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Notes and Comments: Evolving Consumer Safeguards — Increased Producer and Seller Responsibility in the Absence of Strict Liability

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EVOLVING CONSUMER SAFEGUARDS— INCREASED PRODUCER AND SELLER RESPONSIBILITY IN THE ABSENCE OF STRICT LIABILITY

The author examines the roots of product liability controversy, including several early cases developing the law, and reviews recent cases suggesting some important modifications in this field. Emphasis is placed on changes in the duty to warn, res ipsa loquitur, and contract formation as exemplified in the cases of Moran v. Faberge, Inc. and Giant Food, Inc. v. Washington Coca-Cola Bottling Co.

INTRODUCTION

Early Soundings

The scope and extent of liability incurred by the manufacturers, suppliers, and sellers of consumer goods for injuries caused by the use of these goods within their intended environment is an issue which saw its inception not in the awakening of the consumer "movement" of the last decade,¹ but rather during the Industrial Revolution of the 19th Century. A then freshly revitalized and aroused economy was undergoing an eventual metamorphosis from a rural to an industrial and technologically based society. Inherent in the evolutionary process was a necessary evaluation of the relative positions occupied by the new classes of persons conceived by the infant society: "producers" and "consumers." The nature and logical concomitant of the constantly evolving technocracy was a question as to what extent and degree, if any, those who sought to introduce goods into the stream of commerce would be accountable for injuries directly and proximately caused individual consumers by the use of such goods.

The earliest soundings in the field of product liability were by today's enlightened standards hardly auspicious. *Winterbottom v. Wright*,² an English Court of Exchequer decision in the year 1842, was the first judicial attempt to affirmatively and formally construe the relative positions of a manufacturer and a user of a particular product, and the duties and obligations owed by one to the other. Consistent misinterpretation of the essential legal foundations of this case,³ together with the factual circumstances of the case which contemplated third party liability,⁴ caused an inaccurate general proposition for which the case was cited until well into the twentieth century,⁵—the

1. See generally, R. NADER, UNSAFE AT ANY SPEED ; The Designed-In Dangers of the American Automobile (1965); Nader and Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967).

2. 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

3. W. PROSSER, LAW OF TORTS § 93, at 622 (4th ed. 1971) [hereinafter cited as PROSSER].

4. *Id.*

5. *Id.*

“fetish of ‘privity of contract’.”⁶ Perhaps out of fear of “opening the floodgates,” and perhaps out of fear of retarding the rapid industrial growth of the nation, the court held that, in light of an absence of privity between the plaintiff, a third party hired to drive a coach and the defendant, the manufacturer-supplier of the coach, no action could be maintained on the contract itself.⁷ On the basis of some powerful language in the court’s opinion,⁸ however, the case was for decades misconstrued as standing for the proposition that a failure to establish privity of contract would similarly bar an action in tort.⁹

The harshness of the privity argument was substantiated by subsequent judicial decisions¹⁰ and remained in fact a “fishbone in the throat of the law”¹¹ until effectively vitiated in 1916 by *MacPherson v. Buick Motor Co.*¹² In *MacPherson*, the distinction was drawn between an action on the contract and one inherently lying in negligence, the latter being deemed the proper perspective by which to view the product liability question.¹³ Judge Cardozo enunciated what has become a famous legal principle in relation to the duties which inure to one who seeks to introduce his product into the stream of commerce for general consumption:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, . . . then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . .

6. *Id.* at 623.

7. 152 Eng. Rep. at 405.

8. *Id.* at 404, 405. The opinion of Lord Abinger states in part:

We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions . . . There is no privity of contract between these parties . . . unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. . . .

The Opinion of Judge Alderson continues:

If we were to hold that the plaintiff could sue in such a case there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. . . .

9. PROSSER, *supra* note 3, § 93, at 622.

10. *Earl v. Lubbock*, 1 K.B. 253 (1905); *Huset v. J. I. Case Threshing Machine Co.*, 120 F. 865 (8th Cir. 1903).

11. PROSSER, *supra* note 3, § 96, at 641.

12. 217 N.Y. 382, 111 N.E. 1050 (1916).

13. Judge Cardozo stated in derogation of the privity doctrine:

We have put aside the notion that the duty to safeguard life and limb, when the consequences 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.

Id. at 390, 111 N.E. at 1053.

