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Richard R. Michelson

PRODUCT LIABILITY—The Protection of Strict Product Liability Held to Extend to an Injured Party Who is Neither a User Nor a Purchaser.

On February 22, 1968, Holly J. White was employed by the Peabody Coal Co. as a repairman and electrician in its Eagle Mine No. 1 in Shawneetown, Illinois. On that day a ram car owned by his employer, and manufactured by Jeffery Gallion, Inc. ran out of control, breaking a high pressure air hose. The hose then struck him, causing serious and permanent injuries. White brought suit against Jeffery Gallion in the United States District Court for the Eastern District of Illinois, alleging that the cause of the accident was a defective steering valve in the ram car.[1]

The defendant moved for summary judgment, claiming that White had admitted that he was not a purchaser or user, but was merely a bystander, and that under Illinois law, a bystander is not entitled to recover under the theory of strict product liability.

The court, through Chief Judge Juergens, denied the defendant's motion, and held that Illinois law did extend the protection of strict liability to bystanders. In his analysis, Judge Juergens relied essentially on the landmark case of *Suvada v. White Motor Co.*,[2] which:

> [L]aid to rest the privity defense in actions against manufacturers, sellers, contractors, etc., and held these parties to strict privity-free liability for any injury or damage caused by any unreasonably dangerous products which one or all of them might place in the stream of commerce insofar as users and consumers are concerned.[3]

The court examined *Wright v. Massey-Ferguson, Inc.*[4] which compared the state of the law with that prior to *Suvada.* The Wright court had cited *Murphy v. Cory Pump & Supply Co.*[5] as an example of the type of decision which *Suvada* seeks to remedy. In *Murphy,* a seven year old girl lost her leg when she fell in front of a power mower.

1. White v. Jeffrey-Galion, Inc., 326 F. Supp. 751 (E.D. Ill., 1971).
2. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
3. 326 F. Supp. at 753.
4. 68 Ill. App. 2d 70, 215 N.E.2d 465 (5th Dist., 1966).
5. 47 Ill. App. 2d 382, 197 N.E.2d 849 (4th Dist., 1964).

The *Murphy* court had granted summary judgment for the defendant manufacturer on the basis that there was no privity between the plaintiff and defendant. Judge Juergens pointed out that it is incongruous to hold that a user or consumer has a right of action, but that an injured bystander, totally without fault, may not have this same protection. The defense of lack of privity, denied a defendant in a suit by a nonpurchaser user, should be of no more validity in a suit by an injured bystander. The court denied the defendant's motion for summary judgment, and extended the full protection of strict product liability to an innocent bystander.

The result seems reasonable, for if two people are standing side by side, and a defective product causes identical injuries to both of them, why should one be entitled to recover because he purchased the product, while the other be without remedy because he neither bought the product nor was using it?[6]

While the decision of the district court may be a valid extension of the decision in *Suvada*, at least one aspect of strict product liability law seems to have received little or no attention in the cases which have extended its protection. Although the court in *Suvada* correctly stated that such liability does not make the defendant manufacturer an absolute insurer, the fact is that the immediate effect of products liability is proceeding directly toward that very result. At some point in the future it is quite possible that anyone who manufactures anything will have become an insurer of absolutely everyone. It would seem reasonable that before the scope of liability is widened to this extent, the goals sought to be achieved be defined and delineated. It is true that an innocent person who is injured by a defective product should be able to look elsewhere to be made whole, but it is also true that society could suffer economically if such a large unexpected financial burden is placed upon the free enterprise system.

A Historical View of Product Liability

In order to understand the reasoning of the court in extending strict product liability protection by bystanders, it is necessary to review the history of this area of the law for two reasons. First, the ruling was essentially the result of prior rulings, each building upon those before it. Each new decision has widened the protection afforded those

6. For an excellent example of this illogical result, see Caruth v. Mariana, 11 Ariz. App. 188, 463 P.2d 83 at 86 (1970).

innocently injured by a defective product, culminating in protection to the injured bystander. Second, strict product liability is not merely an extension of previous protections afforded those injured by a defective product. It differs in theory from the earlier forms of protection, and, in order to fully appreciate this difference, it is first necessary to examine the aspects of those protections which preceeded strict product liability.

