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GENERAL PRODUCTS—SHOULD MANUFACTURERS BE LIABLE WITHOUT NEGLIGENCE?*

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My first proposition is a simple one, and if it is accepted it is certainly broad enough to require an affirmative answer to the question put in the title. The proposition is this: Strict liability is to be preferred over a system of liability based on fault wherever you have an enterprise or activity, beneficial to many, which takes a more or less inevitable accident toll of human life and limb. This is true at least where the accident victims are as a class economically ill-equipped to carry the burden of serious accident losses. The impact of such losses on the individual in terms of human hardship is often crushing and the repercussions of this blow reach far beyond the individual and pose a significant social problem.¹

The reasons favoring what may be called, in Ehrenzweig's happy phrase, a strict enterprise liability² are these: The accident problem calls for two things (1) steps which will cut down accidents; (2) administration of losses that do happen in such a way as to minimize the individual and social burden of them. So far as the first point goes, studies of the human behavior that causes accidents show that such conduct is not by and large marked by individual ethical or moral shortcoming.³ It also appears that the most effective steps towards accident prevention have been those taken by institutions and organized groups rather than by persons acting as unorganized individuals.⁴ In the problem at hand, for instance, the manufacturer is in a peculiarly strategic position to improve the safety of his products, so that the pressure of strict liability could scarcely be exerted at a better point if accident prevention is to be furthered by tort law.

If we turn to the matter of loss administration, this may be most efficiently done if the basic needs of accident victims are met in all cases and

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1. See *e.g.*, COLUMBIA UNIVERSITY, COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932); 2 HARPER & JAMES, LAW OF TORTS ch. XIII (1956).

2. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 4 (1951).

3. James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950); 2 HARPER & JAMES, LAW OF TORTS ch. XI (1956).

4. *Id.*

distributed over a wide segment of society. The whole institution of private insurance bears witness to this fact. It is both just and expedient that the enterprise which causes losses should lift them from the individual victims and distribute them widely among those who benefit from the activities of the enterprise.

The logical conclusion of the foregoing argument would, of course, be a broad system of enterprise liability which would by no means be limited to manufacturers' products liability. So, it may fairly be asked, why pick out this relatively small area for special treatment?

This introduces my second proposition. The courts should move towards strict enterprise liability wherever that may be done through a process of growth well within the framework of our common law tradition, without seriously impairing our social or economic fabric. Some forty years ago, after the advent of workmen's compensation, Jeremiah Smith thought the courts would probably not change the law of fault back to the strict liability of trespass in any way as sweeping as the earlier change from trespass to fault.⁵ No doubt he was right. It would and should take a statute to work out a system of broad enterprise liability. But this fact should not preclude many judge-made changes. Strict liability as well as negligence is a part of our common law heritage⁶ and where its areas lend themselves to natural and easy extension, it is my thesis that the courts should make the extension.

Such a field, I submit, is that of products liability. Here the commercial law has developed the implied warranties of quality which are frequently imposed by law for reasons of social policy and not because of any express or implied-in-fact understanding of the parties.⁷ It must, of course, be admitted that the policies that gave birth to these implied warranties were not those involving protection of consumers against personal injuries and its consequences.⁸ But the warranty has come to serve this policy in appropriate cases—a fact which courts have recognized.⁹ In this field, then, future

5. Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 344, 366-7 (1914).

6. See, e.g., Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1917); Wigmore, *Responsibility for Tortious Acts I-III*, 7 HARV. L. REV. 315, 383, 441 (1893-4); 2 HARPER & JAMES, LAW OF TORTS §12.2, ch. XIV (1956).

7. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943); Comment, 32 TEX. L. REV. 557 (1954); Notes, 2 VAND. L. REV. 675 (1949); 3 VAND. L. REV. 341 (1950); LLEWELLYN, CASES AND MATERIALS ON SALES 340 et seq. (1930); James, *Products Liability*, 34 TEX. L. REV. 192 (1955); HARPER & JAMES, LAW OF TORTS §§28.15 et seq. (1956).

