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Products Liability--Duty of Care in Automobile Design--Fitness for Collision

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PRODUCTS LIABILITY—DUTY OF CARE IN AUTOMOBILE DESIGN—FITNESS FOR COLLISION*

I. Introduction

In the recent case of *Mickle v. Blackman*[1] the Supreme Court of South Carolina took a giant step forward in the drive to protect consumers from unfit design in automobiles. The court recognized a cause of action in negligence against the automobile manufacturer where severe bodily injuries received during an automobile collision resulted from a defect in design which was not a causative factor in the accident. The decision represented a departure from the weight of authority represented by *Evans v. General Motors Corp.*[2] *Evans* held that a manufacturer's duty to make his product reasonably fit for its intended use did not comprehend collisions. No cause of action could be found, therefore, when the defective design proved unsafe *only* in the event of a collision. In *Mickle* the court, relying upon *Larsen v. General Motors Corp.*,[3] expanded the common law duty of reasonable care to avoid foreseeable harm to include collisions, and thereby charted a sensible and realistic course for this State.

II. The Duty

The duty owed by the manufacturer to the consumer is a question of law for the court.[4] It has been generally acknowledged, especially in the last decade, that the manufacturer's duty of care toward the consumer includes design of the product.[5] There has, however, been a reluctance to impose liability for design defects for several policy reasons. First, because of mass production techniques manufacturers would be subjected to a multiplicity of suits once a design defect was discovered. This

* Mickle v. Blackman, 166 S.E.2d 173 (S.C. 1969).

1. 166 S.E.2d 173 (S.C. 1969).
2. 359 F.2d 822 (7th Cir. 1966).
3. 391 F.2d 495 (8th Cir. 1968).
4. Evans v. General Motors Corp., 359 F.2d 822, 824 (7th Cir. 1966); Kahn v. Chrysler Corp., 221 F. Supp. 677, 678 (S.D. Tex. 1963); W. Prosser, Handbook of the Law of Torts § 36, at 207 (3d ed. 1964).
5. *See, e.g.*, Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954); Restatement (Second) of Torts § 398 (1965); W. Prosser, Handbook of the Law of Torts § 96, at 665 (3d ed. 1964).

same contention formed a cornerstone of the citadel of privity and undoubtedly stemmed from the policy consideration of encouraging industrial development unimposed by a spate of consumer complaints. Second, there has been reluctance to allow a jury to second-guess the expertise of scientists and engineers.[6] This viewpoint, however, overlooks the fact that in professional negligence cases expert witnesses actually judge the conduct in question. As one observer has put it:

> The quasi-legal function is transferred from the jury to the only people who can perform it: the profession itself. (Of course, the jury has the last word: almost totally a question of credibility between the witnesses.)[7]

Third, there has been fear that judgments against manufacturers based on design would necessitate the massive recall of products already on the market, with unfortunate consequences to manufacturers and their employees.[8] This fear has in part been borne out by the fact that between 1959 and 1966 approximately 8,700,000 automobiles were recalled because of defects.[9] While the larger manufacturers are apparently able to absorb this added burden, there may be a stronger case for small manufacturers.

In one recent article Ralph Nader (co-author), perhaps the foremost champion of consumer protection in America today, rejects out of hand these basic policy reasons for reluctance to impose liability. He realistically maintains that there is nothing novel about submitting complicated questions to juries. In automobile design cases, which sometimes involve scientific and technical matter but which rarely involve extremely complex matter, judges and juries should be allowed to pass judgment on the standard of care exercised by experts.[10] As to the "flood of litigation" argument he cites Prosser's statement that "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation', and it is a pitiful confession of incompetence on the part of any court of justice to

6. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product,* 71 YALE L.J. 816 (1962).
7. Curran, *A Symposium on Professional Negligence,* 12 VAND. L. REV. 535, 539 (1959).
8. Noel, *supra* note 6, at 816.
9. Nader & Page, *Automobile Design and the Judicial Process,* 32 ATL L.J. 52, 65 (1968) (hereinafter cited as Nader & Page, *Automobile Design*).
10. *Id.* at 64.

