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Torts - Liability of Supplier of Chattel - Proof of Manufacturer's Negligence

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TORTS—LIABILITY OF SUPPLIER OF CHATTEL—PROOF OF MANUFACTURER'S NEGLIGENCE—Plaintiff service station operator brought an action to recover for injuries resulting from the explosion of one of defendant manufacturer's tires. The tire, while admittedly new, had been purchased by a third party some eighteen months before being brought to the plaintiff for mounting. In addition to his own testimony, the only evidence supporting plaintiff's claim of negligence was expert testimony that such an explosion could be caused by defective wire in the bead when a tire was inflated to normal pressure, and also that there was opportunity for negligence in defendant's manufacturing processes.¹ The district court set aside the jury verdict for the plaintiff and directed a verdict for the defendant. On appeal, *held*, reversed and the jury's verdict reinstated, one judge dissenting. The evidence was sufficient to support the jury's finding of negligence. *Hewitt v. General Tire and Rubber Co.*, 3 Utah (2d) 354, 284 P. (2d) 471 (1955).

A plaintiff who brings suit against a manufacturer for injuries attributable to the use of the manufacturer's allegedly defective product often finds it difficult to show a lack of due care in the production of the manufacturer's goods, and especially in connection with the production of the particular item. Realizing the difficulty of his situation, the courts have often aided the plaintiff in this type of case by extending the doctrine of *res ipsa loquitur* beyond conventional limits,² or, as in the principal

¹ The plaintiff did not appear to rely on *res ipsa loquitur*, for he tried to show opportunity for specific acts of negligence and the court did not invoke this doctrine in its analysis of the evidence submitted.

² In *Ryan v. Zweck-Wollenberg Co.*, 266 Wis. 630, 64 N.W. (2d) 226 (1954), the court aided the recovery of another plaintiff, faced with the task of proving the manufacturer's negligence, by a liberal extension of the doctrine of *res ipsa loquitur*. Alleging the cause of his injuries to be an electric shock from the cooling unit in a three-year-old refrigerator, the plaintiff was given the benefit of *res ipsa loquitur* because the unit was sealed and thus in the "control" of the defendant since the original sale. The jury could also infer that the unit was the source of the shock, even though there was proof that the unit had been found not to give a shock after the accident and had not even been opened for inspection. The case is noted in 21 *INS. COUNS. J.* 472 (1954). For a full discussion of the

case, by upholding a jury verdict based on broad inferences from the few facts which could be established. In the principal case, recovery was allowed without any showing of negligence in the manufacture of the particular tire.³ The plaintiff suggested that defective wire might have been used, or that the bead had been damaged, but was not able to show the nature of the injury or defect in the tire from the condition of the wire in the bead following the accident.⁴ It would appear that in allowing judgment to go against the defendant in cases of this type, the courts are approaching the concept that a manufacturer incurs absolute liability when an article that he has placed on the market proves to have a defect that causes injury to human beings.⁵ Notable examples of this tendency are found in the exploding bottle cases,⁶ and in cases involving the liability of food product manufacturers.⁷ Some legal writers have advocated an even broader extension of this liability.⁸ It is submitted that recovery is often

extension of *res ipsa loquitur* in this type of case, see Ghiardi, "Manufacturer's Control as an Element of *Res Ipsa Loquitur*," 1954 *INS. L.J.* 616.

In Michigan, where *res ipsa loquitur* is not recognized, a similar result is made possible in cases of this type by treating the happening of an accident under certain conditions as sufficient to permit the jury to draw inferences of negligence. See *Bosch v. Damm*, 296 Mich. 522, 296 N.W. 669 (1941).

³ The theory of recovery was ostensibly that of ordinary negligence based on defective manufacture of the product and a failure to inspect and discover the defect. Principal case at 355. The court followed the modern rule of not limiting the right to recover by a requirement of privity between the injured party and the manufacturer. The old rule of non-liability outside of contract, which the courts followed since *Winterbottom v. Wright*, 10 Mees. & W. 109, 152 Eng. Rep. 402 (1842), has been gradually swallowed up by the exceptions the courts have made to escape the rule's harshness. See *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E. (2d) 693 (1946); 164 A.L.R. 569 (1946). Even courts which reiterate the old rule seem to have abolished it through their broad statement of the "dangerous instrumentality exception," and, for their real test, look to see whether the elements of a negligence recovery have been shown. *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 100 N.E. (2d) 405 (1951); *Borg-Warner Corp. v. Heine*, (6th Cir. 1942) 128 F. (2d) 657.

