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SMU Law Review

Volume 21 | Issue 3 Article 8

January 1967

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Overton S. Anderson

Recommended Citation

Overton S. Anderson, Note, *Foreseeability as a Limiting Factor in Applying Strict Products Liability*, 21 Sw L.J. 678 (1967)

https://scholar.smu.edu/smulr/vol21/iss3/8

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the concept of good faith doubt.[36] It seems that an employer, faced with an authorization card demand from a union which had lost an election during the past year, would have an excellent basis for doubting that the union actually represented a majority of employees. This principle has already been recognized by the Board[37] and broad acceptance seems likely.

Lawrence D. Stuart, Jr.

Foreseeability as a Limiting Factor in Applying Strict Products Liability

While taking the drug MER-29, John Cudmore noticed loss of hair and flaking of skin. He ceased taking MER-29 and approximately four months later began experiencing trouble with his vision. This was later diagnosed as cataracts in both eyes. He brought suit against the manufacturer alleging negligence and breach of implied warranty. The defendants alleged that Cudmore was one of a small class of persons, the existence of which was not reasonably foreseeable, who might react abnormally and adversely to the drug. Among other findings returned by the jury[1] were determinations (1) that the plaintiff's cataracts were the result of an "abreaction"[2] to MER-29 and (2) that while he was taking MER-29 the state of medical knowledge was such that the defendant could not, in the exercise of ordinary care, have anticipated that the drug might cause cataracts. The plaintiff filed no motion to disregard any of the jury findings and judgment was entered, based on the findings, that he take nothing by his suit. On appeal the plaintiff contended that the trial court had erred in including the element of foreseeability in special issues where the theory of recovery was in strict products liability based on implied warranty. *Held, affirmed*: A manufacturer should be held liable for injuries from his product only when he ought reasonably to have foreseen such injury in an appreciable number of persons. *Cudmore v. Richardson-Merrell, Inc.*, 398 S.W.2d 640 (Tex. Civ. App. 1965), *error ref. n.r.e., cert. denied*, 385 U.S. 1003 (1967).

[36] *See* notes 13 and 16 *supra*.
[37] *See* Nalco Chem. Co., 163 N.L.R.B. No. 19 (1967).

[1] The jury also returned these findings: that the defendant was not negligent in failing to properly test MER-29 or in withholding information concerning the drug; that MER-29 was not a proximate cause of plaintiff's cataracts or loss of hair; but that the drug was a proximate cause of his flaking skin.

[2] The following definition of abreaction was submitted with the special issue:

> Abreaction means an unusual reaction resulting from a person's unusual susceptibility to the product in question; that is, such person's reaction is different in the presence of the drug in question from that in the usual person. An abreaction is one which could not have been reasonably foreseen in an appreciable class or number of potential users prior to March 2, 1961. [The date Cudmore ceased taking MER-29.]

[Editor's Note: There is some confusion as to the meaning of this term. WEBSTER'S NEW WORLD DICTIONARY (1964) gives the following definition: "in *psychoanalysis*, the relieving of a repressed emotion, as by talking about it." As used by the Texas courts it seems to be a hybrid composed of the two words "abnormal" and "reaction."]

I. Establishing the Manufacturer's Responsibility

Strict products liability was first imposed in cases involving contaminated food, to protect the innocent consumer regardless of his ability to prove negligence on the part of the processor.[3] In search of a legal theory on which to base the new liability, the courts arrived at the idea of a "warranty" running from the manufacturer to the ultimate consumer.[4] The use of warranty as a theory for strict products liability is unfortunate, because of the existence of the contractual form of warranty.

