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Products Liability - Strict Liability in Tort - Section 402A of the Restatement (Second) of Torts - Plaintiff's Burden of Proof

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PRODUCTS LIABILITY—STRICT LIABILITY IN TORT—SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS—PLAINTIFF'S BURDEN OF PROOF —The California Supreme Court has held that a plaintiff, seeking to impose strict tort liability on a manufacturer or seller of an injury-causing defective product, does not have the burden of proving that the defect made the product *unreasonably dangerous*, as required by Section 402A of the Restatement (Second) of Torts.

Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

Plaintiff, William Cronin, a route salesman for a California bakery, was seriously injured when a truck forced his delivery van off the highway and into a ditch. On impact an aluminum safety locking device, designed to hold bread trays in place, fractured, causing the loaded trays to come forward and into the driver's compartment—propelling Cronin through the windshield and onto the ground. He instituted suit on the theory of strict liability in tort against the defendant J.B.E. Olson Corp., the sales agent and general contractor of the assembled delivery van.[1] Expert testimony at trial established that the locking device was made of a very porous piece of aluminum. It lacked the normal tensile strength required to withstand a collision impact. The plaintiff alleged that the defect made the product unsafe for its intended use and was thereby a direct and substantially contributing cause of his injuries. The jury agreed and awarded $45,000.

The defendant's contention at trial and on appeal was that the definition of strict tort liability offered to the jury by the trial was deficient. It was not adequate, the defendant claimed, to require plaintiff to prove that his injuries were proximately caused during the intended use of a product that contained a defect when it left the manufacturer's hands of which plaintiff was not aware. According to Olson, absolute liability would be imposed on manufacturers of injury-causing products unless the plaintiff had the burden of proving the product was also *unreasonably dangerous*, an essential element of Section 402A of the Restatement (Second) of Torts.[2]

1. Suit was originally brought against Olson, General Motors Corporation and Chase Chevrolet, from whom the van was purchased. General Motors was voluntarily dismissed. The jury decided in favor of Chase Chevrolet and Cronin did not appeal that ruling. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 125 n.1, 501 P.2d 1153, 1156 n.1, 104 Cal. Rptr. 433, 436 n.1 (1972).

2. *Id.* at 129, 501 P.2d at 1158, 104 Cal. Rptr. at 438. RESTATEMENT (SECOND) OF TORTS, § 402 A (1965):

The California Supreme Court disagreed.[3] Viewing its holding as a step forward in the evolution of products liability law, the court adopted the rule of strict liability in tort as it applies to products cases set forth in its landmark decision, *Greenman v. Yuba Power Products*:[4]

> [a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.[5]

In the determination of the *Cronin* court the "unreasonably dangerous" element "rings of negligence"[6] since it is normally phrased in terms of *ordinary consumer* expectation.[7] The element imposes the more difficult negligence burden of proof from which strict liability in tort, as applied to products cases, was to have declared its independence. The court therefore discarded it.

The Restatement test seeks to prevent the manufacturer from becoming the absolute insurer of every injury resulting from its products.[8] The *Cronin* court concluded that the *Greenman* rule will fulfill the identical purpose without the obstacles of proof inherent in section 402A[9]—obstacles of proof that may allow manufacturers to avoid their just responsibility to consumers injured by defective products. Most decisions and commentators have viewed the *Greenman* rule and section

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> [o]ne 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 . . . .

3. 8 Cal. 3d at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

4. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). *Greenman* is considered a landmark decision since it was the first case to apply the theory of strict liability in tort to manufactured products not intended for intimate bodily use. The case represents a victory for Chief Justice Traynor of the California Supreme Court, who twenty years earlier had urged that this theory replace negligence on the public policy grounds that the manufacturer should be discouraged from marketing defective products, and if such products are marketed, that the cost of any injury they might cause should be spread through the whole system by insurance coverage. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

5. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

6. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

7. Comment i to section 402A of the Restatement (Second) of Torts states that for it to be unreasonably dangerous:

> [t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics . . . .

RESTATEMENT (SECOND) OF TORTS, § 402A, Comment i (1965).

8. RESTATEMENT (SECOND) OF TORTS, § 402A, Comment c (1965); *see, e.g.*, Shramek v. General Motors Corp., 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

9. 8 Cal. 3d at 134, 501 P.2d at 1162, 104 Cal. Rptr at 442.

