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Products Liability - Strict Liability in Tort - Measure of Proof: Defectiveness of Product - Unreasonably Dangerous Test Abandoned: Cronin v. J.B.E. Olson Corp.

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TORTS—PRODUCTS LIABILITY—STRICT LIABILITY IN TORT—MEASURE OF PROOF: DEFECTIVENESS OF PRODUCT—UNREASONABLY DANGEROUS TEST ABANDONED

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

IN *Cronin v. J. B. E. Olson Corporation*[1] a unanimous California Supreme Court held that an injured person seeking to impose strict tort liability on the seller or manufacturer of an injury-causing product need only prove that the product was defective. It is not necessary to prove that the product was unreasonably dangerous.

Plaintiff William Cronin, a delivery driver employed by a California bakery, was severely injured when the delivery truck he was driving collided with another vehicle, left the highway, and crashed into a roadside ditch. On impact an aluminum hasp, part of a restraining system for bread racks stored in the rear of the van, fractured, allowing the racks to roll forward into the driver's compartment where they struck the plaintiff and propelled him through the windshield.

Plaintiff brought suit against J. B. E. Olson Corp., which had acted as sales agent and general contractor in supplying the truck.[2] Cronin based his action on a theory of strict liability in tort claiming the aluminum hasp was so defective as to render the vehicle unsafe for its intended use,[3] and asserting that this defective condition was a direct and substantial cause of his injuries. At trial plaintiff introduced expert testimony to establish the defective condition of the hasp which was characterized as being "extremely porous," "full of holes, voids, and cracks," and "just a very, very bad piece of metal."[4] Plaintiff did not, however, offer proof that the defect rendered the product unreasonably dangerous. Despite this fact the jury found in Cronin's favor.

On appeal defendant's main contention was that proof that the defective condition of the product rendered it unreasonably dangerous is an essential element in strict liability cases, and that the lower court

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

[2] The original action listed two additional defendants. General Motors Corp. manufactured the chassis of the truck involved but was dismissed before trial. Chase Chevrolet actually sold the vehicles to Cronin's employer but Chase prevailed at the trial level and was not a party on appeal. 8 Cal.3d at 124, 501 P.2d at 1156, 104 Cal. Rptr. at 436.

[3] 8 Cal.3d at 124, 501 P.2d at 1155, 104 Cal. Rptr. at 435.

[4] *Id.* at 126, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

erred in failing to so instruct the jury.[5] Without such a requirement, the defendant argued, strict liability would become absolute liability, attaching "regardless of the insignificance of the risk posed by the defect or the fortuity of the resulting harm."[6] In support of this contention defendant cited section 402A of the RESTATEMENT (Second) OF TORTS which reads in relevant part: "One who sells any product in a defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm thereby caused. . . ."[7] Defendant also cited California case law wherein the Restatement's "unreasonably dangerous" language was used and seemingly adopted.[8]

Thus the issue facing the court was whether California's concept of strict liability necessarily requires a showing that the defective, injury-causing product was also unreasonably dangerous.[9] They held that it does not. In arriving at this decision the court relied heavily on the language used in its landmark decision in *Greenman v. Yuba Power Products, Inc.*[10]

The plaintiff in *Greenman* was injured by a piece of wood thrown from a Shopsmith lathe on which he was working, and it appeared from the facts that certain safety devices usually present on such machines were not included on this machine. Greenman based his claim for recovery on theories of negligence and implied warranty but the court awarded damages on a theory of strict liability in tort. In explaining that theory Justice Traynor wrote: "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."[11] Speaking to the issue of the plaintiff's burden of proof under this theory Justice Traynor declared that:

> To establish the manufacturer's liability it was sufficient that the plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design

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[5] *Id.* at 127, 501 P.2d at 1158, 104 Cal. Rptr. at 438.

[6] *Id.* at 128, 501 P.2d at 1158, 104 Cal. Rptr. at 438.

[7] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[8] *See* Jiminez v. Sears, Roebuck & Co., 4 Cal.3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971); Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Canifax v. Hercules Powder Co., 237 Cal. App.2d 44, 46 Cal. Rptr. 552 (1965).