The result has been the use of an inapplicable term, involving overtones of contract, to describe a development predicated solely on public policy. Moreover, commingling of the two quite separate forms of recovery has created inevitable confusion. On the one hand there is the implied contractual warranty extending from the seller of a product to his buyer.[5] Privity of contract between the parties is a necessary element. On the other hand there is the hybrid, strict products liability form of implied warranty with no requirement of privity. In Texas the latter form has long been applied to manufacturers of products for human consumption,[6] and, more recently, to manufacturers of defective and unreasonably dangerous non-food products.[7]

Historically, strict liability in Texas stems from the landmark case of *Jacob E. Decker & Sons v. Capps*,[8] a case involving injuries resulting from contaminated sausage. There the Texas Supreme Court held that in adulterated food cases "the broad principle of the public policy to protect life and health"[9] favors "an implied warranty imposed by operation of law."[10] The court distinguished the new implied warranty from the contractual type of warranty by stating, "while a right of action in such a case is said to spring from a 'warranty' it should be noted that the warranty here referred to is not . . . contractual warranty, but is an obligation imposed

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[3] *See* Parks v. C.C. Yost Pie Co., 93 Kan. 334, 144 P. 202 (1914); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

[4] This idea first appeared in Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927). It is now generally agreed that the warranty is made directly to the consumer. B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); Markovich v. McKesson & Robbins, 106 Ohio App. 265, 149 N.E.2d 181 (1958); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

[5] Cruz v. Ansul Chem. Co., 399 S.W.2d 944 (Tex. Civ. App. 1966) *error ref. n.r.e.*; Brown v. Howard, 285 S.W.2d 752 (Tex. Civ App. 1955) *error ref. n.r.e.*; Donelson v. Fairmont Foods Co., 252 S.W.2d 796 (Tex. Civ. App. 1952); Baylor v. Eastern Seed Co., 191 S.W.2d 689 (Tex. Civ. App. 1946).

[6] *See* Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Brumit v. Cokins, 281 S.W.2d 154 (Tex. Civ. App. 1955) *error ref. n.r.e.*; Amarillo Coca-Cola Bottling Co. v. Loudder, 207 S.W.2d 632 (Tex. Civ. App. 1947); Coca-Cola Bottling Co. v. Burgess, 195 S.W.2d 379 (Tex. Civ. App. 1966); Coca-Cola Bottling Co. v. Enas, 164 S.W.2d 855 (Tex. Civ. App. 1942) *error ref.*

[7] *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967).

[8] 139 Tex. 609, 164 S.W.2d 828 (1942).

[9] *Id.* at 612, 164 S.W.2d at 829.

[10] *Id.*

by law to protect public health."[11] Texas courts of civil appeals followed *Decker* in subsequent contaminated food cases,[12] but were reluctant to extend strict liability to manufacturers of non-food products.[13] In *Putman v. Erie City Mfg. Co.*[14] the Fifth Circuit made an "*Erie*-educated guess" that the Texas Supreme Court would so extend the rule when the proper case came before it. As was predicted by the Fifth Circuit, the Texas Supreme Court recently extended the applicability of *Decker* to non-food products.[15]

II. EXTENT OF STRICT LIABILITY: FORESEEABILITY

A manufacturer's responsibility generally does not extend to all consequences to which his product contributed,[16] but neither the courts nor legal writers have agreed upon definite limits.[17] The *Restatement (Second) of Torts* states the requirement that the product be "in a defective condition unreasonably dangerous" to the user for strict liability to be imposed.[18]

[11] *Id.* at 616, 164 S.W.2d at 831.

[12] *See* cases cited note 6 *supra.*

[13] "We feel unauthorized on the basis of the *Decker* case to recognize a further exception to the general rule and impose liability in this case absent privity of contract." Cruz v. Ansul Chem. Co., 399 S.W.2d 944, 947 (Tex. Civ. App. 1966) *error ref. n.r.e.* (fire extinguisher). *See also* Brown v. Howard, 285 S.W.2d 752 (Tex. Civ. App. 1955) *error ref. n.r.e.* (cattle spray); Anheuser-Busch, Inc. v. Butler, 180 S.W.2d 996 (Tex. Civ. App. 1944) (exploding bottle); Latham v. Coca-Cola Bottling Co., 175 S.W.2d 426 (Tex. Civ. App. 1943) (exploding bottle); Jax Beer Co. v. Shaeffer, 173 S.W.2d 285 (Tex. Civ. App. 1943) *error ref. w.o.m.* (exploding bottle).