The historical origin of the problem of product liability is Lord Abinger's ill-advised and much-maligned decision in *Winterbottom v. Wright.*[7] In *Winterbottom*, the Postmaster General hired the defendant, Wright, to supply and maintain coaches for carrying the mail. The defendant then contracted with Winterbottom's employer to furnish drivers for the coaches. The coach which Winterbottom was driving fell over, thereby injuring him. His own employer was innocent, for he had merely supplied the drivers. The doctrine of sovereign immunity precluded suit against the Postmaster General. As a result, Winterbottom had nowhere to look for recovery except to Wright. Furthermore, Wright was the logical object of Winterbottom's complaint because he had contractual liability for maintenance of the coaches. Unfortunately for Winterbottom, he lacked privity with Wright and could not maintain a suit in contract. His only alternative was a negligence suit in tort against Wright.

Lord Abinger may have been more astute than his critics have admitted when he said, "(I)f the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action."[8] Although Lord Abinger could not have envisoned today's technology and mobility, he feared that those liable in tort on a faulty product might become insurers. Unfortunately, his solution was to deny the carriage driver recovery. "Unless we confine our operation of such contracts as this to the parties who enter into them, the most absurd and outrageous consequences, to which I can see no limit, would ensure."[9] Thus, the court made privity of contract a necessary element in a cause of action arising out of injuries caused by a defective product. Lord Abinger's solution essentially meant that Winterbottom's employer, had he been riding in the carriage, could have recovered, while Winterbottom himself could not. Although Lord Abinger's fears may have been

7. 10 M & W 109 (1842).
8. *Id.* at 113.
9. *Id.*

well-founded, his solution has proven unsatisfactory. The history of product liability has been the attempts of the courts to free those innocently injured by a defective product from the restrictive requirements of contract law.

The traditional rationale employed by the courts to avoid Lord Abinger's privity limitation was to leave the *Winterbottom* rule intact, but to create ever-increasing exceptions which eventually destroyed the rule. The exceptions were embodied in two principle categories—products for human consumption and inherently dangerous products.

The exception of products for human consumption had its beginning in Illinois in 1898[10] when the Illinois Supreme Court held that the rule of *caveat emptor* would be replaced by an implied warranty that ran with the sale by a retailer to one who purchased food or drink with intent of immediate consumption. The warranty ran beyond the purchaser to his family, thus allowing those not in privity with the seller to recover for injuries.

By 1915, the "food and drink exception" had been refined to allow the injured party to sue in negligence with no requirement to plead or prove any contract theory.[11] This cause of action was limited to products sealed by the dealer, undoubtedly to avoid the intervening negligence of third parties. The theory advanced to justify this expansion of liability was that the dealer was under a duty to sell his product in a wholesome condition.

In 1920, the Iowa Supreme Court, in another sealed product case,[12] had occasion to review the necessity of privity, express and implied warranties, and negligence. It held that privity and express warranties were not necessary, and that recovery could be based upon negligence or breach of an implied warranty. It did not matter which theory was chosen by the plaintiff, as long as he could prove the necessary elements of that theory.

The inherently dangerous product exception to the privity rule arose in New York state only ten years after *Winterbottom*. The defendant had substituted a poisonous substance for extract of dandelion. The court held that when a defective product put human life in imminent danger, it was not necessary to establish privity. The plaintiff could sue in tort on the theory of negligence.[13] In 1916, in

10. 171 Ill. 93, 49 N.E. 210 (1898).
11. Boyd v. Coca-Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1915).
12. David v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920).
13. Thomas v. Winchester, 6 N.E. 397, 57 Am. Dec. 455 (1852).