deny relief on such grounds."[11] Nader adds to this the consideration that in each case, even though a defect in design be proved, the plaintiff must also show that the injury resulted proximately therefrom, and the traditional tort defenses of contributory fault, assumption of the risk, and abnormal use will be available to the defendant.[12] With regard to the call-back problem, he points to the illogic of granting immunity from liability when the manufacture is on a grand scale. It is precisely then that the risks are most grave and widespread.[13]

The manufacturer's duty is stated in substantially the same terms by the *Restatement (Second) of Torts*, the Uniform Commercial Code, and the case law. Section 398 of the *Restatement* calls for a plan or design which does not make the chattel "dangerous for the uses for which it is manufactured." Section 2-314 of the Uniform Commercial Code, prescribing the minimum requirements for merchantability, speaks in terms of fitness "for the ordinary purposes for which such goods are used." In the leading cases involving automobile design, the courts have stated the duty in terms of reasonable fitness for intended use or purpose.[14]

Given this language, the courts have focused upon the words "intended use" in order to determine whether the use or involvement of the product was such as to call into question the manufacturer's duty. This approach was explicitly stated in *Larsen*:

> Accepting . . . the principle that a manufacturer's duty of design and construction extends to producing a product that is reasonably fit for its intended use and free of hidden defects that could render it unsafe for such use, the issue narrows on the proper interpretation of "intended use."[15]

The decisions prior to *Larsen* uniformly indicated that the "intended use" of an automobile was nothing more than travel on the highway, and a cause of action seemingly would not be found unless the defect were shown to be a causative factor in

11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 11, at 43 (3d ed. 1964).
12. Nader & Page, *Automobile Design*, at 64-65.
13. *Id.* at 65.
14. *E.g.*, Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967).
15. 391 F.2d at 501.

the accident. In *Carpini v. Pittsburg & Weirton Bus Co.*,[16] for example, recovery was allowed for injuries resulting from a defectively designed pet cock in the undercarriage of a bus which was disengaged by debris, causing the brakes to drain. As the *Evans* court put it, the product involved was unfit for its intended use and in precisely that respect was the cause of accidental injuries.[17] On the other hand, in those cases in which the accidents were caused by outside forces, as in the collision cases discussed hereafter, the only *injuries* being caused in whole or in part by defective design, the courts have found no cause of action against the manufacturers. The impropriety of this approach can best be seen by examining the recent decisions on automobile design.

III. EVANS AND ITS PROGENY

In *Evans v. General Motors Corp.*[18] plaintiff's decedent was driving across an intersection in a Chevrolet station wagon when it was struck from the left side by another automobile. The side of the station wagon, designed with an "X" frame and therefore not having side frame rails, collapsed inward upon the decedent, inflicting fatal injuries. The plaintiff's theory was that since the collision was a foreseeable emergency, the defendant, by omitting side frame rails, created an unreasonable risk of harm to users of the automobile. The defendant conceded that it had a duty to design its product to be reasonably fit for the purpose for which it was made and to be free from dangerous hidden defects. However, there was no assertion that the "X" frame was in any way causative of the collision—only that it allowed the automobile to collapse once it was struck broadside by another vehicle.

In affirming the ruling of the lower court that no cause of action had been stated, the Seventh Circuit set forth the rationale which has generally been followed in automobile design cases: A manufacturer need not "make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all."[19]

16. 216 F.2d 404 (3d Cir. 1954).
17. 359 F.2d at 825.
18. 359 F.2d 822 (7th Cir. 1966).
19. *Id.* at 824.

This proposition was originally enunciated in another context in *Campo v. Scofield*.[20] In that case the plaintiff complained of injuries received while operating an "onion topping" machine which was provided with neither a safety guard nor a stopping device. During the process of feeding onions into the machine the plaintiff's hands became caught in its revolving steel rollers and were badly injured. In sustaining a demurrer, the court rejected the argument that since rapid development of mechanical contrivances had created so many new dangers, manufacturers should be compelled to equip complicated modern machinery with all possible protective guards or other safety devices. Such an extension of the manufacturer's liability was considered to be solely within the legislative domain.