If he is negligent, where danger is to be foreseen, a liability will follow.¹⁴

Legal writers¹⁵ and courts¹⁶ recognize that while *MacPherson* at first blush purported to create a functionally more expansive class of "inherently dangerous" consumer products, for which a manufacturer could be held liable in the absence of privity under an exception to the privity rule, by including any article which would foreseeably be dangerous to life and limb if made negligently, the operative effect of *MacPherson* was one of more far reaching import. The concerted opinion from both sources conclusively indicated that as a matter of legal practicality, the case's significance rested upon the unique and salient effect the case had upon the privity rule—the effect of making "the exception swallow up the rule."¹⁷ The logical progression to this conclusion rests upon the duty incumbent upon any manufacturer to foresee that any negligent deviation in the construction of a product placed in the stream of commerce creates an unreasonable risk of harm to members of the general public. This expanded duty allows a circumvention of the privity rule, thereby "swallowing up" the rule. Liability is thus coextensive with foreseeability. *MacPherson* remains universal law.¹⁸

Evolution of Strict Liability

The imperative and exigent bridge between the verification of negligence as a basic cause of action in product liability litigation and the adoption by some courts²⁰ of the principle of strict liability in cases of defective product construction proximately causing consumer injury, was the inauguration of the criterion of liability for warranties given the consumer concerning his product.²⁰ *Baxter v. Ford Motor Co.*,²¹ the first judicial recognition of this doctrine, involved express representations in the form of generally distributed advertising material by an automobile manufacturer that all windshields on its product were wholly "shatterproof." Thereafter, the plaintiff, a purchaser of the automobile, was severely injured when a stone struck and shattered the windshield. The Supreme Court of Washington held that statements in the above-mentioned literature as to the nature and shatterproof quality of the glass constituted an express representation made to the

14. *Id.* at 389, 111 N.E. at 1053.

15. PROSSER, *supra* note 3, § 96 at 642-43; Peairs, *The God in the Machine*, 29 BOSTON U. L. REV. 37 (1949).

16. *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946).

17. PROSSER, *supra* note 3, § 96 at 643.

18. *Id.*

19. *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (Mun. App. D.C. 1962).

20. 19 OHIO ST. L.J. 733 (1958); 58 COLUM. L. REV. 1092 (1958); 18 SYR. L. REV. 127 (1966).

21. 168 Wash. 456, 12 P.2d 409 (1932), *aff'd* on rehearing 15 P.2d 1118 (1932).

plaintiff, an express warranty upon which plaintiff was entitled to rely.²² However, the decision is further significant in its expansion of what *MacPherson* only forebode; that is, the manufacturer may incur liability when a warranty is given even *without* an affirmative showing by plaintiff that the manufacturer was aware that its representations were erroneous, or an affirmative showing that the manufacturer was negligent.²³ This liability has been called "the simplest form of strict liability,"²⁴ and again provided a genuine point of further departure from which successive arguments in favor of the strict liability standard were developed.

Strict liability in tort for defective products succeeded this juncture in the law almost as a matter of course. It was universally recognized that substantial unresolved problems existed in the warranty solution as a basis for the imposition of liability upon the manufacturer, specifically in the clouded distinction between the supply of goods and the supply of services,²⁵ and in the continuing privity dispute.²⁶ Therefore, strict liability in tort, which had previously been applied to the sale of tainted food products,²⁷ was extended by the American Law Institute to encompass any and all defectively constructed products via the now famous Section 402A of the Restatement (Second) of Torts.²⁸ Subsection (2)(b) of Section 402A dispensed with the requirement of privity of contract between the manufacturer and the consumer as a necessary part of a product liability suit, and further, Subsection (2)(a) declared formally that no showing of due care by the

22. *Id.* at 462-63, 12 P.2d at 412.

23. *Baxter v. Ford Motor Co.*, 179 Wash. 123, 127-28, 35 P.2d 1090, 1092 (1934).

24. PROSSER, *supra* note 3, § 97 at 651.

25. *Ageis Prods., Inc. v. Arriflex Corp. of America*, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966): "Warranties are limited to sales of goods. No warranty attaches to the performance of a service." *But cf.*, *Albin v. Illinois Crop Improvements Ass'n, Inc.*, 30 Ill. App. 2d 283, 174 N.E.2d 697 (1961).

26. "[N]o one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract . . . the change is called for." W. Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099, 1134 (1960).

27. *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

28. The complete text of 402A provides:

Topic 5. Strict Liability

Sec. 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability 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 or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

manufacturer in the "preparation of sale" of his product, no matter how great in degree, could vitiate the manufacturer's liability for physical harm caused to the ultimate user or consumer of the product where the product was defectively constructed.

Section 402A was first sustained and applied in 1963 in *Greenman v. Yuba Power Products, Inc.*,²⁹ a case involving a defectively constructed combination power tool being properly operated as a wood lathe, and in short order was adopted by several other states³⁰ anxious to circumvent any further problems which the warranty doctrine might engender. Strict liability for defective product construction is now a generally accepted principle in the substantial majority of states.