8. This is pointed out in the sources cited note 7 *supra*.

9. Ketterer v. Armour & Co., 200 Fed. 322, 323 (S.D.N.Y. 1912); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 277-8, 93 P.2d 799, 804 (1939); Bekkevold v. Potts, 173 Minn. 87, 90, 216 N.W. 790, 791 (1927); Race v. Krum, 222 N.Y. 410, 414, 118 N.E. 853, 854 (1918); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Magetti v. Armour & Co., 75 Wash. 622, 624-5, 135 Pac. 633, 634 (1913); Notes, 34 ORE. L. REV. 59 (1954); 32 TEX. L. REV. 557 (1954); 2 VAND. L. REV. 675 (1949); 8 VAND. L. REV. 149 (1954). Cf. 1 WILLISTON, SALES §197 (rev. ed. 1948).

developments of the rule should be those which this policy calls for. This would include strict liability on the part of the manufacturer, upon an implied warranty, for unreasonable dangers lurking in any kind of product. All limitations imposed by the doctrine of privity should go. Liability should extend to anyone who is hurt by a foreseeable use of the product. The foreseeability here involved is different from that required in negligence cases. It is not the foreseeability of unreasonable risks, but rather the foreseeability of the kinds of risks which the enterprise is likely to create.

The limitation of privity may make sense in the setting of contract where liability is imposed in favor of those entitled to rely on apparently promissory conduct. It has no place where liability is imposed by law on an enterprise in order to make it pay for losses which it inflicts on others as an inevitable cost of its activities.

It may be asked why the manufacturer is picked out as the special object of liability. Let me answer quickly that I would impose strict liability on the retailer and distributor as well. Nevertheless, there are reasons for making the manufacturer liable: (a) as we have seen, he is in a peculiarly strategic position to promote safety in his products; (b) he is often in the dominant economic position in the chain of production and distribution. This is by no means always so, but if the injured person is given the choice to sue anyone in the chain, he will naturally pick out the most financially responsible from those who are suable in a convenient jurisdiction, as Dickerson has pointed out in his *Products Liability and the Food Consumer*.¹⁰ Thus a process like natural selection will attract initial claim pressure to the available Big Names. If compensation is made, matters of indemnity and liability-over among potential defendants will be worked out in the way dictated by the economic and bargaining positions of the various parties. (c) Liability of the manufacturer corresponds to the salutary and growing practice for makers to indemnify or insure dealers who handle their products.¹¹ (d) There is already some judicial recognition of a maker's liability upon a warranty not limited by privity.¹²

10. DICKERSON, *PRODUCTS LIABILITY AND THE FOOD CONSUMER* §§5.12, 5.17 (1951).

11. See James, *Products Liability*, 34 TEX. L. REV. 192, 222 (1955); DICKERSON, *op. cit. supra*, note 10, at 269.

12. This rule has become increasingly accepted where food products are concerned. See the admirable treatment of this subject in DICKERSON, *op. cit. supra*, note 10. Illustrative cases are *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Parks v. C. C. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202 (1914); *Le Blanc v. Louisiana Coca-Cola B. Co.*, 221 La. 919, 60 So.2d 873 (1952); *Curtis Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932); *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

The tendency to repudiate the requirement of privity has not, however, been confined to food cases. *Mannsz v. Mac Whyte Co.*, 155 F.2d 445 (3d Cir. 1946); *McAfee v. Cargill, Inc.*, 121 F. Supp. 5 (S.D. Calif. 1954), noted in 8 VAND. L. REV. 149 (1954); *Di Vello v. Gardner Mach. Co.*, 102 N.E.2d 289 (Ohio C.P. 1951),