The objection to the *Evans* court's reliance on *Campo* is twofold: First, in *Campo* the danger to be avoided was in fact obvious (and visible) to all; in *Evans* the danger to be avoided, the relative unfitness of the "X" frame, was inconspicuous if not actually latent; second, the *Campo* court's refusal to require the manufacturer to produce a "more" safe product was apparently based upon the obvious *non sequitur* that to require a safer or better product is the equivalent of requiring one that is "accident-proof." This unrealistic approach became no more persuasive through repetition down the *Evans* line of cases. The duty, as stated by the *Evans* court, was to produce an automobile fit for its intended purpose, but the intended purpose did not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions might occur.[21]

The court seized upon the plaintiff's foreseeability argument in order to set up and knock down the ludicrous suggestion that an automobile manufacturer might be required to equip cars with pontoons because they may foreseeably be driven into bodies of water. Here the court indulges in refutation by means of an absurdity—a technique that is clearly out of place in judicial decision-making.

Had the court dealt more honestly with the issue, it would simply have acknowledged the obvious—that a manufacturer may be required to conform to a *higher* but still *reasonable*

20. 301 N.Y. 468, 95 N.E.2d 802 (1950).
21. 359 F.2d 822, 825 (7th Cir. 1966).

standard of safety without incurring a duty to make products accident-proof. This viewpoint was cogently presented in the *Evans* dissent and later adopted by *Larsen* and *Mickle*. The better view is that the duty of an automobile manufacturer must be stated in the context of traffic realities—*i.e.*, upwards of 45,000 deaths annually and reported injuries in the hundreds of thousands from accidents in automobile traffic. The *Evans* dissent criticized the majority's failure to state affirmatively the manufacturer's duty, and proposed that the duty be stated as this:

> [The manufacturer must] use such care in designing its automobiles that reasonable protection is given purchasers against death and injury from accidents which are expected and foreseeable yet unavoidable by the purchaser despite careful use.[22]

Thus, in view of the statistical certainty of collisions, and, in many cases, the absence of fault on the part of accident victims, the dissent contended that automobile manufacturers should be *duty-bound* to take reasonable measures to minimize the ill-effects of collisions.

The persuasive force of the *Evans* dissent was lost on the Southern District Court of Texas in *Willis v. Chrysler Corp.*[23] There, action was brought for breach of implied warranty of fitness for intended use against Chrysler Corporation, the manufacturer of a 1963 police car which broke into two sections as a result of a collision. The court, relying on *Evans*, held that the defendant had no duty to design an automobile that could withstand a high speed collision and "maintain its structural integrity."[24] The "no duty to make foolproof" subterfuge of *Evans* and *Campo* was reiterated as authoritative.

In *Shumard v. General Motors Corp.*[25] plaintiff's decedent was killed when the car in which he was driving erupted into flames as a result of a collision. The court, denying a cause of action in either negligence or breach of implied warranty of fitness, echoed the "fool-proof—accident-proof" refrain and added to it "no duty to make fireproof." Again focusing on the

22. *Id.* at 827 (dissenting opinion).
23. 264 F. Supp. 1010 (S.D. Tex. 1967).
24. *Id.* at 1012.
25. 270 F. Supp. 311 (S.D. Ohio 1967).

"intended use" language of the stated duty, the court asserted that the "purposes for which a product is manufactured has reference to its normal and proper use and not to *any use*."[26] The court concluded:

> [A]n automobile is not made for the purpose of striking or being struck by other vehicles or objects and . . . the duty of an automobile manufacturer does not include the duty to design and construct an automobile which will *insure the occupants against injury* no matter how it may be misused or bludgeoned by outside forces.[27]

Here the manufacturer was protected by means of the same sophistry employed in the other automobile design cases. The court adhered slavishly to the then familiar proposition that to protect the plaintiff from the specific defect alleged would require that a perfect car be manufactured—one absolutely safe for a collision.

