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Safeguards against Unjust Awards

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Advertised-Product Liability:
Safeguards Against Unjust Awards

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LEGAL COUNSEL to manufacturers of nationally distributed consumer products naturally view with alarm the increasing number of product liability cases in which liability without fault has been imposed.[1]

A great deal has been written regarding the various legal and economic theories underlying this phenomenon. The major reasons advanced in support thereof appear to be that (1) modern economic-social philosophy dictates that where injury is inflicted without fault, liability should be borne by those most capable of bearing it; *i.e.*, manufacturers, and (2) in view of the complicated nature of modern manufacturing procedures, it is unreasonable to require plaintiffs to prove actual negligence on the part of a manufacturer.[2]

Undoubtedly, cases could be found in which the application of either of these theories could be thought to produce equitable results. Nevertheless, neither rationale will support the judicial imposition of liability without fault as a general solution to the problem. Certainly the social and economic ramifications involved in the adoption of such a policy are questions for the legislatures rather than the courts. Perhaps in no other field of modern jurisprudence have courts expressed such a willingness to exercise their power of "judicial legislation."

It is conceded that the second proposition advanced—the plaintiff's inability to prove negligence—is more properly within the realm of judicial determination. However this theory pre-

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1 As referred to herein, "liability without fault" embraces all forms of action which recognize the existence of liability without requiring proof of negligence on the part of the defendant, whether accomplished through the utilization of warranty theories or through the extension of conventional concepts of tort.

2 For an excellent discussion of the legal and economic aspects of liability without fault, see Wilson, Products Liability, 43 Calif. L. Rev. 614, 809 (1955).

supposes not only that a plaintiff's most difficult task is that of proving negligence, but also that it is more difficult for plaintiffs to prove the over-all elements of their case than it is for defendants to prove the elements of theirs.

While this position might have been valid at one time, it is difficult to maintain today in view of the broad discovery procedures existing in most jurisdictions, to which both parties have equal access. In fact, there is good reason to believe that plaintiffs enjoy a distinct advantage in the usual product liability case. A plaintiff in such a case usually utilizes discovery as a means of determining such things as the exact composition of the defendant's product, and the production, control, and inspection procedures involved in its manufacture. While this information is usually within the control of the defendant, it consists of facts which are generally capable of rather precise determination. Employees and executives familiar with company policies and procedures can be questioned, and in a great many instances the facts in question are matters of company record. On the other hand, the manufacturer's use of discovery is often directed toward determining the existence or non-existence of a causal relationship between its product and the injury complained of. Relevant factors in this determination are the conditions under which the product was used, as well as the plaintiff's physical condition at and prior to the time of use. This information is often within the knowledge of one person only—the plaintiff, and is rarely a matter of record. Furthermore, the determination of factors such as physical condition and chemical causation almost always involve questions of complex medical opinion rather than concrete fact. Thus, the information sought by the defendant is usually less susceptible of accurate determination through the use of discovery procedures.

It is beyond the scope of this commentary to examine the legal or economic justification for the judicial imposition of liability without fault.[3] It should be apparent, however, that the utilization of such a theory emphasizes the importance of insisting that plaintiffs bear the burden of proof traditionally required of them. If this is not done, responsible manufacturers face the possibility of being subjected to unwarranted jury verdicts which can irreparably mar the reputation they have established for themselves and their products. If liability without fault is

[3] See Strict Liability of Manufacturers: A Symposium, 24 Tenn L. Rev. (1957).

to be coupled with a judicial disposition toward requiring only minimal proof as to product defects or causal connection, then defendants need only attempt to predict the amount of the verdict, and settle for slightly less than this amount on the courthouse steps.

The problem is perhaps most readily apparent in situations in which courts employ express warranty as a means of extending liability. Abrogating the requirement of privity of contract, by holding that a manufacturer's representations may extend to the general public, expands the scope of express warranty to include a large and indeterminate group of people with whom he has no contact. It is apparent that a manufacturer of nationally distributed products has absolutely no control over the applicability of his general representations to specific individuals. Furthermore, the difficulty of defending against a claim that a particular plaintiff has relied upon such representations is obviously increased. In such a situation it seems clear that the plaintiff's burden of proof should be at least as stringent as that required in cases where privity exists. In other words, if courts permit remote purchasers to rely on express warranty, it would seem not only fair but necessary to hold such purchasers to a strict burden of proof regarding the representations made, their reliance thereon, the existence of a defect constituting a breach of the representations, and a direct causal relationship between the defect alleged and the injury complained of.

The Ohio Supreme Court, in the recent case of *Rogers v. Toni Home Permanent Co.*,[4] apparently recognized the importance of this proposition in an action based upon a theory of express warranty.

The plaintiff in the *Rogers* case alleged that she had purchased the defendant's product in reliance upon representations made in its advertising. She further alleged that she had used the product in accordance with the directions and that she had suffered injuries as a direct result of deleterious ingredients in the product. The trial court sustained the defendant's demurrer but the Court of Appeals reversed,[5] and the case was certified to the Ohio Supreme Court.[6] Directly facing the problem presented, the court abrogated the requirement of privity of contract in actions based upon express warranty.

