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TORT LIABILITY OF MANUFACTURERS

By L. W. Feezer*

Assisted by Dwight Campbell, Jr.†

Ten years ago an article by the present writer appeared in the Minnesota Law Review under the title, "Tort Liability of Manufacturers."1 The purpose of that article was to set forth briefly the development at that time of the law with reference to the liability of manufacturers for injuries or damages to persons not in privity of contract with them due to defects in their products.

The familiar dictum of Winterbottom v. Wright2 and the oft-repeated exceptions to the doctrine which had been attributed to that decision were stated. MacPherson v. Buick Motor Company3 was discussed in some detail, and reference was made to various rules and formulae which frequently appear in cases dealing with this problem. Finally an effort was made to discover and present cases of this type in which the damage suffered by the plaintiff was in the form of injury to property rather than to the person and to inquire as to the probable effect of MacPherson v. Buick

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1(1925) 10 MINNESOTA LAW REVIEW 1.
2(1842) 10 M. & W. 109, 11 L. J. Exch. 415. It may be well to remind the reader that this case sustained the defendant's demurrer in an action brought by the driver of a defective stage coach against the contractor who supplied it to his employer (the driver's master.) Says Prof. Bohlen: "The case came up on demurrer to the plaintiff's declaration, which alleged, as his sole right to recover, his knowledge of and reliance upon this contract to which he obviously was not a party. But this was overlooked and certain dicta of Baron Alderson and Lord Abinger were seized upon to torture the case into an authority for the doctrine that when work is done under a contract or goods are made and sold, the liability for negligence in performance or manufacture is restricted to those who are parties to the contract or sale." F. H. Bohlen, (1922) 35 Harv. L. Rev. 633-660.
3(1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440. The facts of this case are stated briefly by Judge Cardozo in the first sentences of his opinion in the following words: "The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold it to the plaintiff. While the plaintiff was in the car it suddenly collapsed. One of the wheels was made of defective wood and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by a reasonable inspection, and the inspection was omitted."
Motor Company on the further developments in this field of law, particularly in cases of property damage.

It is the present purpose to examine what appear to be some of the outstanding utterances that might be considered as having some bearing on the rights and liabilities as between manufacturers and those who have been occasioned loss by reason of negligently defective products. It is first to state, in black letter as it were, the propositions which seemed to be most significant when the former article was written.

1.—The so-called doctrine of Winterbottom v. Wright, to wit:
"When work is done under a contract or goods are made and sold, the liability for negligence in performance or manufacture is restricted to those who are parties to the contract or sale."

2.—The following are widely recognized exceptions to the doctrine of Winterbottom v. Wright and were the chief reliance of those cases imposing liability prior to the Buick Motor Company Case:
"The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life is actionable by third persons who suffer from the negligence. . . . The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises, may form the basis of an action against the owner; . . . The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might reasonably have been anticipated, whether there were any contractual relations between the parties or not."

3.—The rule of MacPherson v. Buick Motor Company:
"A manufacturer owes the affirmative obligation to employ reasonable care in the manufacture or assembling of chattels which, while not necessarily dangerous if properly constructed, constitute a menace to life and limb if not carefully made; and this duty is owed not only to his immediate vendee but to anyone likely to be harmed by the defective article while the same is being lawfully used for the purpose intended."

A more precise statement of what was decided in the Buick Case, in terms of its own facts, might be: The manufacturer of

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an automobile who purchases wheels from a reputable manufacturer is liable to one who purchases a car from a retailer for injury caused by the collapse of a wheel because of defects which would have been discovered by a reasonable inspection. The writer suggests that the following statement is a generalization not too broad to be supported by the decision: The manufacturer of a product which by reason of negligence in its production is dangerous to human safety is liable without privity of contract to one who suffers bodily injury while the article is being used reasonably for its intended purpose.

The case has received much attention, not a little of which is due to the connotation of Judge Cardozo's fine phrase:

"We have put aside the notion that the duty to safeguard life and limb, when the consequence of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

This case is also regarded as making clear another point which had already been recognized in a number of cases, particularly in New York, but was somewhat hazy and uncertain. This is the notion that the liability of manufacturers should not be confined to things which were "inherently" dangerous, viz., designed to preserve, destroy or affect human life and limb, but should include those things which are dangerous because of negligence in connection with their manufacture. In other words, the test is not whether the article is dangerous when carefully made, but whether it is likely to cause serious harm if carelessly made. 6

Two problems which come to mind in connection with cases of this sort are not disposed of by the MacPherson v. Buick Motor Company Case:

1.—This case did not settle the question whether a manufacturer whose fault was of the sort adumbrated in the statements of this rule would be liable for property damage unconnected with personal injury; and,

2.—The statements by Judge Cardozo did not indicate, nor do they authorize any inference, that the defendant would be liable for either personal or property damage if the offending chattel was not, when used for its intended purpose, either inherently dangerous, or, because of negligent manufacture, dangerous to human life and limb.

