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Strict Liability in Tort Based on Defective Design, Pike v. Frank G. Hough Co., 467 P.2d 229 (1970)

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COMMENTS

STRICT LIABILITY IN TORT BASED ON DEFECTIVE DESIGN

Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970)

Decedent was struck and killed by a Hough paydozer. The structural design of the machine created a blind spot which made it impossible for the operator to see a man six feet tall standing anywhere in a rectangular area 48' by 20' to the rear of the vehicle. This deficiency could have been corrected with rearview mirrors or comparable safety devices. Decedent's widow and minor children brought a wrongful death action against the manufacturer. Plaintiff sought to establish defendant's liability on either a negligence or strict liability theory, based on the defective design of the paydozer. At the close of the plaintiff's case, defendant moved for, and was granted a nonsuit. On appeal to the California Supreme Court, *held*: the doctrine of strict liability in tort is applicable to a manufacturer for a design defect.[1]

To reach this result the court relied on the *Restatement of Torts 2nd § 402A*,[2] and previous California case law which extended the doctrine of strict liability in tort to manufacturing defects. The Court reasoned that no compelling rationale existed for distinguishing between

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1 Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970). Courts have avoided defining design defects. Instead, they have employed a case by case factual determination of what constitutes a design. Consequently, no attempt will be made to define a design defect or to distinguish it from a manufacturing defect. *But see* Comment, *Automobile Design Liability: Larsen v. General Motors and Its Aftermath*, 118 U. PA. L. REV. 299 n. 4 (1969). The comment defines design defects as "common to all vehicles of a particular model. Construction defects are generally limited to an extremely small portion of a given model." Conceptually, however, a defect could be "common to" an entire given model and still be attributable to the manufacturing process, which presents the difficulty with this and similar definitions. In most cases, it will be desirable to present design and manufacturing defects as alternative theories for recovery.

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides: Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

design and manufacturing defects since either would render the product equally dangerous. Moreover, the court buttressed its conclusion by citing the Illinois Supreme Court's recent acceptance of the extension of strict liability in tort to design defects.[3]

As compared to other fields of law, that of products liability has advanced significantly in the past decade.[4] The grounds on which to find a manufacturer liable have expanded from negligence to breach of implied warranty and strict tort liability.[5] In addition, the distinction between negligence liability and strict liability in tort has blurred as courts deemphasize the traditional prerequisites to the application of the doctrine of *res ipsa loquitur*.[6]

In California, the extension of strict liability in tort to include design defects proceeded incrementally from early cases holding the manufacturer liable for design negligence. The California Court of Appeals held in *Brooks v. Allis Chalmers Manufacturing Company*,[7]

3. Wright v. Massey Harris, Inc., 68 Ill. App. 2d 70, 79, 215 N.E.2d 465, 470 (1966).

4. Note, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1350 (1966). *See also* Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962); Noel, *Strict Liability of Manufacturers*, 50 A.B.A. J. 446 (1964); Noel, *Recent Trends in Manufacturer's Negligence as to Design, Instruction or Warning*, 19 S.W. L.J. 43 (1965); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 S.W. L.J. 5 (1965).

5. Nader & Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645, 649 (1967).

6. Noel, *Manufacturer of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 978-79 (1957); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 12.03 (3) (1968). [hereinafter cited as FRUMER & FRIEDMAN] W. PROSSER, LAW OF TORTS, 222-225 (3d. ed. 1964) [hereinafter cited as PROSSER].

7. 163 Cal. App. 2d 410, 329 P.2d 575 (3d Dist. Ct. App. 1958). *See also* Robinson v. Reed-Prentice Corp., 286 F.2d 478 (9th Cir. 1961).

Parallel developments or situations in Missouri and Illinois are presented in the footnotes. The Missouri Court of Appeals in Clark v. Zuzich Truck Lines, 344 S.W.2d 304 (1961), avoided the issue of negligent design and manufacture of a steering mechanism which deviated from standard design practices on an over-the-road tractor; the court held that evidence of design negligence went to the question of whether the mechanism broke before or after the collision with plaintiff's passenger vehicle.