[14] 338 F.2d 911 (5th Cir. 1964), *discussed in* 19 Sw. L.J. 198 (1965).

[15] *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967) (permanent wave lotion); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967) (highly flammable kerosene).

[16] Strict products liability is strict in the sense that privity of contract is not required and that negligence on the part of the manufacturer is not a prerequisite for recovery, but, as stated in Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 36 (5th Cir. 1963), "it is reasonable to draw a line somewhere: a manufacturer of food products is not like one who keeps a tiger for a pet in a crowded city."

[17] Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied,* 375 U.S. 865 (1963); Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961); Connolly, *The Liability of a Manufacturer for Unknowable Hazards Inherent in His Product,* 32 INS. COUNSEL J. 303 (1965); Cruse, *Products Liability—Past, Present and Future,* 8 So. TEXAS L.J. 151 (1966); James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections On Enterprise Liability,* 54 CALIF. L. REV. 1550 (1966); Keaton, *Products Liability—Liability Without Fault and the Requirement of a Defect,* 41 TEXAS L. REV. 855 (1963); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight,* 70 YALE L.J. 554 (1961); Comment, *Cigarettes and Vaccine; Unforeseeable Risk in Manufacturers Liability Under Implied Warranty,* 63 COLUM. L. REV. 515 (1963). This lack of agreement may be due to rapid changes that have taken place in the field of products liability or to the vague but flexible basis for strict liability, which is public policy. That changes in the area have been rapid is pointed out in Wade, *Strict Tort Liability of Manufacturers,* 19 Sw. L.J. 5, 7 & n.17 (1965):

> This [change in the area of products liability] is dramatically illustrated by the experience of the American Law Institute with the *Restatement of Torts (Second).* As originally submitted by the Reporter (William L. Prosser), it contained a new section which provided for strict liability of sellers of 'food for human consumption,' with a caveat for other products. Restatement (Second), Torts § 402A (Tent. Draft No. 6, 1961). Developments had progressed so rapidly, however, that it was decided to include also 'products for intimate bodily use,' and this was approved by the Institute in 1962. See *id.* (Tent. Draft No. 7, 1962). Two years later, however, developments had proceeded so far that the Reporter offered and the Institute approved a new version applying to 'any product.' See *id.* (Tent. Draft No. 10, 1964).

[18] In explaining the "defective condition unreasonably dangerous" phraseology, the comments following § 402A seem to reflect a requirement of foreseeability. Comment *h* states that "[a] product is not in a defective condition when it is safe for normal handling and consumption." Comment *j* states that in order to keep a product from being unreasonably dangerous, the seller must warn of dangers 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."

In delineating the extent of liability, foreseeability of harm has, in some cases, been utilized as a limiting factor for strict products liability.[19] Nevertheless, cases involving contaminated food are often cited to indicate that foreseeability is never a necessary element of the plaintiff's prima facie case in strict liability.[20] In such cases, however, the injurious result would nearly always be obvious if the defect were known[21]—anyone would expect harm from the consumption of a soft drink containing the decomposed carcass of a mouse. Moreover, although concerning foreseeability of defect rather than foreseeability of harm, the opinion of the sharply-divided Texas Supreme Court in *Bowman Biscuit Co. v. Hines*[22] recognized some need for foreseeability even where contaminated food is involved. The court held that the wholesaler was not strictly liable for injuries resulting from wire in a cookie because packaging made discovery of the defect impossible. While this reasoning would, of course, not absolve a manufacturer, the court indicated in dictum that it would apply the same doctrine in the case of a retailer.[23]

In the case of a manufacturer, foreseeability has been expressly recognized as a limiting factor in two classes of situations in which a non-contaminated product is involved. First, where an idiosyncrasy or an allergy is at issue the plaintiff is often required to prove that he is one of a class of persons who might have been foreseen as adversely susceptible to the product.[24] Second, the injury may be of a type that could not have been foreseen in any user due to the existing state of scientific or medical knowledge—the "unknowable risk."[25]

III. CUDMORE V. RICHARDSON-MERRELL, INC.

Cudmore is important not merely for the result under the present facts

[19] *See, e.g.*, Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963); Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952).