At the present writing, Maryland has elected to remain in the dwindling minority of jurisdictions that have not yet adopted the strict liability standard,³¹ although acceptance of the doctrine may be imminent. Consumerism, however, is by no means dormant. A significant aggregate of recent decisions have indicated the willingness of the Maryland judiciary to implement certain emphatic consumer safeguards beyond and in lieu of the express acceptance of strict liability as a remedial basis. It shall therefore be the further purpose of this article to examine and evaluate certain of these enlightened safeguards, and place them in proper perspective with the absence of strict liability in Maryland.

BEYOND STRICT LIABILITY

The Duty to Warn

It is now a universally recognized tenet of the law of product liability that the manufacturer of a product that is likely to be unreasonably dangerous when employed within the parameters of a foreseeable use of the product has a duty to warn the ultimate consumer or user of the product of its latent dangers.³² This warning contemplates not only a

29. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

30. *Garthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Dealers Transportation Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1965); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967); *Olney v. Beaman Bottling Co.*, 220 Tenn. 459, 418 S.W.2d 430 (1967).

31. *Telak v. Maszcenski*, 248 Md. 476, 237 A.2d 434 (1968):

Whatever we may be persuaded to do in the future in this regard, we find it unnecessary, at this time, to espouse the cause of strict liability. *Id.* at 488, 237 A.2d at 440-41;

Bona v. Graefe, 264 Md. 69, 285 A.2d 607 (1972):

[W]e have, on two occasions in the past declined to espouse the doctrine . . . *Id.* at 77, 285 A.2d at 611;

Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974):

With respect to the contention that the complaint sets forth a cause of action under the "strict liability" theory of Restatement 2d, Torts, § 402A, this Court has not endorsed the theory of that section. *Id.* at 220, 321 A.2d at 747.

32. *Moran v. Faberge, Inc.*, 273 Md. 538, 332 A.2d 11 (1975); *Katz v. Arundel-Brooks Concrete Corp.*, 220 Md. 200, 151 A.2d 731 (1959); *RESTATEMENT (SECOND) OF TORTS* § 388 (1965).

delineation of foreseeable dangers encompassed within the intended use of the product, but where applicable, appropriate and reasonable, directions and instructions for the safe and proper use of the product.³³ Warnings and directions are not of necessity identical. Whereas the warning merely indicates a foreseeable hazard, directions and instructions specify procedures for the proper and efficient use of the product and for avoiding danger. "A manufacturer might provide one and still be liable in failing to provide the other, as where instructions fail to alert the user to the danger they seek to avert, or where a warning alerts the user to a peril but does not enable him to avoid it."³⁴ It is therefore said that where the use of an article is safer if the user follows a specific procedure inculcating certain precise precautionary measures not a matter of common knowledge, the manufacturer may have a duty of care to take reasonable steps to warn and direct potential users of the product.³⁵

It should be preliminarily noted at this juncture that the central concern herein, that of a product containing an inadequate warning of latent dangers, is separate and distinct from any consideration of an item defectively constructed. In short, the two operate on different planes and theories of relative liability. Both the Restatement (Second) of Torts,³⁶ and a decided bulk of interpretative case law³⁷ hold conclusively that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property" is strictly liable to the consumer or user for any injury sustained thereby, with no burden on the aggrieved consumer to show either a duty incumbent upon the defendant or a breach thereof by the defendant, the traditional bases of the negligence action.³⁸

Conversely, the strict liability foundation for recovery is not available in cases involving a product incorporating a faulty warning, but otherwise containing no unreasonably dangerous constructional defects. The courts, whether imposing liability upon the manufacturer for a dangerously deficient warning or not, have unanimously and conclusively indicated that the viable criteria for determining liability in actions where the injured consumer is alleging such deficient warning as

33. *E.I. DuPont de Nemours & Co. v. Baridon*, 73 F.2d 26 (8th Cir. 1934); *J.C. Lewis Motor Co. v. Williams*, 85 Ga. App. 538, 69 S.E.2d 816 (1952); *McClanahan v. California Spray-Chemical Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953); *McCully v. Fuller Brush Co.*, 68 Wash. 2d 675, 415 P.2d 7 (1966).

34. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 28.7 at 1547, n.2 (4th ed. 1974) [hereinafter cited as HARPER & JAMES].

35. *Id.* § 28.7 at 1547.

36. See note 28 *supra*.

37. See note 30 *supra*.

38. See *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (Mun. App. D.C. 1962): [R]ecovery is based upon [only] two factors: (a) The product or article in question has been transferred from the manufacturer's possession while in a "defective" state . . . (b) as a result of being "defective," the product causes personal injury or property damage. *Id.* at 922.

a ground for recovery are general negligence principles, not absolute liability.³⁹ It is therefore apparent that a successful plaintiff in a product liability action founded upon an allegedly inadequate warning would necessarily be required to plead and prove that the defendant's breach of his duty of reasonable care proximately caused injuries.