402A as being the same.[10] The California court, however, accepted the dichotomy drawn between the two rules in a recent Alaska decision.[11]

The genesis of strict liability in tort in products liability law resulted from the courts' recognition of the economic reality of industry and the consequent need for consumer protection.[12] The traditional theories available for recovery before *Greenman* and section 402A were negligence and strict warranty liability. Negligence produced an inadequate remedy for many plaintiffs because of the difficulties with proof of fault and the defense of contributory negligence.[13] Evidence critical to the consumer plaintiff's case was often solely within the control and superior knowledge of the manufacturer and consequently not discoverable. Strict liability in terms of warranty, even with restrictions on the requirement of privity, led to undesirable complications.[14] Problems with disclaimer and notice often provided the manufacturer of an unsafe product with shelter from an injured consumer's claim. Moreover, warranty is a product of contract law and is therefore especially adapted to commercial injury, not personal injury.[15] Strict liability in tort, on the other hand, is "strict" in the sense that it is unnecessary to prove the defendant was negligent. And, since the liability is in tort, the defendant cannot avail himself of the usual contract or warranty defenses. It is, therefore, designed to be a vehicle of social policy[16]—pecuniary loss will ultimately fall on the one who caused the harm and is in a better position to control the condition of the product. The manufacturer or seller will be deterred from marketing a malfunctioning

10. *See* Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 1072, 91 Cal. Rptr. 319, 325 (1970); Titus, *Restatement Second of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

11. Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alas. 1969). The Alaska Supreme Court adopted the *Greenman* rule of strict liability in tort and held that the trial court erred when it refused plaintiff's proposed instruction to the jury that set forth the *Greenman* rule. A good cause of action was established when the plaintiff proved that defects in his automobile caused carbon monoxide poisoning.

12. This change in judicial attitude is best reflected by the landmark decisions of Henningson v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960) (requirement of privity in breach of implied warranty cases was given a lethal blow), and MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (recognition that a manufacturer or seller may incur liability for injury caused by a defective product on the theory of negligence and not just on pure contract theory).

13. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1116 (1960).

14. W. PROSSER, THE LAW OF TORTS 656 (4th ed. 1971).

15. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

16. Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); Hawkeye Security Insur. Co. v. Ford Motor Co., 199 N.W.2d 373 (Iowa 1972); Baker v. City of Seattle, 2 Wash. App. 1003, 471 P.2d 693 (1970).

product and, by carrying liability insurance, will distribute any loss caused by personal injury rather than concentrate it on the individual consumer who is not able to bear such loss.[17] Although the doctrine of strict tort liability was at first limited to those products for "intimate bodily use" it is now applicable to most manufactured products in a substantial majority of jurisdictions.[18]

The desire of the drafters of the strict products liability provision in the Restatement was to synthesize a rule that would strike a balance between the interests of the manufacturer, who was not to be subject to absolute liability, and the interests of the consumer, who was in need of adequate remedial protection.[19] It is in light of these conflicting interests that section 402A and the "defective condition unreasonably dangerous" phrase was born. The rule represents a compromise designed to protect both interests.

The origin of the phrase "unreasonably dangerous" can be traced to early warranty law.[20] The implied warranty of fitness for all particular purposes was legally construed to mean "fit and reasonably safe for use by the consumer."[21] It has been suggested by Professor Wade, a leading authority in this area, that a more accurate and descriptive term representing what is meant by the concept would be "not reasonably safe" since "unreasonably dangerous" sounds more like the ultrahazardous activity traditionally within the scope of strict tort liability.[22] And, products liability cases, involving either theories of warranty, negligence, or strict liability, indicate that what is of central importance is not so much that the product is defective, although an essential element, but that the defect made the product *unsafe* in some way.[23] For example in *Fanning v. LeMay*,[24] the plaintiff fell when the soles of a recently purchased pair of shoes became wet and extraordinarily slippery. Suit was brought against the manufacturer and seller on theories of negligence and strict liability. The court rejected both and stated:

> [u]nlike the brakes of a motor vehicle, ordinary shoes such as the

17. *See* note 4 *supra*.
18. Annot., 1 CCH PROD. LIAB. REP. ¶ 4060 (1968). The Commerce Clearing House lists 32 jurisdictions that have accepted strict tort liability in products cases.
19. Sandler, *Strict Liability and the Need for Legislation*, 53 VA. L. REV. 55 (1967).
20. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965).
21. Morrow v. Caloric Appliance Corp., 372 S.W.2d 41, 55 (Mo. 1963).
22. *See* Wade, *supra* note 20, at 15.
23. Hall v. E.I. Du Pont De Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972); City of Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971).
24. 38 Ill. 2d 209, 230 N.E.2d 182 (1967).

