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Torts - Products Liability - Restatement (Second), Torts, 402(A)

J. Jerome Mansmann

its refusal to abolish governmental immunity after it had abrogated the immunity accorded to charities. This analysis reveals an actual incongruity in maintaining a rule which imposes hardship on injured parties and perpetuates a deleterious doctrine.

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TORTS—Products Liability—Restatement (Second), Torts, § 402(A)—The Pennsylvania Supreme Court adopts a strict tort liability rule for the products liability area.

Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

Plaintiff brought an action in trespass against a beer distributor, brewer, and manufacturer for injuries resulting from the explosion of a beer keg which had been purchased by plaintiff's father. Plaintiff relied on a theory of exclusive control and the trial court dismissed the complaint because all parties whose conduct could have affected the condition of the keg had not been joined as defendants.[1] This judgment was vacated and plaintiff was given leave to amend his complaint and proceed on a theory of strict liability.[2]

The court decided the case not on the doctrine of exclusive control but on the more determinative issue of "the nature and scope of the liability in trespass of one who produces or markets a defective product for use or consumption."[3] With one dissent, the court followed the modern trend toward strict liability by adopting Section 402(A)[4] of the Restatement

1. The plaintiff's father and brother who had handled the keg were not joined as defendants and were unable to be joined because the Statute of Limitations had run. PA. STAT. ANN. tit. 12, § 34 (1953).

2. Chief Justice Bell, dissenting, sharply criticised the court for allowing plaintiff to proceed on a theory not pleaded by him. Webb v. Zern, 422 Pa. 424, 429, 220 A.2d 853, 859 (1966). Although a strict products liability theory was not pleaded, plaintiff did urge the adoption of Section 402(A) in a supplemental brief. Supplemental Brief for Appellant.

3. 422 Pa. at 425, 220 A.2d at 854.

4. RESTATEMENT (SECOND), TORTS, 402(A) (1965):

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 or consumer 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 relationships with the seller.

of Torts as the law of Pennsylvania.[5] In its concise opinion the court quoted the text of the section in full and referred to a discussion on strict liability in tort which appeared in the concurring and dissenting opinions of Justices Jones and Roberts in *Miller v. Prietz*.[6]

There exists a wide divergence of opinion among legal writers concerning the special liability attached to a seller or manufacturer of a defective product. Opponents of the rule argue that such a drastic change in the law, in which liability is no longer based on fault, must be made by the legislature, not through judicial decision.[7] They caution the courts that liability without fault is contrary to the basic tenets of our law and a meaningful step toward socialization of the law.[8] Other policy reasons advanced for rejecting the strict liability rule include the argument that manufacturers will not attempt to achieve high safety standards in production since liability for a defect will attach notwithstanding the manufacturer's lack of negligence.[9] Opponents further contend that the American Law Institute has departed from its avowed purpose[10] of restating the law to creating new law.[11] It has long been recognized that the Restate-

5. Chief Justice Bell's dissent attacked the courts judicial legislating, the instability in changing the law so often, and the overruling of recent decisions with nary a word indicating same. 422 Pa. at 428, 220 A.2d at 855.

6. 422 Pa. 383, 221 A.2d 320, 334-341 (1966). This decision involved an action for breach of implied warranty by the administrator of decedent's estate. The infant nephew of the purchaser of a defective vaporizor was killed when it exploded. The nephew lived next door to the purchaser and the court read the term "family" in Section 2-318 of the Uniform Commercial Code to include plaintiff's decedent. Sec. 2-318 Pa. Stat. Ann. tit. 12A (Supp. 1965).

7. Darlymple, *Brief Opposing Strict Liability in Tort*, DEFENSE RESEARCH INSTITUTE, INC. (1966); Smyser, *Products Liability and the A.L.I.; A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965). Prior to this decision Pennsylvania had six areas of strict liability, five of which were achieved by judicial decision. A breakdown of same follows:

(A) By judicial decision

(1) Absolute liability for loss of lateral and subjacent support of adjoining land in a natural state. Malone v. Pierce, 231 Pa. 534, 80 Atl. 979 (1911); Home Brewing Co. v. Thomas Colliery Co., 274 Pa. 56, 117 Atl. 542 (1922).

(2) Absolute liability for trespass by animals. Erdman v. Gateschall, 9 Pa. Super. 295 (1899); Hall v. Kreider, 55 Pa. Super. 483 (1913).

