The *Caruth* court chose to protect the injured member of the public since the manufacturer and distributors can distribute the risk of loss between themselves by means

[8] *Id.* at 259, 37 Cal. Rptr. at 899, 391 P.2d at 171.
[9] *Id.* at 260, 37 Cal. Rptr. at 900, 391 P.2d at 172.
[10] 10 Ariz. App. at 281, 458 P.2d at 375.
[11] 11 Ariz. App. at 195, 463 P.2d at 86.

of insurance and indemnity agreements.[12] The court held that the members of the chain of production and distribution are better able economically to bear the loss than the injured party.

The *Caruth* court stated that the adoption of § 402A of the Restatement (Second) of Torts by the Arizona Supreme Court clearly indicated the direction of the law in the state, even though the section on its face applies only to "users and consumers" in a broad sense.[13] The Restatement expressly warns that it takes no position on the recovery by a bystander:

> There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys the marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumer's pressure and there is not the same demand for the protection of casual strangers.[14]

However, several jurisdictions that have accepted the position of the Restatement have extended its right of recovery to mere bystanders, recognizing that there exists no adequate rationale or theoretical explanation for protecting one class of plaintiffs and not another once the underlying public policy is accepted that the manufacturer is best able to control the dangers arising from defects of manufacture.[15]

The use of the Uniform Commercial Code § 2-318 by

[12] *Id.* at 196, 463 P.2d at 87.
[13] *Id.* at 194-95, 463 P.2d at 84-85.
[14] RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *o* at 356-57 (1965).
[15] Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969) (interpreting the law of Indiana); Mitchell v. Miller, 26 Conn. Sup. 142, 214 A.2d 695 (Super. Ct. 1965); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965). *See also* Klimas v. International Tel. & Tel. Corp., 297 F. Supp. 937 (D. R.I. 1969).

courts in some cases has afforded a bystander, under the theory of an implied warranty, a remedy for injuries sustained due to a defective product.[16] The use of the Code has been especially attractive to injured third parties in those jurisdictions that have adopted Alternate B of UCC § 2-318 with its right of recovery running to "any natural person" under a theory of implied warranty. In *Wasik v. Borg*[17] the court stated that the legislature's choice of the alternate provision was a strong indication of an intent to extend the right of recovery to an injured bystander.

The difference between a recovery based on strict tort liability and a recovery based on an implied warranty may be more semantic than real since under both theories the primary condition of liability is the defective condition of the product when it leaves the seller's control.[18] However, the recognition of a right of recovery based on an implied warranty may be the first step toward extending strict liability recovery to injured bystanders. For example, in *Speed Fasteners v. Newsom*,[19] the Tenth Circuit held that the absence of privity between the plaintiff and defendant was not a bar to a recovery where an implied warranty is imposed by law on the basis of public policy. With strict liability firmly established in product liability cases in Oklahoma,[20] it can be predicted with reasonable certainty that the Oklahoma Supreme Court will extend the right of recovery to an injured bystander when the appropriate factual situation is presented.

[16] Speed Fasteners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967) (finding an implied warranty of merchantability running to a non-user); Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968) (holding that the dangerous instrumentality exception to the privity requirement allowed the plaintiff to sue on an implied warranty theory).

[17] 423 F.2d 44 (2d Cir. 1970).

[18] Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776, 779 (N.D. Ind. 1969).

[19] 382 F.2d 395 (10th Cir. 1967).

[20] Vaughn v. Chrysler Corp., 442 F.2d 619 (10th Cir. 1971); Barnhart v. Freeman Equip. Co., 441 P.2d 993 (Okla. 1969).

However, it should be emphasized that the differences between strict liability and any warranty theory go to their conceptual foundations. Strict liability is imposed for reasons of public policy while express and implied warranties under the UCC rest upon contract principles with all the intricacies of the law of sales. Since strict tort liability can not be restricted by such contract principles as lack of privity or limited because of the absence of any representation to the injured party, it logically follows that the recovery afforded by the theory is available to all potential plaintiffs. The fact that a manufacturer or retailer attempts to restrict its liability by contract is immaterial under the theory of strict liability.[21]

Strict tort liability is based on liability without fault in the sense that once the injuries of the plaintiff are attributed to the defective product the defendant's liability is established. Questions arise as to whether a defendant manufacturer owes a duty to a plaintiff to foresee that he will be adversely affected if the product is defective. The better theory is that foreseeability is irrelevant in a strict liability case since the doctrine is premised on loss distribution rather than on fault. In any event, the requirement that a plaintiff satisfy a foreseeability test is a negligence concept[22] which thwarts the public policy underlying the theory of strict liability. Foreseeability, however, may have a role in determining whether protection should be extended to a bystander where the user has knowledge of the defect. In a California case, *Johnson v. Standard Brands*,[23] the court recognized that a user may upon discovering defects in a product choose not to use it, and would extend even greater protection to a bystander:

> Where a defective product causes injury to a bystander, the policy of loss distribution is best served by

[21] Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 260, 37 Cal. Rptr. 896, 900, 391 P.2d 168, 172 (1964).

[22] Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776, 788 (N.D. Ind. 1969).

[23] 274 Cal. App. 2d 331, 79 Cal. Rptr. 194 (1969).

> making the manufacturer or retailer liable even though the product is used with knowledge of the defect, at least, where it is reasonably foreseeable that it would be so used.[24]

Therefore, such an injured party would be entitled to recover even where the defect is obvious to the buyer or user.

Cases like *Caruth* announce principles of law based on naked public policy which constitute broad departures from the former legal theories. Questions remain unanswered not only because of the hazy state of the law as to the protection of innocent bystanders, but also due to the fact that so few jurisdictions have spoken on the subject. However, by expanding the class of plaintiffs that are entitled to recover in a product liability case, these cases may become as important as *MacPherson v. Buick Motor Co.*,[25] which extended to injured third parties a cause of action in negligence, and *Henningsen v. Bloomfield Motors Inc.*,[26] which allowed a third party to recover on a warranty in strict liability. These cases are establishing new principles of law to fulfill the contemporary need of holding the maker of dangerous products liable to all who are injured by them.

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[24] *Id.* at 337, 79 Cal. Rptr. at 200.
[25] 217 N.Y. 382, 111 N.E. 1050 (1916).
[26] 32 N.J. 358, 161 A.2d 69 (1960).