The Illinois Court of Appeals in Murphy v. Cory Pump & Supply Co., 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964), a case involving the design and manufacture of a lawn mower not equipped with a blade guard, affirmed a summary judgment for the defendant, the court held that the manufacturer had fulfilled his duty as long as the mower was designed without latent defects and its functioning created no danger or peril not known to the user. The court, in reaching this result, rejected the plaintiff's argument for imposing liability based on § 398 of the *Restatement of Law: Torts*; § 398 extends a manufacturer's liability to design negligence.

that the plaintiff's evidence of negligent design and manufacture of the backing mechanism and boon dog on a crane was sufficient to take the question to the jury. *The Darling v. Caterpillar Tractor Company*,[8] the failure of a bulldozer manufacturer to extend the lip supporting an inspection plate to all four edges of the plate through which the plaintiff's leg slipped was sufficient to support a jury verdict. That court stated the legal principle applicable in these cases: "The manufacturer of a chattel owes a duty of care toward a user, although there is no privity of contract between them, where the article is inherently dangerous, or where it is reasonably certain, if negligently manufactured, to place limb in peril."[9]

Three years later, in *Varas v. Barco Manufacturing Co.*,[10] the court of appeals further defined the standard to be employed in negligent design cases. Varas, the operator of a Barco earth tamping machine, was severely burned when gasoline which had leaked from the gas cap of the machine ignited. He alleged that the machine was negligently designed for its intended use. The court, reversing a nonsuit, held that the standard imposed on a manufacturer is "the traditional one of reasonable care. . . . The effect of this standard is to impose upon the manufacturer the duty to so design his product as to make it not accident proof but safe for the use for which it is intended."[11]

Shortly thereafter, the Supreme Court of California alluded to an extension of strict liability in tort to include design defects. In *Greenman v. Yuba Power Products, Inc.*,[12] Justice Traynor, writing for the court,

8. 171 Cal. App. 2d 713, 341 P.2d 23 (2d Dist. Ct. App. 1959).

9. *Id* at 720, 341 P.2d at 28.

10. 205 Cal. App. 2d 246 (2d Dist. Ct. App. 1962).

11. *Id* at 258, 22 Cal. Rptr. at 744.

12. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Other cases with similar holding: Greeno v. Clark Equipment Co., 237 F. Supp. 427 (N.D. Ind. 1965); Schenfeld v. Norton Co., 391 F.2d 420 (10th Cir. 1968); Kilmas v. International Tel. & Tel. Corp., 297 F. Supp. 937 (R.I. 1969); Wasik v Borg ____ F.2d ____ (2d Cir. 1970); Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N E.2d 182 (1965); Hawkeye-Security Insirance Co. v. Ford Motor Co., ____ N.W.2d ____ (Iowa 1970); Dealers Transport Co., Inc. v. Battery Distributing Co., Inc., 402 S.W.2d 441 (Ky. Ct. App. 1966); Telak v. Maszczenski, 248 Md. 476, 237 A.2d 65 (1968); Browne v. Fenestra, Inc., 375 Mich. 566, 134 N W.2d 730 (1965); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Keener v Dayton Electric Mfg. Co., 445 S.W.2d 363 (Mo. 1969); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966); Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92, *aff'd*, 6 Ohio 2d 227, 218 N.E.2d 185

held the manufacturer of a combination power tool strictly liable in tort for injuries to the plaintiff caused by a product defect. In dictum, Justice Traynor stated that strict liability would apply to injuries resulting from design as well as manufacturing defects.[13] The significance of this dictum remained uncertain until implicitly adopted by the Court of Appeals in *Garcia v. Halsett*,[14] and explicitly adopted by the Court in *Pike*.[15] The *Garcia* case involved an injury sustained by a ten year old child while unloading a coin-operated washer. Evidence indicated that the installation of a two dollar micro-switch would have prevented the accident. The court, in reversing a judgment for the defendant, held the evidence sufficient to justify finding that the washing machine was defective in its design because it lacked the micro-switch and that the owner of the launderette, like a manufacturer, retailer or lessor, was strictly liable in tort.[16]

(1966); Marathon Battery Co. v. Kilptrick, 418 P.2d 900 (Okla. 1965); Wights v. Staff Jennings, Inc., 241 Ore. 301, 405 P.2d 624 (1965); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Ford Motor Co. v.Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Ulmer v. Ford Motor Co., 452 P.2d 729 (Wash. 1969); Dippel v. Schiano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Neither Missouri nor Illinois courts hesitated in expanding a manufacturer's liability when the defect resulted from a miscarriage of the manufacturing process. The Missouri Supreme Court, in Morrow v. Caloric Applicance Corp., 372 S.W.2d 41 (Mo. 1963), a case involving a faulty valve on a gas stove, held that privity of contract is unnecessary in order for the ultimate consumer to recover from a manufacturer, and the manufacturer of an imminently dangerous instrumentality is held to be strictly liable on proof of the defect and causation. But in Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343 (Mo. 1964), the court, in affirming judgment for the defendant, held that failure to equip a load binder with a safety ratchet to prevent kick-back, as other manufacturers had done, constituted no breach of duty. The court reasoned to hold otherwise would make an insurer of the manufacturer.