(3) Defendant's possession of wild animals not indigenous to the locality. RESTATEMENT, TORTS, § 507, 508 (1938).

(4) Abnormally dangerous domestic animals, Darby v. Clare Food and Relish Co., 111 Pa. Super. 537, 170 Atl. 387 (1934).

(5) Ultrahazardous activity. Mulchanock v. Whitehall Cement Co., 253 Pa. 262, 98 Atl. 554 (1916); Rafferty v. Davis, 260 Pa. 563, 103 Atl. 951 (1918); Federoff v. Harrison Construction Co., 362 Pa. 181, 66 A.2d 817 (1949).

(B) By legislation

(1) The Pennsylvania Workmen's Compensation Act, PA. STAT. ANN. tit. 77, § 1 *et seq.* (1952).

8. See authorities cited note 7, *supra*.

9. Darlymple, *supra* note 7.

10. See authorities cited note 7, *supra*.

11. *Ibid.*

ment exercises a great influence upon many courts and this is especially true of the Pennsylvania courts.[12] It is suggested that the Restatement authors have a responsibility to thoroughly and thoughtfully consider the rules they promulgate. Section 402(A) did not, it is contended, receive such consideration.[13]

Proponents of the strict liability principle urge that such a rule enables courts to discard the legal fictions used to achieve a strict liability result.[14] Prevention of circuity of actions is listed as one of the principal advantages of the rule.[15] The rationale of a strict products liability rule is that the risk of loss is spread among the consuming public in the form of higher prices[16] much the same as in the workmen's compensation area. Permeating this rationale is the long established principle that a manufacturer or merchant must maintain high standards in order to produce and market safe products.[17]

In *Webb* the court did not directly address itself to the pros and cons of the theory but obviously aligned itself with its advocates. The court also failed to define the extent to which the doctrine is to be applied, nor did it establish any particular refinements of the rule. A brief look to the Restatement Comments and the decisional law of jurisdictions which have adopted a strict liability rule[18] may indicate the probable results in Pennsylvania. The strict liability rule as defined in Section 402(A) establishes the requirements of the plaintiff's prima facie case. Since liability is not predicated upon negligence plaintiff is relieved of the burdensome task of proving an applicable standard of due care and a departure therefrom. Plaintiff must now prove that the product was sold in defendant's normal course of business; that at the time of the sale the product was defective; that the product was expected to and did reach the consumer without substantial change; and that the defect caused the injury.[19] The court left unanswered the question of whether or not the

12. " 'Three out of four cases of first impression relied on the authority of the Restatement. One section had been cited with approval in changing the common law. In only one instance in the years between 1938-1949 did the Supreme Court of Pennsylvania cite a section of the Restatement without following it.' The Restatement had, the author concluded, become primary authority in Pennsylvania." Quoted from Goodrich & Wolkin, *The Story of the A.L.I. 1923-1949*, in Florey, *The Restatement of Torts in Pennsylvania, 1939-1949*, 22 PA. B.A.Q. 79, 81 (1960). See also Darlymple, *supra* note 7.

13. See authorities cited note 7, *supra*.

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

15. *Id.* at 1124.

16. Escola v. Coca Cola, 24 Cal.2d 453, 462, 150 P.2d 436, 441 (1944); Comment, 7 ARIZONA L. REV. 263 (1966).

17. RESTATEMENT (SECOND), TORTS, § 402(A), comment *b* (1965).

18. For a jurisdiction by jurisdiction analysis of their respective strict liability status see Darymple, *supra* note 7.

19. RESTATEMENT (SECOND), TORTS, § 402(A) (1965); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

doctrines of exclusive control or res ipsa loquitur may be utilized in proving that the product passed through the distributive chain in a defective condition.

The court also failed to indicate which, if any, defenses are available to the defendant. Section 402(A) provides that only assumption of the risk in the form of knowingly using a defective product would be a valid defense.[20] It logically eliminates contributory negligence as a defense since liability is not predicated upon negligence.[21] One jurisdiction has, however, specifically allowed contributory negligence to operate as a complete defense.[22] Justice Eagen, in his concurring opinion, urged the acceptance of contributory negligence as a defense in Pennsylvania. The majority opinion left this question unresolved.

