

TORTS—SALES—LIABILITY OF REMOTE CASUAL SELLER

*Thrash v. U-Drive-It Co., 158 Ohio St. 465,
110 N.E. 2d 419 (1953).*

A truck rental agency replaced a standard tire rim on one of its trucks with a misfit. The agency sold the truck to a used car dealer who resold it, without inspection, to the plaintiff's father. Plaintiff was thereafter injured as a direct result of the defect, and brought suit against the original owner and the used car dealer. The trial court entered judgment for both defendants. The intermediate appellate court affirmed the judgment in favor of the original seller, but reversed the judgment for the used car dealer. The Supreme Court of Ohio, affirming the intermediate court's decision, held that the seller of a used car to a dealer is not liable for damage caused by a defect, if the car was resold by the dealer prior to the damage, because the intervening agency of the dealer breaks the "chain of causation."¹

There has been a marked trend in the law to extend the liability of a seller of defective chattels to persons other than his immediate purchaser who are damaged by the defect. Before this development began, a seller of defective chattels was liable only to parties in privity of contract with him.² The trend started by holding a seller liable to remote buyers if the chattel was "inherently dangerous."³ Then in the famous case of *MacPherson v. Buick Motor Co.*,⁴ a manufacturer was held liable

1. *Thrash v. U-Drive-It Co.*, 158 Ohio St. 465, 471, 110 N.E.2d 419, 422 (1953). This comment deals only with the liability of the original seller, and not with the liability of the used car dealer.

The liability of the used car dealer is comparatively well settled by recent cases. Though the automobile is not a dangerous instrumentality *per se* it is imminently dangerous when defective and the majority of cases hold the used car dealer under a duty to exercise reasonable care in examining the vehicle before sale. He is then under the duty either to correct the defect or warn the purchaser of its existence. This is especially true where the sale is made accompanied by a representation that the chattel is fit for its intended use.

Egan Chevrolet Co. v. Bruner, 102 F.2d 373 (8th Cir. 1939); *Flies v. Fox Brothers Buick Co.*, 196 Wis. 196, 218 N.W. 855 (1928). Also see RESTATEMENT, TORTS § 388 (1934).

2. The leading case on this point is *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842). American cases following this theory are: *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 80 N.E. 482 (1907); *Liggett & Myers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S.W. 1009 (1915); *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S.W. 421 (1912).

3. *Langridge v. Levy*, 2 M. & W. 519, 150 Eng. Rep. 863 (1837); *Dixon v. Bell*, 5 M. & S. 198 (1816).

4. 217 N. Y. 382, 111 N.E. 1050 (1916).

to an ultimate buyer on the ground that the chattel was dangerous because defectively made. Since that case manufacturers of chattels which would be dangerous if defective have been held liable to anyone who could reasonably be expected to be in the vicinity of the chattel's probable use.⁵ The effect of this development has been an emphasis on increased protection of the public and a de-emphasis of possible hardship to particular sellers.⁶

The gradual abandonment of the privity of contract prerequisite to liability has had a marked effect on the liability of different types of sellers. The liability for negligence of manufacturers of chattels which would be dangerous if defective has been outlined above. Packagers of food products have been held liable to remote consumers on the same grounds as manufacturers of defective chattels.⁷ Food packagers also may be liable to remote consumers because of implied warranties.⁸ A building contractor, however, is not liable to third persons who are injured by his defective construction if that construction was accepted by the owner of the building; he is liable prior to acceptance, or if he is guilty of wilful negligence.⁹ The non-

5. *Bird v. Ford Motor Co.*, 15 F. Supp. 590 (W.D.N.Y. 1936) (passenger in automobile); *Hoenig v. Central Stamping Co.*, 273 N.Y. 485, 6 N.E.2d 415 (1936) (user of chattel); *Rosebrock v. General Electric Co.*, 236 N.Y. 227, 140 N.E. 571 (1923) (purchaser's employees); *White Sewing Machine Co. v. Feisel*, 28 Ohio App. 152, 162 N.E. 633 (1927) (member of purchaser's family. See RESTATEMENT, TORTS § 395 (1934).

6. In abandoning the privity of contract theory, Lummus, J., in the case of *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946), stated the purpose as follows:

In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. [Italics added.]

Id. at 96, 64 N.E.2d at 696. In the beginning of the development of increased liability there was no distinction made between manufacturers and sellers. *Torgesen v. Schulz*, 192 N.Y. 156, 84 N.E. 956 (1908) (defendant was vendor of siphon bottles); *Thomas v. Winchester*, 6 N.Y. 397 (1852) (defendant was druggist); *Heaven v. Pender*, 11 Q.B.D. 503 (1883) (defendant was dock owner supplying staging for ship repairs); *George v. Skivington, L.R.* 5 Ex. 1 (1869) (defendant was chemist). *Cf. Statler v. Ray Mfg. Co.* 195 N.Y. 478, 88 N.E. 1063 (1909) (defendant was manufacturer).

7. PROSSER, TORTS 684, 685 (1941).

8. PROSSER, TORTS 683 (1941). Recent cases allowing the retailer to bring the wholesaler into the action are: *Occhipinti v. Buscemi*, 71 N.Y.S.2d 766 (Sup. Ct. 1947); *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951); Comment, 1953 WASH. U.L.Q. 327 (1953).

