The History of Strict Liability Tort in Indiana

An Honors Thesis (ID 499)

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FOREWORD

This article was written to explore the emergence of strict liability tort in Indiana. The concept of strict liability is to hold the manufacturer or producer of defective or dangerous products strictly liable for injuries to persons or property caused by the defective condition of such products. I have adopted the style and format of a law review article to enable me to succinctly summarize and deal with the major developments in strict liability in tort.

In Indiana, as in most jurisdictions, the doctrine of strict liability in tort did not come into use until the mid to late sixties. Previous to this, the plaintiff's in product liability cases had to bring their actions under negligence or breach of warranty. There were many problems inherent in these actions that made it very difficult to recover in products liability cases. Since strict liability in tort has become available to the public, it is much easier for consumers to receive compensation for damages or injuries caused by defective products.

I. HISTORY OF STRICT LIABILITY

Originally in the history of products liability cases, the injured party could only bring actions based upon either negligence or breach of warranty. In negligence actions, the plaintiff had to establish that the manufacturer or producer of the product did not exercise due care for the safety of consumers of that product; however, in negligence actions for injuries or damages caused by defective products it might be difficult for the plaintiff to prove that the defendant was responsible for the defect, or that proper inspection by the defendant would have exposed the defect, or that there was a specific negligent act or omission which caused the defect.[1].

In products liability actions based upon breach of warranty, the plaintiff had the unique problem of proving that he was in "privity" of contract with the defendant. In other words, that he was a direct party in the sale of the product that caused injury. If the plaintiff could not establish privity, then he would not be allowed to recover even if the defective product was in fact the cause of his injuries. It is rather incongruous in terms of equitable disposition that a manufacturer or producer of a defective product would not be liable for injuries or damage caused by that product unless there was "privity" of contract. Also in breach of warranty actions, the defendant could assert that the defendant did not comply with certain notice requirements concerning the defective condition of the product, or that the defendant had disclaimed liability for certain kinds of injuries or damages.[2].

Eventually the courts began to recognize the inequities involved in product liability law, and subsequently they began to break down some of the barriers to recovery involved in negligence and breach of warrant actions.

> "Instead of requiring that a particular defendant be negligent in certain respects, some courts have imposed strict liability on the theory of misrepresentation or nuisance, or on the theory of res ipsa loquitor, or on the theory that a statutory violation, especially in connection with unwholesome food products, constituted negligence per se."[3]

As for breach of warranty actions, instead of barring recovery based upon lack of privity, some courts permitted recovery on the grounds that a warranty runs with a chattel, or that advertisement by the manufacturer is the equivalent of express warranties to the consumer, or that a consumer is a third-party beneficiary of contracts negotiated by the manufacturer with the dealer. Also in some instances, the courts have held that disclaimers are inapplicable to products liability actions involving breach of warranty.

Actually all of the aforementioned methods of breaking down the barriers to recovery in products liability cases really only served to impose strict liability without calling it such.

In 1955, Professor Prosser suggested in a Yale Law Journal article that it might be advisable to impose strict liability outright in tort, as a pure matter of public policy.[4]

The earliest judicial championing of strict liability occurred in the case of Escola v. Coco-Cola Bottling Co.[5] In a concurring opinion, Chief Justice

Traynor made reference to the doctrine of absolute liability (strict liability).

Traynor said:

> "In my opinion it should not be recognized that a manufacturer incurs an absolute liability when an article that he had placed on the market knowing that it is to be used without inspection proves to have a defect that causes injury to human beings, . . . Even if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[6]

Traynor also dealt briefly with the problem associated with actions brought under negligence or breach of warranty. On the theory of negligence, Traynor stated, "The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection."[7]

In regards to breach of warranty, Traynor maintained that a retailer has an implied warranty with his customers to only market and sell products that are safe for consumption or use. In the event that the product is not safe, the retailer is under absolute liability to his customer.[8]

Traynor's opinion concerning absolute liability in products liability cases as expressed in the Escola case was a revolutionary breakthrough in the area of strict liability in tort. Besides being the first judicial opinion on the subject, his concurring opinion influenced the decision that was later rendered in the first case to impose strict liability in tort.

In Greenman v. Yuba Power Products[9], the California Supreme Court upheld the doctrine of strict liability. 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.[10]

In Greenman, the plaintiff sued the retailer and manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill or wood lathe. The plaintiff was injured while using the tool, when a piece of wood flew out of the machine and struck him in the forehead.