MacPherson v. Buick Motor Co.[14] Justice Cordozo ruled that the negligence exception to the privity rule extended to a "thing of danger" which could foreseeably be used by one other than the purchaser. In 1960, a New Jersey court held that an injured party, if a user or purchaser, was permitted to claim that the defendant was liable for breach of an implied warranty even though he lacked privity with the defendant.[15] The claim of implied warranty was permitted to stand, even though disclaimed in the contract, because the court felt that the express warranties were illusory and actually deprived the plaintiff of recovery. As a result of these developments, a purchaser or user who had been injured by a defective product was able to recover either in tort or under an implied warranty, even though he lacked privity with the defendant, and even though the defendant had attempted to limit any implied warranties.

These bases for recovery, although more acceptable to an injured plaintiff than the *Winterbottom* privity limitation, still created barriers to a claim by an innocent injured party. The plaintiff must either prove negligence or a warranty, implied if not express. These barriers still provided a sizeable shield to the defendant. However, because of the trend toward allowing the injured party to recover, a further liberalization seemed logical. It occurred in the California case of *Greenman v. Yuba Products, Inc.*[16]

In *Greenman*, the plaintiff had been injured while using a power tool which had been manufactured by the defendant. The plaintiff's wife had purchased the tool as a gift for her husband. Justice Traynor, writing for the California Supreme Court, noted that because the necessity for the plaintiff to establish privity had been eliminated, product liability was purely a tort action. On that basis, the requirement that the plaintiff rely upon an implied warranty was a legal fiction—a vestige of the law of contracts which arose from the need to show privity. Furthermore, Justice Traynor made it clear that the plaintiff need not prove that the defendant had been negligent in the manufacture of the product. Strict liability was imposed upon the manufacturer as a consequence of placing his product in the stream of commerce. Justice Traynor ruled that in order to recover, the plaintiff need prove that the defendant's product was defective, and had caused the injury and that the plaintiff was unaware of the defect.

14. 217 N.Y. 382, 111 N.E. 1050 (1916).
15. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
16. 59 Cal. 2d 57, 377 P.2d 897 (1962).

Product liability in Illinois has essentially followed this historical pattern. The privity limitation of *Winterbottom* had been accepted, and the exceptions of products for human consumption[17] and inherently dangerous products[18] were created and expanded. The most significant product liability case in Illinois is *Suvada v. White Motor Co.*[19] In *Suvada*, the plaintiff had purchased a reconditioned tractor from White for use in his milk distributing business. The brakes failed, causing the tractor to collide with a Chicago Transit Authority bus. The plaintiff sued for costs of repair to his tractor, and the cost of his tort settlement with the bus passengers. From a judgment for Suvada, only Bendix-Westinghouse Air Brake Co., the manufacturer of the brakes, appealed.

In its decision, the Illinois Supreme Court noted that in the sale of food, product liability ran from the seller to the injured consumer as a matter of public policy. It listed the interests of the public which dictated this result: concern for life and health, the seller's responsibility for putting the product into the flow of commerce, and the social justice of imposing the loss upon the one creating the risk and enjoying the profit. The court concluded that these interests also exist in respect to defective products which are unreasonably dangerous to the user, and thus product liability should be extended accordingly. For these reasons, the court ruled that negligence was no longer necessary for recovery and, expressing its approval of *Greenman v. Yuba Products, Inc.*, held that implied warranties, being aspects of contract law, have no meaning in strict liability in tort.