[9] An alternate formulation of the issue would be, "whether the jury must decide that the injuries were caused by a defective product or by a product in a defective condition unreasonably dangerous." 8 Cal.3d at 131, 501 P.2d at 461, 104 Cal. Rptr. at 441.

[10] 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) [hereinafter cited as Greenman]. Greenman is generally recognized as the first case expressly adopting strict liability in tort.

[11] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.[12]

The court in *Cronin* pointed out that the purpose of the *Greenman* rule was to relieve the plaintiff from the problems of proof inherent in asserting negligence in product liability cases.[13] The court clearly felt that by injecting an "unreasonably dangerous" element into this formulation it would be reintroducing some of those problems and unnecessarily compromising the policy set forth in *Greenman*. In particular the court objected to the fact that "unreasonably dangerous," like many negligence concepts, is usually defined in terms of the "ordinary" expectations of the parties.[14]

By ruling that the "unreasonably dangerous" element is not essential the *Cronin* court has formally readopted the standards of strict liability expressed in *Greenman* and rejected the Restatement formulation. In so doing the court has placed California in a minority position among jurisdictions that have formally adopted the theory of strict liability in tort.[15] It does not necessarily follow, however, that the court's ruling should be considered surprising, or that it will substantially change a product supplier's basic liabilities under the theory.

In evaluating the court's action in this case it should be noted that prior to the court's decision in *Greenman*, a person injured by a product had two theories under which he could recover. He could sue for negligence in tort, or sue for breach of warranty in contract. Both theories presented real problems for the prospective plaintiff.[16] As products and their means of distribution became more and more complex it became increasingly clear that the consumer needed greater protection than had traditionally been afforded under these concepts of liability,[17] and the

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12 *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

13 8 Cal.3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

14 In defining "unreasonably dangerous" comment i to § 402A of the RESTATEMENT reads: "The 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).

15 For a limited sampling of decisions holding that proof of an article's "unreasonably dangerous" condition is a prerequisite to recovery *see* Greeno v. Clark Equipment Co., 237 F. Supp. 427 (N.D. Ind. 1965); Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (1969); Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); Ulmer v. Ford Motor Co., 75 Wash. 537, 452 P.2d 729 (1969); *see also* Jenkins, *The Product Liability of Manufacturers; An Understanding and Exploration*, 4 AKRON L. REV. 135, 168-170 (1971) [hereinafter cited as Jenkins].

16 *See* Annot., 13 A.L.R.3d 1057, 1062-1063 (1967).

17 As early as 1944 Justice Traynor had expressed the view that traditional theories of contract and negligence liability were insufficient means of protecting the consumer and called for development of a new theory of product liability. Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 462, 150 P.2d 436, 440 (1944).

courts responded by stretching these concepts to fit the need. The unfortunate result, however, was the development of a series of fictions that adulterated these original bodies of law without fully serving their intended purpose.[18] It was against this background that the *Greenman* court finally recognized a separate theory of strict liability in tort.

Strict liability under either the *Greenman* or Restatement formulations facilitates the plaintiff's task in most product liability cases, and represents a recognition of the consumer's need for the maximum allowable protection.[19] While recognizing the same basic need and the same basic limits on their capacities to fill that need,[20] it would appear that the courts adopting the *Greenman* formulation and those adopting the Restatement view disagree, at least tacitly, on where the emphasis of their action should be placed. It would also appear that the import given to the phrase "condition unreasonably dangerous" is the medium through which this disagreement is expressed.

This phrase seems to have been the source of quiet confusion ever since its inception. Justice Traynor viewed the "unreasonably dangerous" language as comprising one of many helpful, though not completely satisfactory, definitions of defectiveness. It is clear, however, that he regarded defectiveness as the touchstone of liability and he noted several other definitions of defectiveness that would be equally useful in certain fact situations.[21]

Professor Wade on the other hand suggests that the "unreasonably dangerous" or, in his words, the "not reasonably safe" condition of the injury-causing product is its true liability-producing characteristic. In his view the word "defective" is superfluous.[22] The courts adopting the Restatement view seem to have given equal credence to both views. They require a plaintiff to prove not only that the product was defective but that it was unreasonably dangerous as well.[23]

This confusion can be explained, though not resolved, by exploring the rather subtle differences in the public policy considerations underlying

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[18] *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1118 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 363-64 (1965) [hereinafter cited as Traynor].