He brought the action against the defendants under negligence and breach of warranty. The trial court held that there was no evidence that the retailer was negligent or that he had breached any express warranties. The only evidence presented to the jury concerned breach of an implied warranty. The jury returned a verdict for the retailer against the plaintiff in regards to the plaintiff's negligence claims, and the plaintiff was awarded $65,000.00 under his claim of breach of an implied warranty. The plaintiff brought his action to the Calilfornia high court seeking reversal of the part of the verdict that was in the retailers favor.

In Greenman, the court said: "To establish the manufacturers liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way that it was intended to be used."[11]

It was no longer necessary that the plaintiff prove that the defendant was negligent or that he was guilty of breach of warranty.

The doctrine of strict liability was given approval in The (Second) Restatement of Torts, section 402A. Section 402A provides:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liabililty 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 without substantial change in the condition it is sold. (2) The rule used in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of the product."[12]

The authors of section 402A of The (Second) Restatement of Torts feels that the imposition of strict liability in tort is justified, because a seller by presenting his product to the public has assumed a special responsibility toward any member or the public that might be injured by it.

The public has a right to expect that manufacturers will ensure that their marketed products are safe for public consumption or use, and also a manufacturer who does allow unsafe products to fall into the hands of the consumer must be responsible for the injury or danger caused by that product.

The adoption of strict liability in tort in modern times was necessitated by the industrial revolution and the emergence of mass production as the primary means of production.

As the sole proprietorship and handcrafted items were replaced by huge companies mass producing articles in unimagined quantities the relationship between producer and consumer underwent great change. No longer was the consumer able to name a single proprietor or craftsman as the one responsible for a

defective product that he purchased. In fact, for the majority of products purchased, the consumer is totally unaware of the manufacturing process, and he does not have the necessary skill to determine whether or not the product is defective.

The consumer has grown to depend more and more on advertising and the claims of manufacturers in determining the worth and safety of products that they purchase. Consumers are no longer suspicious of marketed products, but accept on blind faith the manufacturers intent to market only sound and safe products.

> "The manufactuer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. The manufacturer's liability should of course, be defined in terms of safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market."[13]

Now it seems that manufacturers are required to carry a heavier burden in regard to the safety of consumers than was expected in the past. In light of the extensive advertising conducted by manufacturers and the far reaching scope of the electronic media this is not an unusual development. Consumers are bombarded daily on television and radio, which between the two of them reach into millions of homes, to buy this or that product. The increased advertising reaches more consumers and they buy more products.

Since the manufacturers are to be the ones who reap the benefits from increased consumer buying it seems only fair that they be even more meticulous in ensuring the safety of that huge purchasing public.

II. STRICT LIABILITY IN INDIANA

In the case of Greeno v. Clark,[14] the Indiana Distict Court ruled for the first time that the doctrine of strict liability as stated in The (Second) Restatement of Torts was applicable in Indiana.

In Greeno, an injured employee brought an action against a forklift truck manufacturer for injuries sustained while using the manufacturers truck. The truck had been leased by the employer from an equipment handling company.

The court held that the elements constituting strict liabililty in tort were established where:

> "The forklift truck in question is alleged to have been sold by defendant in a defective condition, and that while using it in the normal course of his employment plaintiff received serious permanent injuries as a proximate result of an industrial accident caused by one or another of the alleged defect."[15]

Generally in Indiana privity of contract was required before recovery was allowed in products liability cases, and at the time Greeno was decided there were no Indiana cases dealing with strict liability in tort. The court cited cases which in their opinion represented a trend toward permitting a product user to recover from a remote manufacturer for injuries inflicted by the products defective condition.[16]

In the case of Travis v. Rochester Bridge Co.,[17] privity was not required where the product was "eminently dangerous." The concept of an eminently dangerous product was also espoused in Holland Furnace Co. v. Nauracaj.[18]

In later products liability cases, the doctrine of privity of contract was given even less validity. In the case of MacPherson v. Buick Motor Co.,[19] it was held that a manufacturer has a common law duty not based upon any privity of contract to protect third parties using the manufactured article against hidden or concealed defects and dangers therein. In a later case, J. I. Case Co. v. Sandefur,[20] the court disregarded the doctrine of privity of contract and allowed the plaintiff to recover where privity had not been established.