> ones involved here can hardly be characterized as imminently dangerous products or products whose defective condition would make them unreasonably dangerous to users.[25]

Even though the product was found to be defective, it was not unsafe and consequently there was no liability.[26]

Strict liability has never been intended to require a product to be perfectly safe or incapable of doing harm, but has required only that it be reasonably safe.[27] Professor Wade believes that the "unreasonably dangerous" phrase is intended to be the primary basis of section 402A liability and was added by the drafters of the Restatement to prevent a manufacturer from being held liable for injuries caused by a product with only a minor defect.[28] The Arizona decision of *Maas v. Dreher*[29] supports this contention. Plaintiff injured her hand when trying to apply a plastic waste can lid. The lid was found to be defective but not dangerous since the defect was open and obvious and there was no showing by the plaintiff that the condition of the waste can lid was dangerous beyond that contemplated by an ordinary consumer. Recovery under section 402A was denied.[30] The entire emphasis in cases interpreting section 402A, therefore, is on safety, not defect alone, and as a result most of the courts that follow the Restatement's strict liability rule have treated the "unreasonably dangerous" or "not reasonably safe" element as crucially important to plaintiff's case.[31]

In essence the *Cronin* court predicated liability on the defectiveness of the product. It recognized the difficulty in the use of the term "defective condition" but found comfort in Justice Traynor's comment that "there is now a cluster of useful precedents . . . ."[32] The prevailing definition of "defective condition" is accurately stated by the Illinois Supreme Court in *Dunham v. Vaughan & Bushnell Mfg. Co.*:[33]

> [t]hose products are defective which are dangerous because they

25. *Id.* at 211, 230 N.E.2d at 185.
26. *Id.*
27. *See* note 23 *supra*.
28. *See* Wade, *supra* note 20, at 14.
29. 10 Ariz. App. 520, 460 P.2d 191 (1969).
30. *Id.* at 523, 460 P.2d at 194.
31. A representative sample of the many cases that establish the necessity of the unreasonably dangerous condition would include: Cobbins v. General Accident Fire & Life Assurance Corp., 3 Ill. App. 3d 379, 279 N.E.2d 443 (1972); Ulmer v. Ford Motor Co., 75 Wash. 537, 452 P.2d 729 (1969).
32. 8 Cal. 3d at 135 n.16, 501 P.2d at 1162 n.16, 104 Cal. Rptr. at 442 n.16.
33. 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

> fail to perform in the manner reasonably to be expected in light of their nature and intended function.[34]

Although the concept is broad and flexible and its outer limits depend on demands of public policy, a product is generally considered defective if it is not reasonably fit for the ordinary purposes intended.[35] There is to be no difference in applicability of the strict liability rule, according to the *Cronin* court, whether the case involves defect in design or defect in manufacture.[36] But a defect in design has been phrased in terms of making the product unreasonably dangerous to the ultimate consumer.[37] And, a defective condition may result if it is unreasonably dangerous to place the product in the hands of the user without a suitable warning, and no warning is supplied.[38] Therefore, it can readily be seen that "defective condition" is analyzed by reference to ordinary consumer expectation with primary emphasis on the safety of the product. It is an objective test based on community expectations, not a subjective test concerning the particular consumer injured. Judicial interpretations of "defective condition" and "unreasonably dangerous" suggest that the terms are circular or interchangeable,[39] and at least one decision, *LaGorga v. Kroger Co.*,[40] has so held. *LaGorga* involved a

34. *Id.* at 342, 247 N.E.2d at 403.

35. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); *see* Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970) (for the proposition that a defect is any condition not contemplated by the user which makes the product unreasonably dangerous to him).

36. 8 Cal. 3d at 135, 501 P.2d at 1163, 104 Cal. Rptr. at 433.

37. Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967); Berkebile v. Brantley Helicopter Corp., 219 Pa. Super. 479, 281 A.2d 707 (1971). *See also* Dean v. General Motors Corp., 301 F. Supp. 187 (E.D. La. 1969) (the design of the product must be measured by what the community is entitled to expect of those who persuade the public to buy their product).

38. *See* Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab., Inc., 437 F.2d 1295 (5th Cir. 1971); Canifax v. Hercules Power Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); Anderson v. Kliz Chem. Co., 256 Ore. 199, 472 P.2d 806 (1970).

39. Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 199 A.2d 826 (1964).

40. 275 F. Supp. 373, 380 (W.D. Pa. 1967). The suggestion is that the term "defective condition unreasonably dangerous," as used in section 402A of the Restatement to impose strict liability in tort on a manufacturer, conceptually expresses but one idea—that the product is *unexpectedly* unsafe when put to its intended use by an ordinary consumer. It is recognized that courts treat the terms as technically requiring two distinct elements of plaintiff's burden of proof. For example, Lietz v. Snyder Manufacturing Co., 475 S.W.2d 105 (Mo. 1972), clearly expressed the legal distinction between defective condition and the dangerous propensity of a product. The similarity of the terms is apparent, however, when a court states that a defect exists if the article is not reasonably fit for ordinary purposes for which such article is sold and used, as in *Lietz*, and when a product is defined as unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by an ordinary consumer as in Lunt v. Brady Manufacturing Corp., 13 Ariz. App. 305, 475 P.2d 964 (1970). The symantics is obfuscating the basic underlying proposition—that there is something wrong with the product that the ordinary consumer would not expect and which makes the product unsafe or dangerous.

minor plaintiff who was injured when a recently purchased jacket became ignited by a spark from a fire. The defendant argued that since the plaintiff failed to provide supportive evidence with regard to defectiveness, liability must be denied even though the product, due to its flammable fabric, was dangerous. The *LaGorga* court disagreed and held that with respect to defects in design, "unreasonably dangerous" and "defective condition" are synonymous.[41]

Strict liability in tort, just as the theories of negligence and warranty, requires that the plaintiff establish the unsafe condition of the product as the proximate cause of his injuries.[42] The concept of proximate cause, approached as a question of foreseeability, is designed to delineate and restrain the extent to which liability will be charged to a defendant for harm generated. Generally, courts, as a result of extreme confusion, have blended the proximate cause and causation in fact question.[43] Whether the unsafe product was a direct or substantial cause of plaintiff's injuries is a causation in fact question. Whether it was foreseeable that a particular harm from a product would result to a consumer within the protected class is a proximate cause question. Inherent in the definition and application of the "unreasonably dangerous" standard there seems to be a reflection of the concept of proximate cause or foreseeability.[44] The foreseeability implications of the phrase are apparent

41. 275 F. Supp. at 380.

42. *See, e.g.*, Denman v. Armour Pharmaceutical Co., 322 F. Supp. 1370 (N.D. Miss. 1970); Romig v. Goodyear Tire Co., 271 Cal. App. 2d 420, 76 Cal. Rptr. 479 (1969). For recognition of the need of proof of proximate cause in warranty cases see the UNIFORM COMMERCIAL CODE § 2-314, Comment 13 (1962 version). In Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183 (D. Mont. 1970), it was stated that terminology is the only difference between strict tort liability and warranty, the elements being identical.

43. *See* Prosser, *supra* note 14, at 234.

44. *See* Cornelius v. Bay Motors, Inc., 258 Ore. 564, 484 P.2d 299 (1971). In *Cornelius*, plaintiff collided with another vehicle when the brakes failed on his seven-year-old used car only a few hours after purchase. The court held that the brakes were defective but not unreasonably dangerous since:

> [t]he jury could have properly found that the ordinary purchaser of such a seven-year-old used car would recognize, expect and accept these possibilities in purchasing such a car and would not regard it as being "unreasonably dangerous. . . ."