[19] Strict liability in tort has been said to be "strict" in the sense that the plaintiff no longer must bear the difficult burden of proving negligence. And, since the liability is "in tort" the defendant cannot insulate himself by employing the warranty defenses of contract. Annot., 13 A.L.R.3d 1057, 1071 (1967).

[20] The author has discovered no jurisdiction that has expressed an intention to hold a manufacturer or distributor as an insurer for all injuries caused by its products.

[21] Traynor, *supra* note 18.

[22] Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965) [hereinafter cited as Wade].

[23] Cases cited note 15 *supra*.

these conflicting interpretations. The policy arguments that seemingly underlie the Restatement formulation, as interpreted by most courts, were recognized, though not endorsed, by Professor Prosser in his famous *Assault Upon the Citadel* article. It was argued that strict liability would ". . . provide a healthy and highly desirable incentive for producers to make their products safe,"[24] and that, "public interest in human life, health, and safety demands the maximum possible protection that the law can give against dangerous defects in products. . . ."[25]

The main thrust of these statements is toward safety and the protection of the consumer through the elimination of unsafe products. When speaking in terms of encouraging safety one is placing primary emphasis on the supplier and the effect strict product liability will have on his actions. From this frame of reference the objective test[26] of liability expressed in the definition of "unreasonably dangerous" seems quite acceptable. It retains the flavor of, and provides continuity with, the elemental ideas of blame and responsibility underlying earlier negligence and warranty theories[27] while, at the same time, it extends the product supplier's liability to the maximum extent useful in fostering product safety.

Examining the pronouncements of the public policy considerations behind the *Greenman* formulation we find a different emphasis. In announcing the *Greenman* rule the court stated: [T]he purpose of such liability is to insure that the costs of injuries resulting from defective products are born [sic] by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[28] A similar statement of policy appears in *Vandermark v. Ford Motor Co.*[29] wherein the California Supreme Court stated: "Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[30] The court went on to state that in its view such a policy does no injustice since manufacturers and retailers can

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24 Prosser, *supra* note 18, at 1119.

25 *Id.* at 1122.

26 The test is termed *objective* in the sense that a jury determination of the product's safety characteristics is made in relation to their own view as representative or ordinary members of the community rather than in relation to plaintiff's actual knowledge or conceptions. For the effect of such a distinction *see* Fanning v. LeMay, 38 Ill.2d 209, 230 N.E.2d 182 (1967).

27 The phrase "unreasonably dangerous" had its beginnings in warranty law wherein liability under implied warranty was sometimes imposed according to whether or not the product was "fit and reasonably safe for use by the consumer." Wade, *supra* note 22, at n.54.

28 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

29 61 Cal.2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

30 *Id.* at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899.

protect against losses by procuring insurance and including the cost of such protection in the cost of the product.[31]

The language of these cases indicates that the primary thrust of this policy is to insure compensation to the *innocent* victim of a product-induced injury. Given this original emphasis it is not unreasonable to expect that the court would disfavor an objective test of liability that is insensitive to the actual expectations of a particular victim.

The Alaska Supreme Court, in a recent decision,[32] expressly recognized the disparity in the *Greenman* and Restatement formulations. In formally adopting the *Greenman* view it voiced as its own the public policy language of the *Greenman* court and expressed its preference toward the adoption of the simplest (from the plaintiff's standpoint) possible burden of proof standards.[33]

The reason most often postulated for the Restatement's inclusion of the "unreasonably dangerous" requirement is that it was meant to prevent the suppliers of products with an innate potential for harm due to abuse, carelessness, or some strange fortuity (*e.g.*, liquors, drugs, simple tools) from becoming absolutely liable for all harm they might cause.[34] The case of *Cornelius v. Bay Motors*[35] presents a good example of how section 402A's "unreasonably dangerous" requirement is applied to prevent this result. In that case the plaintiff had purchased a seven-year-old used car from a retail dealer and had driven it only a few hours when the brakes failed causing a collision. The injured buyer brought suit on a theory of strict liability claiming the brakes were defective and were the direct cause of his injury. While it was determined that the brakes were indeed *defective* they were not found to have rendered the car *unreasonably dangerous* and recovery was denied. On appeal the court held that whether a product is "unreasonably dangerous" is a question of fact to be decided by the members of the jury based upon their common knowledge and expectations of product safety. The jury in this case apparently felt that mechanical defects on a seven-year-old automobile should have been anticipated and checked for by the buyer.