5See discussion of this point in the former article (1925) 10 Minnesota Law Review 1, 13.
In surveying the developments in this field of tort liability, it appears to the writer that the most significant decisions are those which deal with the question of property damage. The case of MacPherson v. Buick Motor Company was already almost ten years old at the time of the former article and had become familiar to most of the courts which had been called upon to pass on this question during that time; and its doctrine was by that time very widely accepted. For this reason, what follows will deal largely with the property damage situation.  

Outstanding as a contribution to the literature of recent years on our problem is, of course, the Restatement of the Law of Torts which has been in preparation by the American Law Institute since 1923, and the first two volumes of which have now been published. Chapter fourteen of the Torts Restatement is entitled, "Liability of Persons Supplying Chattels for the Use of Others." In dealing with the specific subject of manufacturers we are particularly concerned with sections 388 to 390, "Rules Applicable to all Suppliers," and with sections 394 to 398, dealing more specifically with manufacturers. As not all readers of this REVIEW have access to the Restatement, the writer ventures to set out the text of a few of these sections. These rules which have been referred to, with the comment appended by the Reporter and his assistants, occupy twenty-seven pages. Each section is printed in black letter which is followed by the comment and in some cases by illustrative statements of facts with the Reporter's conclusion as to whether or not there would be liability in the given situation.

Section 388, entitled, "Chattels Known to be Dangerous for Intended Use," reads as follows:

"One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is

6In the periodicals during the last ten years there have been many notes dealing with tort liability for defective products. However, there has been little attention paid to the question of property damage as distinguished from personal injury, and perhaps even less note has been taken of the offending chattel's threat to property as contrasted with its potential danger to persons. The most extensive notes on the property damage cases are (1932) 31 Mich. L. Rev. 264; (1930) 14 MINNESOTA LAW REVIEW 306; and (1921) 19 Mich. L. Rev. 482.
supplied;
b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and
c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so."

Just what all this means when reduced to language forms with which lawyers are familiar at first seems a little puzzling to the writer; nor have the illustrations and comment furnished a key. In fact, reading through the entire chapter, to quote Dean Leon Green's recent comment in the Illinois Law Review on another chapter of the Torts Restatement, "will leave the reader with a decided feeling of dizziness."

A case with which the writer is familiar is suggested as probably illustrating a situation to which this rule might be applied. In that case, *Farley v. Edward E. Tower Company*, it was held that it was properly left to the jury whether the vendor and manufacturer (either or both) of celluloid combs for use in water-waving by a hairdresser using heat in the process would be liable to a customer who was burned when the combs took fire. The combs were not indicated to the hairdresser as being inflammable. The hairdresser was exonerated by the jury, but a verdict against the dealer from whom he bought them and also against the manufacturer was allowed to stand.

Passing to section 389 we find a rule as to the liability of manufacturers or others furnishing chattels to another which are incapable of safe use. At the risk of discouraging the reader from continuing, this section is also quoted at length:

"One who supplies directly or through a third person a chattel for another's use knowing that the chattel is unlikely to be made reasonably safe before being put to a use to which the supplier should expect it to be put, is subject to liability for bodily harm caused by such use to those whom the supplier should expect to use the chattel or be in the vicinity of its probable use and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier had informed the other for whose use the chattel is supplied of its dangerous character."

The illustration given for the application of this rule is as follows:

"A employs B, a building contractor, to build a row of houses according to plans and specifications supplied by A. These plans require material and workmanship so cheap and inferior that any

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7(1935) 29 Ill. L. Rev. 583-593.
competent builder would realize that a house built thereunder might collapse at any time. B builds the houses under these plans and specifications. One of the houses collapses and harms C, a possible purchaser, inspecting the house at A's invitation, and D, a traveller upon the adjoining highway. B is liable to C and to D." As Dean Green points out in the article previously referred to, the decisions in similar cases are contra, and this cannot be sustained even as good class room law. He adds, "This is not the same situation as an automobile." Mr. Green evidently intends to imply what the average reader of this chapter taken as a whole is not unlikely to infer, namely, that the draftsmen of these sections had at least in the back of their minds the cases arising out of defective autos and perhaps firearms and explosives and other things of the sort described in some of the earlier cases as "intended to preserve, destroy or affect human life."

Section 390 in effect says that one who puts a dangerous instrumentality into the hands of an incompetent will be liable for the harm ensuing. It reads:

"One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of, its use, is subject to liability for bodily harm caused thereby to them."

Passing to section 394 we find that a manufacturer is one of the suppliers who may be liable under the preceding sections.