Id. at 568, 484 P.2d at 305. In other words, it is foreseeable that an old car will have worn parts and unreliable brakes immediately after purchase and such is in the ordinary expectation of the consumer. In this regard take note of the language of Comment i of the Second Restatement, note 5, and also Comment j which provides that in order to keep a product from being unreasonably dangerous, the seller must warn of danger to which a "substantial number of the population" are susceptible "if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of the presence of the ingredient and the danger." RESTATEMENT (SECOND) OF TORTS, § 402A, Comments i, j (1965).

when a court holds that an open and obvious condition that is known to the consumer cannot be unreasonably dangerous.[45]

Some courts have defined the "unreasonably dangerous" term from the vantage point of the manufacturer's foreseeability:

> [t]he proper test of "unreasonable danger" is whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff *with* knowledge of the potential dangerous consequences the trial just revealed.[46]

Moreover, it has been held that the determination of whether the product is considered "unreasonably dangerous" requires the balancing of the likelihood and the gravity of harm against the burden of precaution that would be effective to avoid the harm.[47] This test is based on ordinary principles of negligence and also requires foreseeability to be applied in terms of the producer. Other courts have approached the "unreasonably dangerous" requirement as a matter of consumer foreseeability, with the concern focused on fitness of the product and its unexpected dangers to the ordinary user, and not on the conduct of the manufacturer.[48] A jury instruction that a product is defective and unreasonably dangerous if it "fails to guard against dangers reasonably to be foreseen" has been held erroneous since it focuses on the conduct of the seller rather than on the product and expectations of the consumer.[49]

Products liability law is still evolving and struggling for preciseness in yet uncharted areas. Cogent and lucid literature is needed to stabilize the quagmire of decisional law. In one respect the *Cronin* decision may have a unsettling effect if influential in other jurisdictions. It represents a dramatic shift in public policy toward imposition of absolute liability on the manufacturer. The elimination of the "unreasonably dangerous" element removes the traditional consideration given to reasonable product safety. Theoretically, a manufacturer or seller of an injury-causing

45. *See* Morrow v. Trailmobile, Inc., 12 Ariz. App. 578, 473 P.2d 780 (1970). *See also* Proppell v. Waters, 126 Ga. App. 385, 190 S.E.2d 815 (1972).

46. Dorsey v. Yoder Co., 331 F. Supp. 753, 759-60 (E.D. Pa. 1971); *see* Lewis v. American Hoist & Derrick Co., 20 Cal. App. 3d 570, 97 Cal. Rptr. 798 (1971).

47. 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

48. *See* note 40 *supra*; *cf.* Lunt v. Brady Mfg. Corp., 13 Ariz. App. at 307, 475 P.2d at 966. *See also* Wulff v. Sprouse-Reitz Co., 498 P.2d 766 (Ore. 1972) (holding that what is of primary importance in products liability litigation based on strict tort liability is not whether the defendant acted wrongfully but what the consumer reasonably expected from the product).

49. 13 Ariz. App. at 308, 475 P.2d at 967.

product containing only a minor defect that is not unsafe or dangerous in any way, henceforth in California, will be held liable. The elimination of the "unreasonably dangerous" element also removes an important aspect of the proximate-foreseeability issue. One purpose of law is to define the type of conduct that society expects in certain human activity. The *Cronin* rule leaves to speculation important questions concerning the type of conduct that will be required of a manufacturer or seller, the perfection with which products must be produced, the foreseeability that a product with only a minor defect may cause injury, and the preciseness of performance that can be subjectively expected by a consumer of a product.

The net result of the *Cronin* decision is that the plaintiff's burden of proof is substantially lessened. The delicate balance, between the interests of the consumer and the interests of the manufacturer, attempted by the drafters of section 402A is discarded. Since increased liability will be imposed, a manufacturer or seller will build the resulting costs into the costs of doing business, ultimately reflected by inflated product prices. The *Cronin* approach is, therefore, a substantial deviation in public policy that should initiate from the legislature, not the judiciary—even though it may have a commendable deterrent effect on manufacturers by encouraging them not to produce injury-causing products.

On the other hand, since the definitions of "defective condition" and "unreasonably dangerous" can be interpreted, as they were in the *LaGorga* case, as being identical, the practical effect of *Cronin* may be deceptively slight. The *Cronin* court sought to cleanse strict tort liability as defined by section 402A of its "negligence complexion."[50] An analysis, however, of the prevailing applications of the "defective condition," such as in the *Dunham* case, reveals that a product will be considered defective if it is not in the condition reasonably expected when used for ordinary purposes. In this respect, the *Cronin* court, by eliminating "unreasonably dangerous," may not have reached the objective it desired.

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50. 8 Cal. 3d at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.