Significantly, the court in *Cronin* agrees that product suppliers should not become absolutely liable. The court asserts, however, that

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31 *Id.* at 263, 391 P.2d at 172, 37 Cal. Rptr. at 900.

32 Clary v. Fifth Avenue Chrysler Center Inc., 454 P.2d 244 (Alaska 1969).

33 *Id.* at 248.

34 RESTATEMENT (SECOND) OF TORTS, § 402A, Comment i (1965); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966). *See, e.g.*, Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971).

35 258 Ore. 564, 484 P.2d 299 (1971).

requiring proof of defect and also requiring proof that the defect was the proximate cause of the injury is sufficient to prevent that result.[36]

It would seem that the court is correct in that assertion,[37] but it is unclear how the *Cronin* court would handle a fact situation like that in *Cornelius v. Bay Motors supra.* Presumably a finding could be made that the buyer's failure to inspect the brakes rather than the actual brake failure was the proximate cause of the injury. In the alternative the court might find that the automobile was simply worn out and not *defective.* This however, points up a major weakness shared by both the *Cronin* and *Greenman* decisions. That weakness is the failure to give concrete guidance as to when an article should be adjudged defective. Are products to be judged in relation to the average quality of like products as was the Shopsmith in *Greenman;* or by reference to how well it performs its intended function as implied in *Cronin;*[38] or in relation to the safety expectations of the particular consumer?[39] Clearly no one standard will suffice in all situations; applicability will vary according to the type of injury sustained and the type of product causing the injury.[40]

Until the term "defective" takes on a more definite and predictable meaning the long range effects of *Cronin* on a product supplier's liability will remain unclear. Some observations as to the present status of California strict liability law can be made, however. Clearly a California plaintiff no longer has to allege and prove a product's "unreasonably dangerous" condition in order to recover. Even so, the product supplier is not an insurer of his products, nor is it indicated that he will become one. His basic liability has not been increased, but his exposure to possibly successful claims has been widened to the extent that he relied on the stiffer burdens of proof and the objective characteristics of the "unreason-

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36 8 Cal.3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

37 The courts who still hold that strict liability can be imposed only on warranty principles "sounding in tort" have not been considered leaders in the move toward increasing the product supplier's liability, but the standard statement of implied warranty (a product must be reasonably fit for the purposes for which it was intended) indicates that liability would attach without a showing of a "condition unreasonably dangerous." Jenkins, *supra* note 15, at 161. *See* Lonzrick v. Republic Steel Corp., 6 Ohio St.2d 227, 218 N.E.2d 185 (1966); UNIFORM COMMERCIAL CODE § 2-314(2)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*).

38 The New Jersey Supreme Court has given official sanction to this definition of "defective" but does not consider it to be exclusive of others. Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 67, 207 A.2d 305, 313 (1965).

39 Though there have been no cases decided using this definition it would appear to be acceptable under the *Cronin* standards.

40 For a full discussion *see* Freedman, *"Defect" in the Product; The Necessary Basis for Products Liability in Tort and in Warranty,* 33 TENN. L.R. 323 (1966); Traynor, *supra* note 18.

ably dangerous requirement" to thin the ranks of prospective claimants.[41] Finally, when and if other jurisdictions consider adoption of the *Cronin* stance it should be done with the demands of public policy well in mind. Defectiveness as a touchstone of liability can become a meaningless fiction if it is interpreted simply as an injury-causing characteristic of a product.[42] The "unreasonably dangerous" requirement is a useful safeguard against that possibility, and should not be lightly discarded.

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[41] This type of exposure has been further widened by the court's decision in Lugue v. McLean, 8 Cal.3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), wherein the court held that a plaintiff no longer has to allege that he was "unaware" of a defect, although a showing by the defendant of plaintiff's knowledge will bar recovery.

[42] Traynor, *supra* note 18, at 372.