The Illinois Supreme Court, in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), expanded manufacturer liability by eliminating the lack of privity defense in an action against a manufacturer and subcontractor who had contributed to the product of the defective braking system at issue. In doing so, the court adopted *Restatement (Second) of Tort* § 402A: "Without extended discussion, it seems obvious that public interest in human life and health, the invitation and solicitations to purchase the product and the justice of imposing loss on one creating the risk and reaping the profits, are present and as compelling cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases." *Id.* at 186.

13. 59 Cal. 2d 57, 64, 377 P.2d 897, 901 27 Cal. Rptr. 697, 701 (1962): "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture. . . ."

14. 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

15. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

16. 3 Cal. App. 3d 319, 326, 82 Cal. Rptr. 420, 424 (1970). *See also* Mechana v. Helms Bakeries Inc., 439 P.2d 903, 67 Cal. Rptr. 775 (1968).

While Missouri has yet to extend strict liability in tort to design defects, the Supreme Court, in

The burden of strict liability is not new to the manufacturer of defective products; he has long been liable under an expressed or implied warranty irrespective of a showing of negligence.[17] More recently, manufacturer's negligence liability has come to resemble strict liability because of the increased availability of the doctrine of *res ipsa loquitur*.[18] Typically, the plaintiff in an action based on negligent design is required to establish: first, that the design of a product involves an unreasonable danger of harm which should have been foreseen by the manufacturer; second, he must demonstrate that this injury resulted from the dangerous design of the product; and, third, he must show that the injury results from no unforeseen use of the product.[19]

In order to carry the burden of proof on the issue of negligence the plaintiff ordinarily has recourse to the doctrine of *res ipsa loquitur*.[20] However, before the doctrine will apply, the plaintiff ordinarily must show that: 1) the defect probably existed at the time the manufacturer relinquished control of the product; 2) the defect would not ordinarily occur in the absence of negligence; and, 3) the accident was not due to some voluntary action or contribution of the plaintiff.[21]

When the action is based on strict liability in tort for design defect, the plainiff still must establish that the design of the product is defective; the injury resulted from the design defect; and that the product was being used in a foreseeable manner.[22] Having established these burdens of proof, the plaintiff is entitled to go to the jury. Thus, he avoids only the issue of negligence, the "easiest" issue because of the availability of the doctrine of *res ipsa loquitur*. As Dean Prosser has hyperbolically stated,

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Keener v Dayton Electric Mfg. Co., 445 S.W.2d 362 (Mo. 1969), did adopt *Restatement (Second) of Torts* § 402A. *See also* Kerber v. American Machine & Foundry Co., 411 F.2d 419 (8th Cir. 1969)

With *Suvada* as a basis, the Illinois Supreme Court, in Wright v. Massey-Harris Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966), held that the failure of the manufacturer of a corn picker to install a safety shield over the shuching rollers, constituted a design defect for which the manufacturer was strictly liable. Further, Williams v. Brown Mfg. Co., Inc., 93 Ill. App. 2d 344, 236 N.E.2d 125 (1968), held a manufacturer strictly liable in tort for the defective design of the slippage mechanism on a power trencher.

17 Note, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH L REV. 1350, 1369 (1966): *See also* Comment, *The Contractual Aspect of Consumer Protection Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

18 *See* note 4 *supra*.

19. Noel, *Manufacturer's Negligence of Design on Directions for Use of a Product*, 71 YALE L.J. 816, 866-67 (1962).

20. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1114 (1960).

21. Prosser § 97 at 671-72; I FRUMER & FRIEDMAN § 12.03 (1) at 285-86 (1968).

22 Prosser, *Fall of the Citadel*, 50 MINN. L. REV. 791, 840 (1966).

"where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."[23]

Moreover, the defenses available to the manufacturer under either negligence or strict liability theory are essentially the same. Recent rrends in products liability cases have all but obliterated the theoretical distinction between assumption of risk and contributory negligence.[24] Illustrative of the trend is *Varas*,[25] in which negligent design was at issue and contributory negligence would have been a defense. In reversing a nonsuit, the court, citing prior California law, stated "Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence. Doing an act with appreciation of the amount of danger, as well as the danger itself, is necessary to render a person negligent as a matter of law." And on the question of assumption of risk, which is usually a defense to an action based on strict liability in tort, the Court again citing California law, stated that "the two essential elements of the doctrine of assumption of risk are voluntary exposure to danger, and actual, not merely constructive, knowledge and appreciation of the risk assumed." Consequently, to define contributory negligence and assumption of risk as the *Varas* court did, renders the two defenses virtually the same.

In those jurisdictions which have judicially adopted the *Restatement of Torts 2nd § 402A*, the extension of strict liability to include design defects seems inevitable. As the California Court said in *Pike v. Hough*: ". . . there is no rational distinction between design and manufacture in this context, since a product may be equally defective and dangerous if its design subjects persons to unreasonable risk as if its manufacture does so."[26]

Many rationales advanced in favor of strict manufacturer liability for defects are equally applicable to the design situation. As Justice Traynor

23. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1114 (1960).

