

# A Comparative Survey of Products Liability Law as Applied to Motor Vehicles\*

## Introduction

OTTO C. SOMMERICH †

Products liability law in the United States has run the gamut from liability in negligence, only for fault, and in contract only on a basis of privity, to strict liability without restrictions of fault or the necessity of privity in contract.<sup>1</sup> Its pace of development is as astonishing as the growth of the U.S. gross national product and sometimes as bewildering as the complex technology for the marketing and distribution of enormous quantities of products.<sup>2</sup>

Nor is the end in sight, for we are living witnesses to the persuasion that a manufacturer should assume absolute liability for any damage on the theory that he should assimilate the risk for such damages in the ordinary cost of doing business.<sup>3</sup>

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\* *The International Lawyer* is grateful for the special editorial assistance of Captain Eddy James Rogers, Jr., QMC, for this series of articles. Captain Rogers, a graduate of Harvard Law School and a member of the Texas Bar, is now serving with the United States Army at Fort Lee, Virginia, where he is teaching public contract law and general business law.

† Member of the New York Bar since 1899, L.L.B. Columbia University Law School, and chairman of the Section's Committee on European Law.

<sup>1</sup> *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, summarizes the extensions of the original rule.

<sup>2</sup> Wm. E. Knepper, "About Tomorrow's Tort Trends," *N.Y.L.J.* 2/21/1967, p. 1, refers to "the frenzy of the 'Law Explosion.'"

<sup>3</sup> A note in the *California Law Review*, Vol. 54, No. 4 (1966), p. 707, pays tribute to the work of Prof. Ehrenzweig and Justice Traynor in advancing this concept. "The most generally accepted argument advanced in support of absolute liability on the part of a manufacturer is nothing more than a

Indeed, this state of legal affairs has invited comment from competent sources that present principles of products liability contravene "legal tradition that goes back centuries"<sup>4</sup> and that we are adrift in a sea of uncertainty and unpredictability in the law.<sup>5</sup>

The development of the law of products liability appears to be in proportion to the social awareness that a defective product carries with it the "potency of danger"<sup>6</sup> and damage and that the cost of injuries resulting from its use should be borne by the manufacturer who put the product on the market and who invited its use, rather than upon uninsured persons who are powerless to protect themselves and are strongly limited in the possibility of proving fault within the technical requirements of the rules of evidence.<sup>7</sup>

Yet, this development has been comparatively recent. As late as 1905, the British courts in *Earl v. Lubbock* (L.R.[1905] 1 K.B. 253) returned to the doctrine of *Winterbottom v. Wright* (10 M. & W. 109), that a third party could not recover from a manufacturer for a latent defect in the latter's product.

This bulwark and citadel<sup>8</sup> of privity of contract was taken by storm and demolished by Judge Cardozo in 1916 in *MacPherson v. Buick Motor Co.* (217 N.Y. 382) who "put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else."<sup>9</sup> The manufacturer was held "responsible for the finished product"<sup>10</sup> and was charged with the knowledge "that in the usual course of events the danger will be shared by others than the buyer."<sup>11</sup> The

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distillation of the theory of risk distribution through the price structure which Professor Ehrenzweig and Justice Traynor were advancing a decade ago."

<sup>4</sup> Lee S. Kreindler, Chairman of Aviation Committee of American Trial Lawyers Association, as reported in *The New York Times*, April 23, 1966, p. 62.

<sup>5</sup> Warren Freedman, "Products Liability Today, Whither Thou Goest, I Will Go," an address delivered in Honolulu, 1967, before the A.B.A. Section on Corporation, Banking and Business Law, reprinted in *N.Y.L.J.* 8/9/1967, p. 4.

<sup>6</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 387.

<sup>7</sup> *Greenman v. Yuba Power Products*, 59 Cal. 2d 67; *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437; Keeton, "Products Liability—Liability Without Fault and The Requirement of a Defect," 41 *Texas L.Rev.* 855 (1963).

<sup>8</sup> *Prosser*, "The Assault Upon The Citadel (Strict Liability To The Consumer)," 69 *Yale L.J.* 1099 (1960).

<sup>9</sup> *Id.*, p. 390.

<sup>10</sup> *Id.*, p. 394.

<sup>11</sup> *Id.*, p. 389.

principle was to be applied to "whatever the needs of life in a developing civilization require them to be."<sup>12</sup>

Justice Frankfurter credits this decision with becoming a radiating principle and an established part of the law of torts.<sup>13</sup> It has clearly culminated in the doctrine which appears in the Restatement of the Law of Torts (Second) which today has virtually the force of law:<sup>14</sup>

Sec. 402A—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 relationship with the seller. . . .

The limitation in Subdivision "(1)" that the product be "unreasonably dangerous" has tended to limit the application of strict tort liability to personal injury cases.<sup>15</sup> Recovery for economic loss has largely been governed by the principles now found in the following sections of the Uniform Commercial Code:

2-315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the

<sup>12</sup> *Id.*, p. 391.