The *Suvada* decision, and thus, the status of product liability in Illinois prior to its extension to bystanders, may be summarized as extending to any of a number of classes of defendants including manufacturers, sellers, independent contractors, suppliers, component parts manufacturers, and those who hold themselves out to be manufacturers.[20] It covers, as a matter of law, without regard to warranties or negligence, any product which is unreasonably dangerous to the user,[21] and defect of design or manufacture. It pertains to both personal injury and property damage.[22] The plaintiff must prove, to establish a prima facie case, (1) that the injury or damage resulted from a defect

17. Wiedeman v. Keller, 171 Ill. 93, 49 N.E. 210 (1898).
18. Colbert v. Holland Furnace Co., 331 Ill. 78, 164 N.E. 162 (1928).
19. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
20. *Id.* at 617, 210 N.E.2d at 185.
21. *Id.* at 619, 210 N.E.2d at 186.
22. *Id.* at 621, 210 N.E.2d at 187.

of the product; (2) that the condition was unreasonably dangerous; and (3) that the condition existed at the time it left the manufacturer's possession.[23]

The defenses available to the accused under strict product liability were enunciated in *Williams v. Brown Mfg. Co.*[24] The plaintiff was injured while operating a trenching tool, and sued the manufacturer. The court rejected contributory negligence as a defense because it did not denote a high enough degree of culpability to bar recovery. However, the court did recognize two defenses—misuse of the product, and assumption of risk. As to assumption of risk, the prudent man standard was rejected, and the trier of fact directed to apply a subjective analysis to the plaintiff himself. Regardless of his protestations, he must be evaluated in the light of his knowledge, experience, and personal circumstances.[25] The court also indicated that the plaintiff's misuse of the product, which is not reasonably foreseeable by the defendant will preclude recovery.[26]

EXTENSION TO BYSTANDERS

Prior to the Illinois extension of product liability protection to bystanders, eleven jurisdictions had ruled that injured bystanders were so protected. The two most significant "bystander" cases are the Michigan case of *Piercefield v. Remington Arms Co.*[27] and the California case of *Elmore v. American Motors Co.*[28] *Piercefield* is significant because it was the first case to allow a bystander to recover in a products liability suit. However, the recovery was not based upon strict product liability, but upon negligence.

Elmore, by far the more significant of the two cases, was the first case to award recovery to a bystander in a strict liability case. In *Elmore*, the California court relied primarily upon *Greenman v. Yuba Products, Inc.*[29] It reasoned that because *Greenman* had precluded any

23. *Id.* at 188. The third burden, that of proving that the defect existed at the time it left the defendant's possession, is the most difficult. However, it seems far from insurmountable. A possible indication of the difficulty of this burden might be gleaned from Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1st Dist., 1947) wherein the plaintiff became ill upon discovering a dead mouse at the bottom of the previously sealed bottle. The court ruled that the plaintiff had proven a prima facie case by showing that the mouse was in the bottle and the bottle was sealed. Bear in mind that in some other jurisdiction this evidence might be called res ipsa loquitur.
24. 45 Ill. 2d 418, 261 N.E.2d 305 (1970).
25. *Id.* at 430, 261 N.E.2d at 312.
26. *Id.* at 425, 261 N.E.2d at 309.
27. 375 Mich. 85, 133 N.W.2d 129 (1965).
28. 75 Cal. Rptr. 652, 451 P.2d 84 (1969).
29. 59 Cal. 2d 57, 377 P.2d 897 (1962).

necessity for privity or warranty, and had held the manufacturer strictly liable in tort, there was no reason to limit the defendant's liability to users and purchasers. A bystander is within the definition of *Greenman*, a human being who does not suspect the defect, does not misuse the product, and is innocently injured as a result of the product defect. Accordingly, he is entitled to protection. Of the other jurisdictions which extended product liability to bystanders prior to the *White* decision, one based its ruling upon implied warranty,[30] two based their rulings on negligence,[31] one based its ruling on both implied warranty and negligence,[32] and following *Elmore*, five have extended strict product liability to bystanders.[33]

In *White*, the district court, in interpreting strict product liability in Illinois as extending to bystanders, adopted a line of reasoning similar to that of the California court in *Elmore*. Just as the California Supreme Court had held that the *Greenman* definition of strict product liability logically encompassed bystanders, the district court held that the *Suvada* definition accomplished the same result. Protection should be extended to anyone injured by an unreasonably dangerous product, if such defect existed when the product left the manufacturer's possession. The absence of the privity requirement eliminates the only logical bar to anyone who can carry this burden, whether he be a user, a purchaser, or anyone else.[34]

Strict Product Liability—To What Extent Is the Seller Now Liable?