Nothing could be more misleading or erroneous. It could not be seriously contended that a car may be so designed as to preclude any possibility of injury during a collision; a certain amount of physical punishment necessarily attends such violence. An automobile manufacturer can, however, protect against foreseeable and easily avoided injury or enhancement of injury due to improper design; and he should be under a duty to do so as are other manufacturers. Reasonable care in automobile design is no less attainable than reasonable care required by the law in myriad other undertakings. It is the peculiar bias of the *Evans* line of cases that forecloses a middle ground between no duty, on the one hand, and an absolute or insurer's duty on the other.

IV. LARSEN—THE MIDDLE GROUND

In *Larsen v. General Motors Corp.*[28] the plaintiff alleged negligence in design and breach of implied warranty of merchantability. He claimed injury as a result of a severe rearward thrust of the steering mechanism into his head during a head-on collision. Again, there was no contention that the allegedly defective design in any way caused the accident.

26. *Id.* at 314.
27. *Id.* (emphasis added).
28. 391 F.2d 495 (8th Cir. 1968).

On these facts, basically indistinguishable from those of the *Evans* line of cases, the Eighth Circuit found a cause of action for negligent design. The court stated that it perceived no sound reason why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle *consonant with the state of the art*[29] to minimize the effect of accidents. The court proceeded on the premise that the user must accept the normal risk of driving, but he need not be further penalized by being subjected unnecessarily to a risk of injury due to negligent design. Addressing itself to the "fool-proof—accident-proof" argument, the court simply and summarily conceded that the manufacturer's duty does have its rational limits, based on principles of foreseeability. A consumer is not legally entitled to a perfect car, nor to one that floats on water; he may, however, be entitled to a *better* car.

Even the *Larsen* court's treatment of the troublesome "intended use" language is not entirely satisfying. The court accepts the proposition that the manufacturer's duty of design extends to "producing a product that is reasonably fit for its intended use . . . ."[30] In attempting to expand the scope of "intended use" to include collisions, the court states:

> While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts.[31]

The quoted language on its face distinguishes between normal use (which is exactly what is contemplated by the duty) and a mere "contingency of normal use" (which at least arguably is not comprehended by the duty). The practical effect of recognizing, as the court must, that a collision is a *contingency* of intended use and not the use itself is to force the court to step outside the unequivocal language of the duty in order to reach the desired result—namely, extending the manufacturer's duty to comprehend foreseeable though unintended incidents of use. The case's rationale might have been more compelling had

29. *Id.* at 503. This is an important qualification in view of the inevitability of rapid scientific and technological advances in the automotive industry. Were the state of the art at the time of manufacture not taken into account in determining the question of negligence, producers would often be held to future standards which they could hardly meet at the time of production.
30. *Id.* at 501.
31. *Id.* at 502.

the court rested its decision entirely on the general common law duty of a manufacturer to eliminate any unreasonable risk of foreseeable harm from his product.

One further observation should be made with respect to the stated duty. In both *Evans* and *Larsen* the court stated the duty in terms of "fitness for intended use" and then resolved the case by adjudging that a collision was or was not an intended use. It seems, however, that the crucial question was not whether a collision was an intended use—obviously a collision is not a use, much less an intended use—but rather whether an automobile could realistically be considered *fit* for normal use if the jolt from a collision would render it a death-trap. If, for example, an automobile were so constructed that the impact of a bicycle would cause it to fold, or if a ship were so made that a slight contact with a wharf would cause it to sink, it should be no answer that a car is not made for the purpose of being struck, or that the intended use of a ship is not bouncing off wharves. The intended use of a car is travel on the highway; but travel on the highway really means travel through peril. Thus, if the manufacturer's duty is to be stated in terms of intended use, the appropriate question for the court is whether the car was reasonably fit for *perilous* travel.