[20] *See, e.g.*, Griggs Canning Co. v. Josey, 139 Tex. 623, 632-34, 164 S.W.2d 835, 839, 840 (1942) in which the Texas Supreme Court held a retailer of a can of contaminated spinach liable irrespective of whether he knew or could possibly have discovered the defect: "[W]e think the rule which would exempt him from liability merely because he has no means of knowing whether the contents of the sealed cans are unfit for human consumption is unsound in principle." *Id.* at 632, 164 S.W.2d at 839. "[W]e hold that a retailer who sells unwholesome food for human consumption is liable to the consumer for the consequences under an implied warranty imposed by law as a matter of public policy, even though . . . the retailer has no means of knowing that the contents are unfit for human consumption." *Id.* at 634, 164 S.W.2d at 840.

[21] *See* F. HARPER & F. JAMES, THE LAW OF TORTS, § 28.22, at 1584-85 (1956):

> Food sold for immediate consumption is warranted as fit for consumption by ordinarily healthy and normal people under ordinary circumstances. This means that it is not contaminated and that it is free from impurities that might *foreseeably prove injurious*, such as pebbles, glass or mice. (Emphasis added.)

[22] 151 Tex. 370, 251 S.W.2d 153 (1952).

[23] *Id.*

[24] *See, e.g.*, Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956) ("reasonable [sic] foreseeable idiosyncracies"); Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (Dist. Ct. App. 1963) ("substantial portion of possible users"); Howard v. Avon Prods. Inc., 395 P.2d 1007 (Colo. 1964) ("reasonably foreseeable class of potential users"); Crotty v. Shastenberg's—New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960) ("appreciable number"); Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 378 P.2d 298 (1963) ("reasonably foreseeable and appreciable class of number of potential users").

[25] Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963). *Contra*, Green v. American Tobacco Co., 154 So. 169 (Fla. 1963).

and peculiar record, but to determine the effect of the holding on cases which may arise in the future with different fact situations. Unfortunately, the court did not clarify its position on foreseeability by indicating the weight placed by it upon the various facts in the case. Thus, in an analysis of the opinion, it is necessary to examine separately each fact apparently considered by the court and to evaluate the effect of each, both upon the holding and upon the applicability of foreseeability in each of the forms that it has taken.

Purity. Early in the *Cudmore* opinion the court points out that the plaintiff's injuries resulted from usage of a pure product.[26] The court does not suggest that the mere fact of purity absolves the manufacturer of responsibility for resulting injuries—the seller of pure cyanide as a cold remedy would doubtless be liable for the consequences. The distinction takes *Cudmore* out of the category of cases, such as those involving contaminated food, which seem to indicate that foreseeability of harm is not a factor in strict liability.[27] And the distinction brings it within the two classes of situations in which foreseeability has been expressly recognized —cases involving allergies and those involving "unknowable risks." The court apparently accepts the view that in adulterated food cases foreseeability of harm would be readily apparent if the condition of the product were known and thus need not be proven in such cases.[28]