To fully appreciate the current status of strict product liability, related factors must be considered. For example, in *Gray v. American Radiator and Sanitary Corp.*[35] defendant Titan Valve Co. of Ohio had manufactured a valve which it sold to a radiator manufacturer in Penn-

30. Lenzick v. Republic Steel Corp., 6 Ohio St. 227, 218 N.E.2d 185 (1966). The court referred to the plaintiff as a user, but he was actually a non-user, non-purchaser. While working in his employer's building, he was injured by a defective roof which the defendant had constructed.

31. Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969). Dean v. General Motors Corp., 301 F. Supp. 187 (E.D. La. 1969).

32. Mitchell v. Miller, 26 Conn. Sup. 142, 214 A.2d 694 (1965).

33. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1968); Klimas v. International Telephone & Telegraph Co., 257 F. Supp. 937 (D.R. I. 1969); Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970); Caruth v. Mariana, 11 Ariz. App. 188, 463 P.2d 83 (1970); Lamendala v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971).

34. Mieher v. Brown, — Ill. App. 3d —, 278 N.E.2d 869 (1972), decided shortly after the *White* case also extended strict liability protection to non-purchasers, non-users.

35. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

sylvania. The Pennsylvania company shipped the radiator containing the Titan Valve to an Illinois distributor, and eventually, it was purchased by Mrs. Gray. The radiator exploded, causing her injuries, and she sued in negligence. Titan Valve Co. was a co-defendant, and she alleged its valve to be defective. Titan's registered agent was served in Cleveland, Ohio, under the Illinois "long arm" statute.[36] Titan appeared specially to contest the jurisdiction of the court. The court held that there was minimum contact with the state, and that, under Illinois law, the place where the last act occurs to render the defendant liable is the place where the tort is committed. Thus, the explosion constituted a tort by the defendant in Illinois, and personal jurisdiction was properly established.

The significance of "long arm" statutes in general, and the *Gray* decision in particular, as they relate to strict product liability become apparent by varying slightly the facts of the *Gray* case. Assume Mrs. Black, while visiting Mrs. Gray, is injured by the explosion. The Titan Valve Co., a citizen of Ohio, then finds itself served with a summons to appear and defend itself in Illinois against a plaintiff who has neither purchased, nor used Titan's product. Based upon the *Gray* opinion, the Illinois court has personal jurisdiction over the defendant.

At trial, the defendant will be permitted to assert the affirmative defenses of assumption of risk and misuse of product. Is it possible for a bystander to do either? In some situations, it is possible for a bystander to assume the risk. For example, one who chooses to be near a product, with full knowledge of the product's defects, and is then injured by it, is a bystander who has assumed the risk. It must be conceded, however, that under this standard, few bystanders, as compared with users and consumers, can assume the risk. As to this particular plaintiff, Mrs. Black, it could not be claimed that she had assumed any risk at all.

Similarly, the defense of misuse of the product is of no avail to the defendant. It is difficult to envision how someone who must, by definition, be a non-user, can at the same time be a mis-user. Furthermore, even assuming Mrs. Gray had misused the product, it does not appear that the defendant may, consistent with the reasoning and policy of the *Suvada* decision, assert this defense against the plaintiff-non-user. The court in *Suvada* had noted that "losses should be

36. ILL. REV. STAT., ch. 110, §§ 16 and 17(1)(6).

borne by those who created the risk and reaped the profit. . . ."[37] Thus, Titan is without the normal product liability defenses. If Mrs. Black can show that the valve was defective before it left Titan's possession, that the defect was unreasonably dangerous, and that it was the cause of the injury, she may recover. Actually, her burden is to show that the defect existed while the valve was in Titan's possession, because the mere fact of the explosion would itself show an unreasonable danger and the cause of injury. By showing that the valve exploded and that it was a sealed unit which was not tampered with by subsequent manufacturers or dealers, she has proven her case.