It is often suggested that this liability should be imposed only in the case of food—and indeed the majority of decisions favoring my present position are food cases. But as a matter of principle, why should there be such a limit? Even if it is felt that progress should be gradual, it would be logical to start at the point of greatest danger, and I doubt if this would be food. Surely greater danger lurks in a defective automobile wheel than in a pebble in a can of beans. And in reading a great many food cases one is struck with the essential triviality of most of them. Verdicts of \$100 or so are common even in cases litigated through to the appellate level. The figures given by Dickerson on settlements tend to show the same thing.¹³ Dean Green suggests that negligence is generally easier to prove in non-food cases. But even if that were true, it would be no answer to my contention that strict liability is a more expedient and equitable basis for adjusting these losses than is negligence. Dean Green's point presupposes that negligence is the preferable basis, to be dispensed with only in the exceptional case where difficulties of proof are overwhelming.

I should like to suggest that any limitation of strict liability to food cases is sadly reminiscent of a similar restriction commonly imposed a generation or so ago¹⁴ while negligence was being developed as a basis for products liability. The older restriction is now generally repudiated as a mistake. It would be too bad to repeat the mistake as strict liability is extended.

It has also been suggested that warranty liability should be imposed (in non-food cases) only where the maker has engaged in extensive advertising.¹⁵ But this suggestion misses the vital policy behind strict liability. It is not inducement by defendant or any conscious reliance by plaintiff or defendant that justifies strict liability in this field. Rather it is the fact that the loss is a casualty produced by the hazards of defendant's enterprise, so that the risk of loss is properly a risk of that enterprise. This would still be true if plaintiff were altogether ignorant of defendant's part in the process.¹⁶

Before I close, something should be said about the nature of the liability I propose, for it seems to me that some of the objections to it spring from a failure to appreciate its limitations. While liability under warranty would be strict, in the sense that *negligence* would no longer be required, yet this does not mean that the maker would be held for all injuries caused by his products. Any product may become the instrumentality of serious injury or

noted in 5 VAND. L. REV. 849 (1952); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932).

See the illuminating discussion by Finley, J., in *Freeman v. Navarre*, 47 Wash. 2d 760, 766-7, 289 P.2d 1015, 1018-9 (1955).

13. DICKERSON, *op. cit. supra*, note 10, at 246 et seq.

14. Compare *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918).

15. See, e.g., *Burr v. Sherwin-Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954).

16. Compare the author's analysis in *James, Products Liability*, 34 TEX. L. REV. 192, 195 (1955).

death—consider for instance the lethal possibilities that lie in a book placed strategically at the top of a long dark flight of stairs. In warranty as well as negligence a plaintiff must trace his injury to a quality or condition of the product which was unreasonably dangerous either for a use to which the product would ordinarily be put, or for some special use which was brought to the attention of the defendant.¹⁷ These are the risks and losses which may fairly be regarded as typical of the enterprise and so fairly allocable to it. Further, in warranty as well as negligence plaintiff must show that this unreasonably dangerous condition existed when the goods left the maker's hands.¹⁸ Thus it would defeat warranty as well as negligence if the danger came from tinkering with or abusing the product after the maker had sold it. In appropriate cases these issues will be for the jury under a warranty theory just as they would be in negligence. The issue that would be removed would be whether the dangerous condition was caused by negligence or was preventible by due care. In other words, the risk of loss from dangerously defective products would be put upon (and distributed by) the producer rather than upon the consumer or innocent bystander, even where the producer is also innocent. This enterprise liability should not be unlimited, but it should extend to all casualties and hazards that are injected into society by the activity of the enterprise, at least to the extent that they are reasonably foreseeable.¹⁹

17. *Id.* at 206; HARPER & JAMES, *LAW OF TORTS* 1573 (1956).

18. *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932); *Strawn v. Coca-Cola Bottling Co. of Missouri*, 234 S.W.2d 223 (Mo. App. 1950); *Geisness v. Scon Bay Packing Co.*, 16 Wash.2d 1, 132 P.2d 740 (1942).

19. Compare EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* §15 (1951).