Abreaction. Denial of liability seems to have been based primarily upon the jury finding that the appellant's cataracts were the result of abreaction to MER-29—"that appellant belongs to a class of people not appreciable in number who are allergic to the drug."[29] The court held that "in such cases the manufacturer of a drug . . . should be liable on the grounds of implied warranty for injurious results only when such results or similar results ought reasonably to have been foreseen by a person of ordinary care in an appreciable number of persons."[30] The court gave no reasons for this holding but cited numerous sister-state decisions, including *Howard v. Avon Products, Inc.*[31] and *Esborg v. Bailey Drug Co.*[32] In *Howard*, at the time the plaintiff had purchased the defendant's product only one person had sustained an adverse reaction, but a year after her purchase some twelve other identifiable cases of reaction to the product arose. In affirming a judgment for the defendant the Colorado Supreme Court stated, "the implied warranty . . . attached at the time she purchased the jar of 'Strawberry Cooler' . . . and at that point in time there was no reasonably foreseeable class of potential users who could be described as prone to suffer from an allergic reaction to [the product]."[33] In *Esborg*, the Washington

[26] "This is not a case in which a foreign substance found its way into a bottled drink; it is not a case involving spoiled food . . . ." 398 S.W.2d at 644.
[27] *See, e.g.*, note 20 *supra.*
[28] *See* note 21 *supra* and accompanying text.
[29] 398 S.W.2d at 644.
[30] *Id.*
[31] 395 P.2d 1007 (Colo. 1964).
[32] 61 Wash. 2d 347, 378 P.2d 298 (1963).
[33] 395 P.2d at 1011.

Supreme Court placed a burden on the plaintiff, when confronted with the defense of allergy or hypersensitivity, to produce "substantial evidence" showing foreseeability of harm to an appreciable class of potential users.[34] The fact that the court in *Cudmore* emphasized the abreaction finding and cited cases requiring a foreseeable class of susceptible users indicates that the court considers such a foreseeable class a prerequisite for recovery in any allergy case.

Unknowable Risk. Also among the cases cited by the court are those in which strict liability was held inapplicable because the state of scientific or medical knowledge was such that the harm was unforeseeable—the "unknowable risk" cases. In these cases, *Lartigue v. R.J. Reynolds Tobacco Co.*[35] and *Ross v. Philip Morris & Co.*,[36] the plaintiffs contracted lung cancer after smoking cigarettes manufactured by the defendants and brought implied warranty suits. In both cases the rulings were for the tobacco companies because the state of medical or scientific knowledge was not such that cancer could have been foreseen as a result of cigarette smoking. In *Ross* the Eighth Circuit noted that a holding for the plaintiff, "would have made defendant an absolute insurer—without regard to 'reasonableness' and without regard to 'developed human skill or foresight."[37] The Fifth Circuit in *Lartigue* discussed the extent of the manufacturer's responsibility for injuries resulting from his products: "He is an insurer against foreseeable risks—but not against unknowable risks."[38]

Although primary emphasis seems to have been placed upon the abreaction finding, the citation of unknowable risk holdings in a case in which a finding was made that "the state of medical knowledge was not such that the appellee could reasonably have discovered that MER-29 might cause cataracts"[39] would seem to indicate that the court might recognize the "unknowable risk" limitation in a case in which a finding of allergy was not also returned.

IV. Conclusion

If the events in *Cudmore* had taken place at a later time the result might have been different. Facts now available, but not then before the Texas court, include: a conviction of criminal fraud for withholding information from the Food and Drug Administration;[40] the fact that as many as three thousand users may have suffered various side reactions to MER-29;[41] and recent judgments against the manufacturer, based largely on fraud in gaining FDA approval. Such facts have enabled other plaintiffs to recover

[34] 378 P.2d at 304.
[35] 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963).
[36] 328 F.2d 3 (8th Cir. 1964).
[37] *Id.* at 12.
[38] 317 F.2d at 37.
[39] 398 S.W.2d at 647.
[40] Flexman, *MER/29 (Triparaonol) and Cataract*, 1964 Med. Trial Tech. Q. 191.
[41] *See Hearings on Inter-Agency Coordination in Drug Research and Regulation Before the Subcomm. on Reorganization and International Organizations of the Comm. on Governmental Operations*, 88th Cong., 1st Sess., pt. 4, at 1955-78 (1963).