Prior to this decision plaintiff had two avenues of relief available to him in the products liability area; (1) a cause of action in trespass for negligence, and (2) an action in assumpsit for a breach of an implied and/or expressed warranty. Under Section 2-318 of the Uniform Commercial Code[23] the injured plaintiff may proceed against the manufacturer if he is a member of a defined group or in direct privity thereto. Economic losses[24] are recoverable under the assumpsit action and Justice Eagen in *Webb* has urged that they be limited solely to actions of that type.[25] In the *Webb* case the majority was again mute concerning this matter.[26]

Webb represents a justifiable step in an area which has, for practical purposes, left many innocent plaintiffs remediless. It is a decision which will facilitate the just compensation of injured persons and relieve them of the almost impossible task of proving negligence in a complicated manufacturing process. The court rationally allows the action to be brought in trespass where recovery for personal injuries is sought since such an action is grounded in tort.

But the achievement of this just compensation may be unnecessarily delayed while the new doctrine is more fully explained. The court should have established guidelines for the practitioner to follow in handling a products liability case brought under Section 402(A). These guidelines

20. RESTATEMENT (SECOND), TORTS, § 402(A), comment *n* (1965).

21. *Ibid.*

22. Maidrino v. Weco Products Co., 45 N.J. 570, 214 A.2d 18 (1966).

23. See material cited note 6, *supra.*

24. "Economic Loss" is defined as a diminution in the value of the product because it is inferior in quality and does not work for the general purpose for which it was manufactured and sold. Comment, 114 U. PA. L. REV. 539, 541 (1966).

25. 422 Pa. at 426, 220 A.2d at 855. See also Comment, 52 VA. L. REV. 509 (1966); Comment, 27 U. PITT. L. REV. 683 (1966).

26. In his concurring opinion Justice Eagen urges the limitation of tort recovery to personal injury damages and economic losses to be recoverable under the Commercial Code. 422 Pa. at 427, 220 A.2d at 855.

should exclude economic losses under Section 402(A) and relegate them solely to an assumpsit action based on the Commercial Code. It should have logically eliminated contributory negligence as a defense since the action is not predicated upon negligence. The court should have more fully explained its rationale underlying the adoption of such a significant change of law. Now the doctrine's explanation, extension or limitations must await clarification thereby continuing the confusion until such time as the appropriate fact situations are presented to the court. Such a categorical change in the Pennsylvania law, albeit a desirable change, demands a more complete elucidation.

J. Jerome Mansmann

TRADE REGULATIONS—"Monopolizing" under Section 2 of the Sherman Antitrust Act—An inquiry into an alleged violator's willfulness is necessitated.

United States v. Grinnell Corp., 384 U.S. 563 (1966).

While a monopolist[1] must continue to flex his economic muscles with extreme caution and enlightened awareness of the antitrust laws, the *Grinnell*[2] decision, at least, permits him to maintain a legal existence. Since the *Alcoa*[3] doctrine was announced in 1945, the sustenance of monopoly power[4] has been singularly vulnerable to an indictment under Section 2 of the Sherman Antitrust Act.[5] Fashioning a virtual per se principle for a "monopolizing" offense, *Alcoa* allowed for a monopolist only when that powerful position is "thrust upon him,"[6] and sounded the dirge for the honestly industrial monopolizer. Authored by Mr. Justice

1. A monopolist is defined in terms of monopoly power, *i.e.*, to control prices, United States v. U.S. Steel Corp., 251 U.S. 417 (1920), or exclude competition, Patterson v. United States, 222 Fed. 599 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (1915) or regulate production. See also United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956). Such monopoly power has generally been inferred from a predominant percentage-share of the relevant market: 80% in American Tobacco Co. v. United States, 328 U.S. 781 (1911), and 90% in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). See also 1955 ATT'Y. GEN. NAT'L. COMM. ANTITRUST REP. 43-44, 48-55.

2. 384 U.S. 563 (1966).

3. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

4. See note 1, *supra*, for meaning of "monopoly power."

5. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1940), "Every person who shall monopolize . . . any part of the trade or commerce. . . ."

6. In United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945), Judge Learned Hand illustrated this "thrusting" with only three situations: "A market . . . so limited that it is impossible to produce . . . except by a plant large enough to supply the whole demand . . . [c]hanges in taste or in cost which drive out all but one purveyor. A single producer may be the survivor . . . by virtue of his superior skill, foresight and industry."