Section 395 deals with the peculiar duty of manufacturers to users of their products with which this paper deals primarily. The section reads:

"A manufacturer who fails to exercise reasonable care in the manufacturer of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured."10

The only illustration given for this section is stated:

"The A Motor Company incorporates in its car wheels manufactured by the B Wheel Company. These wheels are constructed of defective material, as an inspection made by the A company

9(1935) 29 Ill. L. Rev. 583. See note 21, page 599.
10Italics ours.
before putting them on its car would have disclosed. The defec-
tive character of the wheel, however, is not readily discoverable
after the wheel is installed. The car is sold to C through the D
Company, an independent distributor. While C is driving the
the defective wheel collapses causing the car to swerve and collide
with that of E, causing harm to C, E, F, and G, who are guests
in the cars of C and E respectively. The A Motor Company is
liable to C, E, F and G."

Three points seem to the writer to deserve notice in comparing
this intendedly authoritative statement of the law, as it ought to be,
with the rule of MacPherson v. Buick Motor Company, viz:

1.—The "ambit of liability," to use the phrase employed in the
comment of the reporter in the published text of the Restatement,
is made to include "those whom the suppliers should expect to be
in the vicinity of its probable use."

2—The rule is made to apply only to things involving "an un-
reasonable risk of causing substantial bodily harm."

3—The liability imposed by this section is only for bodily harm
—and nowhere else is liability for property damage provided for,
nor does the comment on this section directly or indirectly refer
to the problem of property damage.

It is not proposed herein to make an extended study of the
cases since the article of 1925. It will serve the purpose to say
that the principle of MacPherson v. Buick Motor Company has
been widely accepted and followed in many jurisdictions in this
country; and that, in the more recent opinions, not much is said
about Winterbottom v. W'right and its three exceptions. There is
also some disposition to invoke principles of warranty and sales
especially with reference to food products. But an examination
of the most recent cases which the writer has been able to find
dealing with manufacturers' liability for negligently defective

112 Restatement, Torts, page 751.

This was one of the questions raised in my former article on this topic,
viz., whether the rule of MacPherson v. Buick Motor Co. would be regarded
in future as including others than the owner or direct user of the thing.
This is illustrated by the case of Coakley v. Prentiss-Wabers Co., (1923)
182 Wis. 941, 195 N. W. 388. The plaintiffs here included both the owner
of a defective campstove which exploded and his mother-in-law who was
assisting in preparing supper upon it. The owner suffered personal
property damage, and the mother-in-law suffered personal injury. (It might
be added that the owner's claim for property damage was based not upon
the damage to his mother-in-law but upon the fact that his tent burned.)

12Hertzler v. Manshum, (1924) 228 Mich. 416, 200 N. W. 155; Ward
products seem not to favor the warranty concept as a basis of liability.

As the earlier paper sought to emphasize the logic of extending manufacturer's liability to include property damage, it is especially pertinent to consider what have been the developments in this direction. It has already been pointed out that the Restatement has not mentioned property damage; nor does it refer to injury due to chattels which are dangerous (when used as intended) only to property. What of the case law? A few cases were examined in the earlier article. The most notable was *Murphy v. Sioux Falls Serum Company* in which the South Dakota supreme court overruled a demurrer to a complaint against the manufacturer of hog cholera serum by a plaintiff whose hogs died following its use. The complaint charged negligent manufacture and the presence of impurities. The striking feature of the case is that the court seemed to take for granted manufacturer's liability for property damage and said not a word to indicate that such a view was unique. The cases since are few, but of the new ones discovered all seem to recognize a right of action for property damage, and the only uncertainty seems to be whether this liability is limited to cases where the harm is caused by a thing dangerous to personal safety or applies likewise to a product which (always being used for its intended purpose) is likely to cause only property damage and not personal injury. The four most outstanding cases are worth noting in some detail. Two of these cases concern products dangerous to human safety; the products in the other two are not likely to endanger life and limb. They are so classified.

1.—**Product Not Dangerous to Human Safety:**

A.—*Pine Grove Poultry Farm v. Newtown By-Products Manufacturing Company.*\(^{14}\) The defendant sold meat scraps to the plaintiff to be used as food for ducks. The ducks were killed due to fine steel wire in the meat scraps. There was a statute making it negligence as a matter of law to sell meat scraps containing anything harmful to animals. On this basis the defendant was held liable, and it was said by the New York Court of Appeals to be unnecessary to consider whether the principle of *MacPherson v.*


\(^{14}\)(1928) 249 N. Y. 293, 162 N. E. 84.
Buick should be extended to include damage to property rights as well as personal injuries.

B.—Ellis v. Lindmark. A, a wholesale druggist, contracted to sell a barrel of cod liver oil to B, a retail druggist. A knew that the oil was to be resold to subvendees who were to use it to feed to their chickens. Instead of delivering cod liver oil, A delivered a barrel of linseed oil, some of which B resold to C. C fed it to his chickens, and many of them died, whereupon C sued both A and B for the damage to his poultry. After upholding the verdict of the jury that both A and B were negligent, and that the damage was caused by their negligence, the court held that D may recover from both A and B.