In reference to privity, the court said:

> "As stated by the leading authorities, public policy has compelled this gradual change in the common law because of the industrial age where there is no longer the usual privity of contract between the user and the maker of a manufactured machine."[21]

Also in Coca-Cola Bottling Works of Evansville v. Williams,[22] the plaintiff was allowed to recover based on an inference negligence or more commonly referred to as "res ipsa loquitor." The principal of "res ipsa loquitor" is:

> "a rebuttable presumption or inference that the defendant was negligent which arises upon proof that instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in the absence of negligence."[23]

Actually, res ipsa loquitor is another way of imposing strict liability.

It is apparent from an analysis of the foregoing cases that Indiana in

effect had been imposing strict liability in tort without calling it such. In Greeno, the court took an altogether different approach. In reference to strict liability, Judge Eisbach said:

> "The question is now squarely before this court and must be decided. It is perhaps fortuitous that the Indiana Supreme Court has not yet passed on this issue, but doubtlessly that forward looking court would embrace the Restatement (Second), Torts §402A, and the many recent cases and authors who have done likewise, as eminently just and as the law of Indiana today."[24]

From the language of the court, it is not difficult to conclude that they had grown tired of imposing strict liability on manufacturers and retailers under the guise of eminently dangerous products or res ipsa loquitor. In their opinion, it was time to drop all pretenses and embrace the doctrine of strict liability in tort wholeheartedly.

III. ELEMENTS OF STRICT LIABILITY.

Generally to establish strict liability to products liability cases, the plaintiff must: (1) establish the defendant's relationship to the product in question; (2) the defective and unreasonably dangerous condition of the product; and, (3) the existence of a proximate causal connection between such condition and the plaintiff's injuries or damage.[25]

It is not enough that some product caused injury, but the plaintiff must prove that the defendant was connected with the product. He must establish that the defendant manufactured, produced or sold the defective product. The defendant's product must be the proximate cause of the plaintiff's injuries. There must not be any other intervening causal factor that precipitated the accident.

In Indiana, for a manufacturer to be held strictly liable in tort for injuries or damages caused by a defective product that he produced, the three elements must be present.

In the case of Craven v. Niagara Mach. & Tool Works, Inc.,[26] the court held that to establish the elements of strict liability in a products liability claim it must be shown that the plaintiff was injured by the product because it was defective and unreasonably dangerous, that the defect existed at the time product left the hands of the defendent, and that the product was expected to and did reach the consumer without substantial change in its condition.

Also in Cornette v. Searjeant Metal Products, Inc.,[27] the court held that one who sells a defective product is responsible for injuries or damages caused by that product even if the seller has exercised all possible care in the preparation of that product.

Central to the elements involved in strict liability is the defective and unreasonably dangerous condition of the product. To impose strict liability, the plaintiff must establish that he was injured by the product, because it was defective and unreasonably dangerous.

A reputable test for determining a dangerously defective article was espoused by the Oregon court in Phillips v. Kimwood.[28]

> "A dangerously defective article would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability

> imposes what amounts to constructive knowledge of the condition of the product."[29]

Also according to section 402A, The (Second) Restatement of Torts, before strict liability is imposed on a manufacturer the product must be one which is expected to and does reach the consumer without any substantial change in the condition in which it was sold.[30]

The Indiana courts follow both the Kimwood doctrine and The (Second) Restatement of Torts in determining what a dangerously defective product is, and in Greeno v. Clark, supra, the court elaborated upon their definition of a defective and dangerous product.

> "The court stated that liability is conditioned upon the existence of a defective condition at the time the product leaves the seller's control, which condition is not contemplated by the consumer or user and is unreasonably dangerous in the sense that it is more dangerous than would be contemplated by the ordinary consumer or user . . ."[31]

The definition of unreasonably dangerous as expressed in Greeno was upheld, in a 1980 case, Bemis v. Rubush.[32] In Bemis, Gerald Rubush suffered severe head injuries when he was hit in the head by a moving part of the batt packing machine he was working on. In the opinion of the lower court, the machine was dangerously defective, and Rubush was allowed to recover; however, the Indiana Supreme Court later reversed the decision.

Also in the case of Lukowski v. Vecta Educational Corp.,[33] it was held that the imposition of strict liability in tort requires delivery of the product and that the product then be in an unreasonably dangerous condition.