24. Contributory negligence involves conduct which the injured party should have known involved an unreasonable risk of harm, whereas assumption of risk involves conduct in the face of a known and actually appreciated danger. Professor Arno Becht of Washington University School of Law labels these terms inadvertent and advertent contributory negligence, respectively. For further definitional aspects, *see* Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961).

25. 205 Cal. App. 2d 246, 262-63, 22 Cal. Rptr. 737, 747 (2d Dist. Ct. App. 1962). *See, e.g.*, Keener v. Dayton Manufacturing Co., 445 S.W.2d 362, 365 (Mo. 1969); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629, 635 (1970).

26. 2 Cal. 3d 465, 475, 467 P.2d 229, 236, 85 Cal. Rptr. 629, 636 (1970).

pointed out in his concurring opinion in *Escola v. Coca Cola Bottling Co.*,[27] the cost of an injury attributable to a defective product ought to be borne by the manufacturer for two reasons. First, the producer created the risk of harm by placing the merchandise on the market. Second, since a producer can carry insurance to cover any loss resulting from his strict liability and offset his expenses by raising the price of his goods, he can distribute the costs more efficiently than can the consumer. Another reason frequently advanced in favor of strict liability is that a manufacturer has the greatest ability to control the danger created by a defective product.[28]

Other courts have emphasized that the consumer relies on the manufacturer's representation and regulation, thus giving rise to the implicit assumption that the goods are reasonably safe for their intended use.[29] Finally, strict liability in tort makes unnecessary the series of warranty actions which frequently arise when a suit cannot be brought directly against the manufacturer because the plaintiff is not in privity of contract with the producer.[30] Under the strict liability doctrine, the liability of the manufacturer can be established in a single suit since no privity between the plaintiff and the defendant is a prerequisite to recovery under this theory.

Although the expansion of strict liability in tort to include design defects both clarifies the law of products liability and extends protection to consumers, several problems, must be resolved before the extension will be complete. The first problem focuses on the appropriate situation in which to find a defective design. The second renders the defendant's total output of his produce unmarketable; whereas a manufacturing defect usually affects only the individual product in question or, at most, a part of the defendant's total output of a particular product.

A finding of design defect is justified in three generic situations:[31] first, that of the *Pike* case in which the manufacturer failed to supply needed

27. 24 Cal. 2d 453, 462-63, 150 P.2d 436, 441 (1944).

28 Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944); Henningsen v Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). *Contra*, Gilliam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 158 (1958).

29 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 64, 701, 377 P.2d 897, 901, 27 Cal. Rptr. 697 (1962); Putnam v. Erie City Mfg. Co., 338 F.2d 911, 914 (5th Cir. 1964) (applying Texas Law); Suvada v. White Motor Co., 32 Ill. 612, 210 N.E.2d 183 (1965); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d, 70, 215 N.E.2d 465 (1966).

30 RESTATEMENT (SECOND) OF TORTS § 402A, comment at 355 (1965).

31. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 420-30 (1962).

safety devices in the design of his product; second, that of the Brooks case[32] in which a concealed danger has been created by the manufacturer's design; and, third, when the design employed by the manufacturer calls for material of inadequate strength, and which has yet to be identified in California under the general rubric of defective design. If the defective design designation is limited to those fact patterns which clearly fall within these three generic situations, and is not allowed to merge with those generaly found in manufacturing defect cases, then the marketability of the manufacturer's product will only be called into question when it is clearly appropriate to do so.

The second problem focuses on the extent to which the traditional limitations on strict liability apply to strict liability in tort for design defect. It is clear that a manufacturer is not liable for injuries resulting from unintended or unforeseeable use of his product. But it is unclear to what extent the doctrine of assumption of risk applies in design defect cases based on a theory of strict liability in tort. Under the traditional doctrine of assumption of risk, a plaintiff is barred from recovery as a matter of law if he voluntarily exposes himself to the danger and has actual knowledge of the risk assumed. Yet in some design cases the question has been sent to the jury.[33] These decisions result in an unwarranted expansion of a manufacturer's liability.

Finally, the courts which have adopted a theory of strict liability in tort for design defects must decide the extent to which a plaintiff may challenge standard design practices.[34] This question will remain the most perplexing of all.

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32. 163 Cal. App. 2d 410, 329 P.2d 575 (3d Dist. Ct. App. 1958).

33. *See* note 25 *supra*.

34. *See* Comment, *Manufacturer's Liability for Defective Automobile Design*, 42 WASH. L. REV. 601, 616-19 (1967).