V. MICKLE

In *Mickle v. Blackman*[32] the plaintiff, a passenger in a 1949 Ford, was thrown during a collision against a defectively designed gear shift lever knob[33] which shattered upon impact, causing her to be impaled upon it. With the divergent results of *Larsen* and *Evans* before it, the South Carolina Supreme Court recognized a cause of action against the defendant Ford Motor Company for negligent design.[34] Although relying

32. 166 S.E.2d 173 (S.C. 1969).

33. The ball, which covered a gear shift lever that tapered to a diameter of 5/16 of an inch, was force-fitted and could not be removed without rupturing it. The evidence indicated that the white tennite butyrate knob used by Ford in its 1949 model was subject to rapid deterioration from exposure to the ultraviolet rays of sunlight. The hairline cracks which developed on the surface in this process destroyed the force distributing quality of the knob and caused it to shatter easily on impact. There was no evidence that the black knobs, to which Ford switched for its 1950 model, deteriorated with age or normal use.

34. The case was reversed and remanded on other grounds as to defendant Ford Motor Co. Viewed in its full complexity the case is of interest because of a number of complex questions, including instructions given to the jury on

heavily on *Larsen*, the South Carolina court avoided the "intended use" quagmire and grounded its decision solidly upon the traditional common law duty to use reasonable care to avoid foreseeable harm. As the court stated:

> By ordinary negligence standards, a known risk of harm raises a duty of commensurate care. We perceive no reason in logic or law why an automobile manufacturer should be exempt from this duty.[35]

With regard to the "intended use" pitfall, the court noted that the *Evans* court was divided on whether to give controlling weight to the concept of safety for intended use as the limit of the defendant's obligation of care (the majority), or to find a duty to exercise care to furnish reasonable protection to collision victims, applying elementary negligence principles, in the statistical certainty that there would be many such victims (the dissent). Adopting the latter approach, the South Carolina court effectively bridged the gap between the common law negligence principle of "reasonable foreseeability" and the "intended use" test used repeatedly in products liability cases. The court quoted from *Spruill v. Boyle-Midway, Inc.*:[36]

> "*Intended use*" *is but a convenient adaptation of the basic test of* "*reasonable foreseeability*" framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence. "Intended use" is not an inflexible formula to be apodictically applied to every case. Normally a seller or manufacturer is entitled to anticipate that the product he deals in will be used only for the purposes for which it is manufactured and sold; thus he is expected to reasonably foresee only injuries arising in the course of such use.
>
> However, he must also be expected to anticipate the environment which is normal for the use of his product

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the question of the manufacturer's duty, the factor of prolonged safe use (13 years) of the product, the alleged superseding negligence of the car owner for not replacing the knob even though the hairline cracks were patent, alleged excessiveness of the verdict ($312,000), and the surprising after-discovered evidence that the paraplegic plaintiff, subsequent to the trial, married and gave birth to a normal baby girl.

35. 166 S.E.2d 173, 185 (S.C. 1969).

36. 308 F.2d 79 (4th Cir. 1962). In this case a 14-month-old infant suffered chemical pneumonia as the result of ingestion of a small quantity of inherently dangerous furniture polish which gave insufficient warning of danger.

> and . . . he must anticipate the reasonably foreseeable risks of the use of his product in such environment. These are risks which are inherent in the proper use for which his product is manufactured.[37]

VI. CONCLUSION

The more conservative courts may continue to protect automobile manufacturers by seeking the "intended use" refuge and by refusing to require the production of so-called "fool-proof" cars. Those courts, however, that have pinned their reluctance to expand the manufacturer's duty on want of precedent, now have a clear choice of directions and need not be thwarted by the technicalities of a variously stated duty. The South Carolina Supreme Court has enunciated with commendable clarity the better rule regarding the manufacturer's duty toward consumers —he must use reasonable care to design unreasonable risks out of his products.

HYMAN RUBIN, JR.

37. *Id.* at 83-84, *quoted in Mickle* at 187.