

The owner of the car may in turn sue his seller in a contract action for breach of warranty and he will be entitled to recover all his damages, including those awarded against him to the third person.³⁵

Conclusion

In its evolution from a strict insistence on fault to an acceptance of almost absolute liability, French law demonstrates how a general theory of liability may be put to practical use. Taken together, French contract and tort law afford fairly satisfactory relief to those injured by a defective product.

As contrasted with U.S. law, the French law evinces a more realistic recognition of the economics involved in traffic accidents and avoids some of the problems frequently involved in negligence cases. The French law of warranty is substantially similar to our own, but French tort law already has achieved the reform often advocated in the United States of making the owner liable for injuries occasioned by his automobile, without regard to the limitations placed on liability by the Anglo-American doctrine of *respondeat superior*. The evolution of the law has been much the same in France and America but French law has reached a maturity which yet awaits our common law dénouement.

Germany

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“The assault upon the citadel of privity is proceeding in these days apace.” So wrote Cardoso in 1931. Today the citadel in all American states has fallen, but its battlements in Germany deploy the traditional colors of the Roman law contract—tort dichotomy, undaunted by the world of merchandising and advertising which otherwise has become a full part of the German scene, as in America.

In Germany there is no “product liability” in the American sense, meaning strict liability of the manufacturer or assembler (or of the wholesaler or retailer) *vis-à-vis* the consumer for defective performance. Damages in Germany, both in contract and in tort,

³⁵ *Supra* notes 10 and 12.

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are based on fault; the burden of proof is upon the plaintiff and the liability for agents in tort opens statutory escapes from liability when the defendant can show proper supervision. Consequently, the German law on product liability can be reduced to the following classic and, for America, somewhat archaic gambits:

Consumer v. Retailer

In Contract: Under Article 459 of the German Civil Code, there is a statutory warranty of fitness, but in case of breach the remedies are limited to rescission of the sale, reduction of the price, or, under Article 326, to payment of direct damages suffered by the defects, which do not include damages for personal injuries. The fact that the seller is absolutely liable in contract for the acts of his agents is therefore of little help to the consumer since the liability of the principal is so narrow.

The circle of persons to whom the manufacturer owes a duty of care has been somewhat enlarged by case law in that not only the buyer but also the members of his household or those to whom he owes a duty of care are to be included in contract liability. The contract protection therefore extends not only to the contracting party but also to ascertainable persons who have a special connection with the injured party and the obligor; thus a "protective effect for third parties" becomes an implied element in any sales contract. This extension resembles the presumption made in New York cases that, at the least, any purchase of food and household goods is made to benefit all members of the household. It has been extended in Germany to tenants in an apartment building, to servants, and to cleaning personnel working in a household.

In Tort: Section 823 of the German Civil Code obligates anybody who intentionally or negligently injures the body or the health of another to compensate the person injured for the harm. This permits the consumer to recover damages for his personal injuries in theory only, since he must prove negligence on the part of the retailer who can escape liability not only by showing that he has properly inspected the merchandise received from the manufacturer, but even if he has not, he can exculpate himself for negligence of his employees by showing that there is no fault in selecting or supervising his agents.

Consumer v. Manufacturer

In Contract: There can be no recovery unless the plaintiff stood in privity of contract with the defendant. Contractual liability of the manufacturer on the basis of warranty has not been recognized, not even for food, drugs, or branded merchandise. A recent decision of the Highest Court (*Der Betrieb*, June 10, 1963, p. 1147) also denies a consumer's claim against the manufacturer clothed in the form that the retailer claims the damages incurred by the consumer against the manufacturer. "Liquidation of damages to the benefit of a third party" are thus rejected. In an *obiter dictum*, the Highest Court, however, leaves it open, "whether a different view may obtain when a manufacturer who by advertising directly praises the advantages of his product vis-à-vis the ultimate consumer and where the merchandise goes through an uncontrollable supply chain, the ultimate consumer relies essentially upon the representation of the manufacturer." So far, neither the High Court nor any lower court has ruled again on this open issue.

In Tort: The situation is the same here as under Consumer v. Retailer. The consumer's chances in a product liability suit in tort are slim since the burden of proof is upon him to show fault of the manufacturer and fault in selection or supervision of personnel. Compared to American standards, the burden is strict and the exculpation, easy.

While this article was in preparation, the Fall 1966 *Buffalo Law Review*, dedicated "to the late Doctor Arthur Lenhoff, Judge, Scholar and Practitioner," was published under the able editorship of Professor Touster. Page 229 *ff.* contains an excellent contribution on product liability abroad by Charles Szladits, in which he exposes the German law (pp. 232-243). Since Professor Szladits' study contains the latest German cases and monographs written in Germany on the subject up to and including those published in late 1966, it is impossible to write, six months after Dr. Szladits' article, a better synopsis of the German situation than he did.

This author anticipates, however, that it will not be long before the citadel of privity will topple in Germany too. A small army of occupation in the form of German comparatists analysing the American scene and making recommendations for German application are at work. Scholarly studies in German, fully digesting the U.S. law on product liability, have been recently written by the German Pro-