As stated in The (Second) Restatement of Torts, a defect may be constituted by manufacturing flaws, design defects or failing to discharge the duty to warn or instruct of potential danger of the product.[34]

In the case of Zahora v. Harnischfeger Corp.,[35] the court held that a manufacturer is under no duty to produce accident or fool proof products; however, a manufacturer has a duty to design and build products which are reasonably fit and safe for the purpose for which they are intended, and manufacturer has a duty to design its products in a manner to avoid hidden defects and latent or concealed danger.

Also, according to Gilbert v. Stone City Construction Co., Inc.,[36] those who come in contact with a product may reasonably expect its supplier to provide feasible safety devices in order to protect them from dangers created by the design.

And surprisingly, in the case of Burton v. L. O. Smith Foundry Products Co.,[37] the court held that the fact that less flammable substitutes were available for compound supplied to decedents employer did not render the compound defectively designed.

The failure to warn or instruct the consumer of the potential danger of a product is also considered to be a defect in the product according to The (Second) Restatement of Torts.

In Burton v. L. O. Smith Foundry Products Co., supra, the court held that a product may be faultless by design, but if the manufacturer does not warn consumers of potential dangers of the product then it is legally defective.

According to Indiana Nat. Bank of Indianapolis v. De Laval Seperator Co.,[38] under Indiana law a manufacturer is considered negligent if he fails to warn users of his product of its dangers where he has actual or constructive knowledge of the danger.

A manufacturer who has actual or constructive knowlege of a danger associated with a product has a duty to warn consumers of that danger; however, where the danger is an obvious one the manufacturer has no such duty. This doctrine is referred to as the obvious danger rule, and it has been upheld in Indiana.

In Bemis v. Rubush, supra, in reference to the obvious danger rule, the court said: "although the manufacturer who has actual or constructive knowledge of an observable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and observable to all."[39]

Also in Craven v. Niagara Mach. and Tool Works, supra, the "obvious danger rule" was restated. The court held that where danger or potential danger of

product is known or should be known to user, the duty to warn of that danger is not a must.

Finally, in Conder v. Hull Lift Truck Inc.,[40] the court ruled that failing to warn of hazards associated with the foreseeable misuse of the product rendered the product unreasonably dangerous.

In The (Second) Restatement of Torts, it is recognized that there are some unreasonably dangerous products for which liability should not be attached. According to Comment K of the Restatement, these "unavoidably unsafe" products, "are products which in the present state of human knowledge, are quite incapable of being made safe for their intended or ordinary use."[41]

This is true of many drugs and vaccines which have serious side affects or other unforeseen complications.

> "It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk."[42]

In the case of these "unavoidably unsafe" products scientific expertise is not capable of guaranteeing their safety; but, however, these products can be used without incurring liability for the manufacturer of the product if proper warning is given.

> "The seller of such products again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to

> supply the public with an apparently useful and desireable product attended with a known but apparently reasonable risk."[43]

The concept of an "unavoidably unsafe" product was recognized by the Indiana courts in the case of Bemis v. Rubush, supra, the court held that unavoidably dangerous, but useful and desirable, products exist and are marketed but liability does not attach under section 402A of The (Second) Restatement of Torts if adequate warning and instructions are given.[44]

In addition to determining the condition of the product that caused injury, before strict liability is imposed, the plaintiff must establish that such condition proximately caused his injuries. The requirement that the plaintiff establish causation has been recognized in section 402A of The (Second Restatement of Torts and the majority of strict liability cases.

In the case of Evans v. General Motors,[45] where plaintiff asserted that decedent was fatally injured because the automobile in which he was riding at the time of the accident was equipped with an "X" frame lacking side frame protection the court held that proximate cause had not be established.

> ". . ., the court stated that the plaintiff did not assert that the "X" frame had caused the decedents automobile to be driven into the path of the striking car or had prevented it from being driven out of that path, nor did the plaintiff contend that the decedent could not have been killed or injured in the same collision had the automobile been designed with a perimeter frame rather than an "X" frame.[46]

For the defective condition of the product to be the proximate cause there must not be any other intervening or supervening causal factors. . . ." An intervening cause with respect to the doctine of proximate cause means not a

concurrent and contributing cause, but a superseding cause which is itself the natural and logical cause of the harm" Tabor v. Continental Baking Co.[47]

If an intervening cause is involved, then that intervening cause must logically be considered to be the proximate cause of the accident. The principal has been upheld numerous times in Indiana.