⁴ In a case almost identical on its facts, the plaintiff showed a kinking of the wire at the point of rupture. *Baker v. B. F. Goodrich Co.*, 115 Cal. App. (2d) 221, 252 P. (2d) 24 (1953). In the principal case, the only showing was the defendant's evidence that the condition of the wire was similar to that in a tire exploded by excess inflation, tending to show contributory negligence. The causal chain was supported by a process of elimination. The court said that the plaintiff was negligent, the accident was caused by a third party, or the defendant was negligent. Principal case at 358. Since there was no evidence to overturn the jury's rejection of the first two, their finding as to the third was justified.

⁵ See the concurring opinion of Traynor, J., in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. (2d) 453 at 461, 150 P. (2d) 436 (1944).

⁶ See the discussion and cases cited in *Zentz v. Coca-Cola Bottling Co.*, 39 Cal. (2d) 436, 247 P. (2d) 344 (1952).

⁷ Brown, "The Liability of Retail Dealers for Defective Food Products," 23 *MINN. L. REV.* 585 at 597 (1939).

⁸ "The consumer, barring his own fault in use, should have no negligence to prove; that the article was not up to its normal character should be enough." LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 341 (1930). Some courts have used a warranty recovery to approximate this result. *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409 (1932). In that case, a "warranty" recovery was allowed without any privity, but this

allowed in these cases by torturing conventional tort theory to fit the facts that the plaintiff has shown in a particular case. In the principal case, recognition of the difficulty inherent in plaintiff's proof of defendant's negligence led the court to allow the jury to speculate as to the two theories of causation which were advanced.⁹ Perhaps it would be fairer to both parties frankly to eliminate the requirement of proof of the manufacturer's negligence rather than continue to seek to circumvent it. If this were done, the plaintiff should have to show: (1) use of the product consonant with its normal character;¹⁰ (2) injury resulting from a defect in the product; and, (3) that the defect was present in the product when it reached the market.¹¹ While the manufacturer could not relieve himself of liability by showing due care, he would be protected by showing a non-normal or careless use of the product. Most important, the elimination of proof of the manufacturer's negligence would focus the court's attention on the sufficiency of the evidence to support the minimum elements of a fair recovery.¹²

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decision has not been extensively followed. See *Chanin v. Chevrolet Motor Co.*, (D.C. Del. 1935) 15 F. Supp. 57. However, in negligence actions brought against the manufacturer the courts have often stretched conventional theory to support plaintiff's recovery. In addition to the cases cited in notes 2, 3, and 5 *supra*, see *Peterson v. Minnesota Power and Light Co.*, 207 Minn. 387, 291 N.W. 705 (1940) (defendant had to show injury not result of defect in stove control unit); *Plunkett v. United Electric Service*, 214 La. 145, 36 S. (2d) 704 (1948) (*res ipsa loquitur* allowed since plaintiff had no access to proof of defendant's negligence); *Reed and Barton Co. v. Maas*, (1st Cir. 1934) 73 F. (2d) 359 (jury allowed to draw inferences of defendant's negligence from accident seven years after original sale).

⁹ For a full discussion of the impropriety of such speculation, see *Du Bois v. De Bauche*, 262 Wis. 32, 53 N.W. (2d) 628 (1952); *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 46 S.Ct. 564 (1926).

¹⁰ "Advertisements should be responsible affirmations of normal character." LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 341 (1930).

¹¹ See the concurring opinion of Traynor, J., in *Escola v. Coca-Cola Bottling Co.*, note 5 *supra*, at 468.

¹² For a full discussion of the question of strict liability in the light of modern social conditions, see Niccolini, "Liability Without Negligence," 1954 *INS. L.J.* 527; Wilson, "The Protection of the Injured Person," 43 *CALIF. L. REV.* 614 (1955); Wilson, "The Protection of the Producing Enterprise," *Id.* at 809.