Finally, the question of whether the defendant may seek indemnification from the negligent user is, as yet, unresolved. It is settled that indemnification back through the chain of distribution is proper. However, an Illinois case dealing with indemnification in strict liability suits indicates that the usual concepts of active and passive negligence[38] will not be considered.

> [W]e agree with the . . . contention that *Suvada* intended to eliminate the fault weighing process of active-passive negligence in determining any grant of indemnity relief.[39]

This reasoning would seem to disallow any action by the defendant-manufacturer to recover against the negligent user. This result, however, appears highly incongruous and unjust in light of the fact that misuse is a defense in a strict liability action.

Thus, today, a component part manufacturer in Ohio, who sells his product in Pennsylvania, can ultimately find himself liable, in Illinois, to someone who has not even purchased or used his product. The defendant is probably without a defense nor possibility of recoupment, and the plaintiff need not prove negligence.

Perhaps this result is best. If one is responsible for damages incurred by another, then certainly he, and not the innocent victim, should bear the loss.

However, consider what is occurring. The extension of strict product liability to bystanders has made sellers and manufacturers of defective products liable to everyone. By extending protection to pur-

37. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182, 186 (1965).
38. *See* Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); Sergent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).
39. Texaco v. McGreen, 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969).

chasers, users, and everyone else, protection has been extended to the whole world.

At what point does the manufacturer become an insurer? Perhaps he is now. To be an insurer one does not necessarily incur unlimited liability. An insurer may, by contract, limit his liability within the bounds prescribed by law. A defendant in products liability is not so fortunate. Any warranties, or limits thereon, although they may be ethical and acceptable under the law of sales, are of no merit in strict product liability where contract rules have been rejected. Even protections usually afforded the defendant by tort law are of no avail. A defendant may prove that he was extremely careful (and thus non-negligent), and such proof will have no bearing on the outcome. Essentially, the defendant's only protection is that the plaintiff may not be able to prove that the defect existed while in the defendant's possession. It might be possible for the defendant to show that the injured party assumed the risk, but as we have seen, very few, if any, bystanders would assume any risk at all.

Strict product liability is, of course, intended to give a remedy to a party who is injured by a defective product. Under the current state of the law, even in an action between two innocent parties, the seller of the product and the one injured thereby, the law intends that the injured shall be compensated. However, there are weaknesses to this story. For instance, there is no assurance that the successful plaintiff will be able to recover his damages should he win his judgment. If the defendant is small or financially weak, the plaintiff may succeed in having spent much time and money only to put the defendant out of business. Also, potential entrepreneurs may be deterred from establishing their own businesses. A person who starts a business with few assets and a significant amount of debt could find himself liable for a defective product before he can become established enough to survive the suit.

Perhaps an answer is a form of products liability insurance which is similar to workmen's compensation. Liability insurance which protects the manufacturer from claims by injured parties, without maximum liability limits, might be prohibitive in cost to him. However, if he were to be required by statute to carry product liability insurance, and if his liability (including such factors as pain and suffering) were limited by the statute, then the party injured by the defendant's product would be assured of recovery with less of a necessity to resort to the

courts. As to the manufacturer, he could satisfy his liability in an orderly manner based upon a predictable cost of doing business—an insurance premium rather than an unexpected law suit. Somewhere between the philosophy of *Winterbottom* and that of our principal case there must be a reasonable answer.

RICHARD R. MICHELSON