In the case of Indianapolis v. Willis,[48] the court said, "and where the cause of an injury or death is a negligent act of an independent responsible intervening agency such act must be regarded as the proximate cause thereof and the original negligence considered as only the remote cause."[49]

Also in Claypool v. Wigmore,[50] the doctrine of intervening cause was relied upon again, and in Engle v. Director General of Railroads,[51] where an intervening agency was one over which the original tort-feasor had no control, and was not put into motion by the original wrongful act, and was such as under ordinary circumstances could not be reasonably expected to occur, it will be treated as the sole proximate cause of the accident.

IV. DEFENSES.

According to the doctrine of strict liability in Tort, there are some defenses that are available to the plaintiff. These defenses are usually based upon the actions of the plaintiff, and the defendant has the right to assert that he is not responsible for the plantiff's injuries where the plaintiff's own actions were the cause of such injuries.

The four defenses available to a defendant in tort are:

> "(1) that the plaintiff negligently failed to discover the defective condition of the defendant's product or to guard against the possibility of its existence; (2) that the plaintiff assumed the risk of the injuries or damages which he sustained by voluntarily and unreasonably proceeding to encounter a known danger; (3) that the plantiff's misuse of the product, rather than any defect in the product, caused the plaintiff's injuries or damages; (4) that the plantiff's misuse of the defendant's product concurred with the defectiveness of the product to cause the plaintiff's injuries or damages."[52]

In strict liability cases, the defense of contributory negligence is not available. According to section 402A of The (Second) Restatement of Torts: "Contributory negligence of the plaintiff is not a defense when such negligence consist merely in a failure to discover the defect in the product or to guard against the possibility of its existence."[53]

Although contributory negligence is not a defense in strict liability, the doctrine of incurred risk or assumption of risk is a valid defense. If the user or consumer of a product discovers a defect and is aware of the danger, and continues to use the product then he is barred from recovery. By continuing to use a dangerous product, he has assumed the risk of any danger involved.

In Greeno v. Clark, supra, the Indiana courts recognized the defenses of assumption of risk and misuse as stated in The Restatement of Torts.

According to the Restatement:

> "neither would contributory negligence constitute a defense, although use difference from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is, "misuse," would either refute a defective condition or causation . . . Incurring a known and appreciated risk is likewise a defense.[54]

In Latimer v. General Motors Corp.,[55] the court stated again that misuse of a product is a defense in strict liability cases, and also in Bemis v. Rubush, supra, the court ruled that misuse of a product and incurred risk are defenses under section 402A.

According to Fruehauf Trailer Division v. Thorton,[56] for the purpose of determining whether defense of misuse is available to a defendant in a products liability case, misuse is part of the assumption of risk when the user has knowledge of the defect.

Incurred risk in the context of a products liability case is concerned with the voluntariness of the plaintiff's actions, and it also takes into consideration a user's age, experience, knowledge and understanding, as well as the obviousness of the danger or defect.[57]

For example, an electrician who works with many electrical products may be more aware of the danger involved in the use of such products than a layman, and in a products liability case one of the fctors that the court would take into consideration would be the experience of the electrician or the layman's lack of it.

Another defense available to the defendant is that the cause of the harm is a nonforeseeable misuse of the product by the plaintiff. In Conder v. Hull Lift TrucK Co.,[58] the court held that the defense of misuse was only available when the product is used in a manner not reasonably foreseeable.

Any changes or alterations that occur in a product after delivery is a defense. In Conder, the court held that a substantial change in a product which causes injury to plaintiff constitutes a defense for the manufacturer.

Also, as discused earlier, the "obvious danger" rule does not require a manufacturer to warn the consumers of obvious dangers inherent in a product.

Finally, in products liability cases involving strict liability in tort, the manufacturer, producer, or seller of a product is held strictly liable for damages or injury caused by the product. It is not necessary that the defendant actually sell the product, but liability attaches to one who places the defective article in the "stream of commerce." Gilbert v. Stone City Construction Co., supra.

The user or consumer of a defective product is able to recover for damages or injuries caused by that product, and even bystanders whom the supplier of a product should reasonably foresee as being subject to harm caused by the defect may recover for damages or injuries caused by the product. Gilbert v. Stone City Construction Co., supra.

V. CONCLUSION.

In conclusion, in Indiana Strict Liability in Tort has grown from a little known theoretical proposition to an established legal principal. As the result of the imposition of strict liability in tort, manufacturers have been forced to be more responsible for the health and safety of consumers, and consumers are afforded equitable relief when they are injured by a defective product.

Footnote Page

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3. 13 A.L.R. 3d. p. 1063.
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