2.—Product Dangerous to Human Safety:

A.—Marsh Wood Products Company v. Babcock and Wilcox. The defendant sold the plaintiff a number of boiler tubes, some of which had been manufactured from defective steel. A tube exploded and injured a co-plaintiff employee as well as the plaintiff’s real property. There was a judgment for the plaintiffs permitting a recovery in each case, and, upon a writ of error, it was held that a manufacturer may be liable though the purchaser may be expected to make new tests before putting the article into permanent use, and that manufacturer’s liability is to be extended to cover property damage proximately resulting from the negligence of the defendant.

B.—Genesee County Patrons Fire Relief Ass'n. v. L. Sonneborn & Sons, Inc. The defendant was the manufacturer of a waterproofing substance known as “Hydrocide No. 889.” A local contractor, to whose right of litigation the plaintiff succeeds, used the preparation to waterproof the inside of a farmer’s silo. The employee of the contractor used an ordinary farm lantern for illumination. Fumes from the Hydrocide No. 889 were exploded by the flames of the lantern, and the resulting fire destroyed the newly-built silo, a barn and other property. There had been no warning of the dangerous consequences of using the preparation in conjunction with an open flame. The New York court held the manufacturer liable to the owner of the property upon which the hydrocide was being applied, using the following language:


16(1932) 207 Wis. 209, 240 N. W. 392.

17(1934) 263 N. Y. 463, 189 N. E. 551.
"As hydrocide No. 889 manufactured by the defendant, was a secret, highly explosive preparation, imminently dangerous to life and property, sold without warning of its dangerous nature, intended to be used in the condition it was in when delivered and for the purpose for which it was recommended in a way that should reasonably have been anticipated, we believe that the defendant manufacturer is legally responsible for the damage to property which resulted... We confine our decision to cases in which the product is imminently dangerous to life and property."

There is also an English case of significance on this point. It is McAlister (or Donoghue) v. Stevenson, in which the manufacturer of a bottle of ginger beer containing a decomposed snail was held liable for the illness of the consumer for whom it was purchased by a friend in a café which served it to the plaintiff. The majority opinion in the House of Lords announced,

"By Scotch and English lay alike the manufacturer of an article of food or medicine sold by him to distributors in circumstances which prevent the distributor or the ultimate purchaser from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health." 9

A strong dissenting opinion, however, holds that the case is governed by Winterbottom v. Wright. The writer of the majority opinion remarks that this rule is a proposition which he ventures no one in England or Scotland who was not a lawyer would for one moment doubt. While this case does not involve property damage, nor a chattel or substance not imminently dangerous to health, the whole language shows a tendency toward a liberal theory of manufacturer’s responsibility.

In short, the case law which we have on this point has already gone beyond the Restatement in New York, where the Restatement rule evidently had its source, in that: firstly, property damage may be a basis of manufacturer’s liability where the offending product is dangerous to human safety, as well as in all the other jurisdictions where the problem has arisen; and secondly, in those cases where the article was not dangerous to human life, the defendant was held liable notwithstanding—viz., in Minnesota, in South Dakota and in the eighth circuit, and in New York the same result was reached by statute.

The most significant thing about all this is that on this point


19See opinion of Lord Atkin, at page 599.
the Restatement was left behind by the forward progress of the common law while its creators were formulating it, and when published it no longer stated the law of the jurisdiction from whose decision was derived the outline skeleton for the rule as finally incorporated. May not one wonder, perhaps hope, that this will be the sorry fate of many of the rules which the Institute has labored so hard to formulate? However effectual the Restatement may be in some branches of the law, it would seem unwise as well as impossible to attempt to make static so fluctuating a thing as the law of torts.

It is an interesting coincidence that Judge John B. Sanborn, who wrote the opinion in *E. I. Du Pont De Nemours and Co. v. Baridon*, 20 which goes furthest beyond the Restatement and which expressly disapproves *Huset v. J. I. Case Threshing Machine Co.*, 21 long an authority, is a nephew of Judge Walter Sanborn, who wrote the opinion in the *Huset Case*. The coincidence is a valuable example of the truth of the quotation with which the former article began and which we shall use to close this one—"The law is progressive and expanding, adapting itself to the new relations and interests which are constantly springing up in the progress of society." 22

20 (C.C.A. 8th Cir. 1934) 73 F. (2d) 26, discussed in (1935) 19 MINNESOTA LAW REVIEW 482.
21 (C.C.A. 8th Cir. 1903) 120 Fed. 865, 57 C. C. A. 237, 51 L. R. A. 303.