9. *Howard v. Reinhart and Donovan Co.*, 196 Okla. 506, 166 P.2d 101

producer who sells habitually is liable for negligence only if he has actual knowledge that the chattel is dangerous,¹⁰ consciously misrepresents the source of the chattel,¹¹ or makes reckless misrepresentations as to the chattel's safety.¹² The mere failure to inspect by such a seller is not negligence.¹³ It should be noted that all these classes of sellers are habitual sellers. There has been little litigation concerning the liability to remote users of casual sellers.¹⁴

(1946); *Woodside Manor, Inc. v. Rose Brothers Co.*, 83 A.2d 325 (D.C. Mun. App. 1951). Cf. *Mann v. Leake and Nelson Co.*, 132 Conn. 251, 43 A.2d 461 (1945).

10. Eldredge, *Vendor's Tort Liability*, 89 U. PA. L. REV. 306, 310 (1941).

11. *Id.* at 313.

12. *Id.* at 315.

13. *Id.* at 322. Professor Eldredge relies principally on various secondary authorities and on the absence of contra cases to support this statement. He does cite *Peaslee-Gaulbert Company v. McMath's Admr.*, 148 Ky. 265, 146 S.W. 770 (1912); *Belcher v. Goff Brothers*, 145 Va. 448, 134 S.E. 588 (1926); *Tourte v. Horton Mfg. Co.*, 108 Cal. App. 22, 290 Pac. 919 (1930); *Noble v. Sears Roebuck & Co.*, 12 F. Supp. 181 (W.D. Wash. 1935); *Isbell v. Biederman Furniture Co.*, 115 S.W.2d 46 (Mo. App. 1938); and *Boyd v. J. C. Penney Co.*, 195 So. 87 (La. App. 1940) as containing statements that the vendor's duty is limited to revealing known defects. At 319 Professor Eldredge states that *State, to use of Bond v. Consolidated Gas, E. L. & P. Co.*, 146 Md. 390, 126 Atl. 105 (1924) and *Camden Fire Ins. Co. v. Peterman*, 278 Mich. 615, 270 N.W. 807 (1937) held that the vendor is under no duty to inspect if he received the chattel from a reputable manufacturer.

RESTATEMENT, TORTS § 401 (1934):

A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use.

RESTATEMENT, TORTS § 402 (1934):

A vendor of a chattel manufactured by a third person is subject to liability . . . if, although he is ignorant of the dangerous character or condition of the chattel, he could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have.

Professor Eldredge analyzes these two sections and the comments to them and concludes at 324-330 that they do not impose a duty of inspection. He recognizes at 330-333 three cases which do impose a duty of inspection: *Garvey v. Namm*, 136 App. Div. 815, 121 N.Y. Supp. 442 (2d Dep't 1901); *Santise v. Martins, Inc.*, 258 App. Div. 663, 17 N.Y.S.2d 741 (2d Dep't 1940); and *Ebbert v. Philadelphia Electric Co.*, 126 Pa. Super. 351, 191 Atl. 384 (1937), *aff'd*, 330 Pa. 257, 198 Atl. 323 (1938).

See PROSSER, TORTS 681 (1941):

A dealer who sells goods made by another ordinarily is not held to the same inspection as the manufacturer, but must exercise the care and competence of a reasonable dealer as to defects which he has an opportunity to discover.

Perhaps it may be said that all these authorities mean that the vendor has a general duty to exercise due care, and that that duty may, in some unusual circumstances, be breached by a failure to inspect.

14. PROSSER, TORTS 682 (1941).

The remote seller in the principal case, although a casual seller, has some of the characteristics of these other types of sellers. A manufacturer may be held liable because he created the defect. The seller here also created the defect by an overt act. On this basis he could be liable. An habitual seller has considerable knowledge concerning the product he sells. The seller here, who was engaged in the business of renting cars, probably had the same degree of knowledge as an habitual seller.¹⁵ He did not, however, have the same volume of sales as the habitual seller. The seller here bears a closer resemblance to a building contractor in that his sales are less frequent. It has been suggested that the main reason for holding the manufacturer liable is that his volume of sales is great enough to allow him to distribute the loss to a large segment of the public by a slight price increase.¹⁶ This reason also applies to liability of habitual sellers. If the significant fact in determining the liability of a seller is his volume of sales, then the decision of the court in the principal case is correct in view of the small number of sales made by this defendant. If, however, the loss distribution motivation is not controlling, the decision is erroneous in light of the extension of the liability of sellers of defective products to provide increased consumer protection.

TORTS—TRADE SECRETS—NECESSITY OF CONFIDENTIAL
RELATIONSHIP

Smith v. Dravo Corporation, 203 F.2d 369 (7th Cir. 1953).

Smith designed and manufactured a novel freight container. After his death, Dravo Corporation became a prospective buyer of his business and during negotiations received detailed information from his executor concerning the construction of the container. Dravo decided against the purchase, but, shortly thereafter, marketed a freight container which was almost identical to that which had been designed and produced by Smith. Smith's executor brought an action to enjoin Dravo Corporation from

15. The UNIFORM COMMERCIAL CODE §§ 2-104, 2-314 (1952), provides for greater liability on implied warranty grounds for those having special knowledge of the product sold than for those not having such knowledge.

16. *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 461-468, 150 P.2d 436, 440-444 (1944) (concurring opinion). See Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 382-384 (1951).