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[4] 167 Ohio St. 244, 147 N. E. 2d 612 (1958).

[5] 105 Ohio App. 53, 139 N. E. 2d 871 (1957).

[6] 139 N. E. 2d at 887.

The *Rogers* decision has generally been interpreted as one extending the scope of manufacturers' liability, in that it permitted a plaintiff, who was not in privity of contract with the defendant, to utilize the warranty formula and thus avoid the necessity of proving negligence. However, with respect to the question relevant here—the existence of judicial safeguards against unwarranted jury awards—the *Rogers* case could well be viewed as a bulwark against spurious claims.

The court clearly held that in order to sustain her action, the plaintiff would have to allege and prove that (1) the defendant made express representations as to the quality and merit of its product, (2) the product was purchased in reliance upon such representations, (3) there was a defect in the product constituting a breach of these representations, and (4) she suffered injury by reason of such defect.[7]

The primary issue presented in the *Rogers* case was, of course, the legal adequacy of the plaintiff's complaint rather than a determination of the sufficiency of evidence presented at trial. Nevertheless, the decision clearly stands for the proposition that recovery would be denied unless the plaintiff proved each of the essential elements of warranty, namely: representation, reliance, breach, causation, and injury.

Since the *Rogers* case was never tried on its merits, there is no way of knowing how these principles would have been applied by a trial court. However, this recent statement of the Ohio Supreme Court on the subject of a manufacturer's liability contains, in principle, the safeguards necessary to protect manufacturers from spurious claims.

It is interesting to compare the rationale of the *Rogers* opinion with the standard of proof established by the Court of Appeals of Cuyahoga County in a case presenting strikingly similar issues.

In *Markovich v. McKesson & Robbins, Inc.*,[8] the plaintiff sought recovery for injuries allegedly suffered when a home permanent waving solution was applied to her hair by a third person. The complaint was based upon separate counts of negligence, express warranty, and implied warranty. The plaintiff alleged in her complaint that the directions for use had been carefully followed, but that because the product was unwhole-

[7] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N. E. 2d 612 (1958).

[8] 149 N. E. 2d 181 (Ohio Ct. App. 1958).

some, injurious, deleterious and unfit for human use, she had suffered injuries as a direct result of the carelessness and negligence of the defendant, and by reason of its breach of warranty which had induced the initial purchase.

With respect to the issue of reliance, the evidence revealed that the plaintiff had requested a third person to purchase the product by its trade name. However, there was no evidence that the purchase was made in reliance upon any express warranty of safety or fitness, or that the product was in fact "unwholesome, injurious, deleterious or unfit for human use."

Although there was evidence introduced which indicated that the person who had applied the solution had followed the directions, and that the plaintiff had sustained some injury, the only evidence as to causal connection between the application of the defendant's product and the plaintiff's injury was the testimony of a doctor who had examined the plaintiff some five months after the application in question.[9]

It was established that the witness was not a chemist and had not obtained a chemical analysis of the product.[10] Furthermore, he admitted that his only knowledge regarding the composition of permanent waving solutions had been obtained from secondary sources.[11] Although he initially identified the offending ingredient,[12] he later admitted his inability so to do.[13] In spite of the foregoing the doctor was permitted to testify, in answer to a hypothetical question, that some chemical in the defendant's product in fact caused the injury.

The trial court sustained defendant's motion for a directed verdict at the conclusion of the plaintiff's case. The Court of Appeals reversed, and remanded the case on the grounds that the plaintiff's evidence was sufficient to take the case to the jury.

On the basis of evidence presented, it would appear the Court of Appeals looked little further than the existence of injury in determining the burden which the plaintiff would have to bear. At best, a jury could only speculate as to the existence of a defect in the defendant's product or a causal connection between the use of the product and the plaintiff's injury—an approach which

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9 Transcript of Record, p. 181, Napier (Markovich) v. McKesson & Robbins, Inc., Civil No. 664,930, Ct. Common Pleas (Cuyahoga Co., Ohio, 1958).

10 Id. at p. 171.

11 Id. at p. 172.

12 The ingredient so identified was not in fact present in the product.

13 Transcript of Record, p. 250.

was specifically repudiated in the case of *Leach v. Joyce Products Co.*[14]

In conclusion, it is submitted that if courts are willing to assume the responsibility of imposing liability without fault, they must recognize the importance of holding plaintiffs to the burdens of proof which they have traditionally been required to bear. There is no valid social, economic, or legal theory which justifies a relaxation of these standards of proof under either theory of tort or express warranty. Particularly in the latter instance, where remote purchasers having no contact with the defendant are permitted to maintain actions without a showing of negligence, such relaxation can only encourage a multiplicity of spurious claims.

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[14] 116 N. E. 2d 834, 836 (Ohio Ct. App. 1952).