<sup>13</sup> Justice Frankfurter, "Law and Men," pp. 196, 198, in a biographical sketch of Justice Cardozo.

<sup>14</sup> Rheingold, "What Are The Consumer's 'Reasonable Expectations'?" *The Business Lawyer*, Vol. 22, No. 3, pp. 589, 590.

<sup>15</sup> Cumming, "Manufacturer's Responsibility For Defective Products: Continuing Controversy Over The Law To Be Applied," *California L.Rev.* Vol. 54, No. 4 (1966), p. 1681; "Manufacturer's Strict Liability to Consumers for Economic Loss," *St. John's L.Rev.*, Vol. XLI, Jan. 1967, p. 408.

goods shall be fit for such purpose. L. 1962, c. 553, eff. Sept. 27, 1964.

### 2-318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section. L. 1962, c. 553, eff. Sept. 27, 1964.

At the same time that the Uniform Commercial Code was enacted in California in 1962, its courts enunciated in *Greenman v. Yuba Power Products, Inc.* (59 Cal. 2d 57; 377 P.2d 897) a doctrine of absolute liability in tort, holding a manufacturer absolutely responsible for personal injuries resulting from a defective product.<sup>16</sup> But in 1965 the same courts held that the theory of absolute liability in tort was unavailable as a vehicle for recovery of economic loss as contrasted to recovery for personal injuries.<sup>17</sup> Yet, at virtually the same time, New Jersey took an opposite point of view and held that the theory of absolute liability in tort was available as a device for the recovery of economic loss in a products liability case where no personal injury or property damage had occurred.<sup>18</sup>

The courts of other jurisdictions are no doubt now being occupied with the swing from strict liability in tort to absolute liability in tort where defective products are involved, and with the further question whether the new theories, which apply in personal injury cases, are equally valid when applied to economic loss cases.

While the pendulum swings, a very recent case in the United States Court of Appeals for the 7th Circuit adds a fitting footnote to *MacPherson v. Buick Motor Co.*<sup>19</sup> and the subject of automobiles, which Judge Cardozo there noted were designed to go 50 miles an hour.<sup>20</sup> In *Schemel v. General Motors*,<sup>21</sup> a passenger in a car going

<sup>16</sup> Although the phrase "strict liability in tort" has become the accepted characterization of *Greenman v. Yuba*, Cumming (*supra*) believes that the term "absolute liability in tort" is correct because no reference is made to any defenses which the manufacturer might have if the case were tried under a sales law approach.

<sup>17</sup> *Seely v. White Motor Co.*, 63 Cal. 2d 9 (1965).

<sup>18</sup> *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52 (1965).

<sup>19</sup> *Supra*.

<sup>20</sup> *Id.*, p. 391.

<sup>21</sup> Not yet reported; decided 7/17/1967.

115 miles per hour at the time of an accident sued General Motors on the ground of negligence in building a vehicle which would go so fast. The fascinating fact is that in a dissenting opinion, Judge Roger Kiley held that "General Motors is chargeable with the duty of reasonably foreseeing the probable dangers" of building a car capable of high speeds. The majority opinion, however, held that the manufacturer's "duty is to avoid hidden defects and latent or concealed dangers. He is not bound to anticipate and guard against grossly careless misuse of his product." In the language of a periodical which noted the decision, a tendency was found in the forums of law to apply "responsibility at any speed" as well as "the tendency of more and more courts in the U.S. to hold manufacturers to tougher standards of liability when their products cause injury."<sup>22</sup>

Both a practical and scholarly interest in the law of representative countries of Europe invite a comparison, and the accompanying articles of members of the European Law Committee show an interesting division of progress in those countries.

Because products liability includes such a vast array of litigation and comment in so many different types of products, the subsequent articles have limited themselves out of practical necessity to the field of motor vehicles.<sup>23</sup>

In *Germany* we find that there is no products liability law as known to America, and that liability is wholly based on fault. In the words of Ernest C. Steefel, German law on the subject can, from the American viewpoint, be reduced to "archaic gambits." Prof. Ruth B. Ginsburg has found no case in point or even commentary in *Sweden* directed specifically to the question. In *Italy*, according to Messrs. Riccardo Gori-Montanelli and David A. Botwinik, the higher courts and commentators agree that the manufacturer's sole liability is his contractual one to the purchaser of the vehicle. As found by Paul L. Baeck there is no liability without fault in *Austria*. Understandably, as ascertained by Isaac Shapiro there is no case or article to be found in the *Soviet Union* in which the liability of the Soviet manufacturer of motor vehicles is mentioned. The only cases he found

<sup>22</sup> *Time*, Aug. 25, 1967, p. 48.

<sup>23</sup> Daniel P. Moynihan has the following to say about automobiles, in "Next: A New Auto Insurance Policy," *The New York Times Magazine*, Aug. 27, 1967, pp. 26, 76: "The point is that the private automobile, as authors Alan K. Campbell and Jesse Burkhead say, 'is undoubtedly the greatest generator of externalities that civilization has ever known.'" Its only possible rival, they add, would appear to be "warfare among nations."