The Maryland judiciary has sustained the rule of product liability law that the negligent failure to warn of concealed and latent dangers is a breach of duty sufficient to impose liability upon the negligent manufacturer for consumer injury.⁴⁰ It has been held that this duty to warn "is no different from the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others."⁴¹ Implicit within the unreasonable risk issue are questions concerning the essential adequacy of the warning itself, if indeed a warning is given, and these questions are factual, requiring an evaluation in consideration of the underlying and surrounding circumstances of the individual case.⁴² The warning itself should be of a nature and design that is reasonably calculated and intended to reach and be understood by individuals likely to use the product.⁴³ The warning must itself be intelligible to and readily understandable by the average consumer of the particular product⁴⁴ and it must be basically distinct⁴⁵ to be adjudged adequate. A generally suggested position pertinent to determining the comparative adequacy for a particular warning is the holding by some courts⁴⁶ that the warning, to be adequate *per se*, must be given to the general buying public at large: those to whom the manufacturer, by widespread representations and advertising, prompts to implement his product.⁴⁷ It is therefore apparent that a warning to the original purchaser alone will be insufficient.⁴⁸

The Maryland law concerning a manufacturer's duty to warn accords with the traditional negligence concepts of tort law. In the most recent

39. See note 30 *supra*. See also PROSSER, *supra* note 3, § 96 at 644.

40. Twombly v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960); Moran v. Faberge, Inc., 273 Md. 538, 544, 332 A.2d 11, 15 (1975), in which Judge Digges cited the RESTATEMENT (SECOND) OF TORTS § 388 (1965) with approval.

41. Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975) citing HARPER & JAMES § 28.3 and PROSSER, *supra* note 3, § 31. Judge Digges indicated:

Whether any such unreasonable risk exists in a given situation depends on balancing the probability and seriousness of harm, if care is not exercised, against the costs of taking appropriate precautions. *Id.* at 543, 332 A.2d at 15.

42. HARPER & JAMES, § 28.7 at 1548.

43. *Id.*

44. Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).

45. McLaughlin v. Mine Safety Appliance Co., 11 N.Y.2d 62, 226, N.Y.S.2d 407, 181 N.E.2d 430 (1962).

46. See E.I. DuPont De Nemours & Co. v. Baridon, 73 F.2d 26 (8th Cir. 1934); Altorfer Bros. Co. v. Green, 236 Ala. 427, 183 So. 415 (1938).

47. Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 V.A.L. REV. 145 (1955).

48. HARPER & JAMES § 28.7 at 1548. This conclusion is also based in part upon RESTATEMENT (SECOND) OF TORTS, § 388, Comment *h*. Cf. Annot., 164 A.L.R. 470 (1946).

case on point, *Moran v. Faberge, Inc.*,⁴⁹ the analysis of the Court of Appeals of Maryland cut a broad swath across the plane of general common law concepts, specifically that of foreseeability. *Moran* involved a product liability action against a manufacturer of cologne for injuries suffered by the plaintiff, a seventeen-year-old girl. In *Moran*, the plaintiff's friend poured perfume⁵⁰ from a drip bottle onto the lower portion of a candle's wick, somewhat below the flame. The candle burst into flame, burning the plaintiff on her neck and breasts. At the trial the plaintiff introduced evidence indicative of the high flammability and combustibility of the perfume compound, and testimony from two Faberge officials, the company's chief perfumer and a company aerosol chemist to the effect that Faberge was not only fully cognizant of the potential flammability of the perfume, but also was aware of its latent dangerous propensities when brought into close contact with a flame.

Faberge centered its defense upon what has become a popular and, on occasion, successful motif for manufacturer absolution in many late product liability decisions—the doctrine of 'intended use.'⁵¹ The nexus between the seemingly diverse considerations of the foreseeability of imminent danger to the consumer, concededly possessed by Faberge, and considerations relative to the question of intended use may be expressed as follows: if it can be said that the intended use of a particular product encompasses any *foreseeable* use to which the product may be put, then the manufacturer of the product has created an unreasonable risk (and is therefore negligent and subject to corresponding liability) by failing to give the consumer an adequate warning of the existence of such latent hazards;⁵² however, if it can be said that the manufacturer's responsibility to warn extends only to those *intended* uses for which the product was supplied, then any latent danger concerning a use that, although wholly foreseeable, was not one for which the product was supplied, confers upon the manufacturer no duty to warn. The *Moran* court formally resolved that "the duty of the manufacturer to warn of latent dangers inherent in its product goes beyond the precise use contemplated by the producer and extends to all those which are reasonably foreseeable."⁵³ While there are earlier cases⁵⁴ to the same effect, it must in fairness be indicated that the

49. 273 Md. 538, 332 A.2d 11 (1975).

50. Faberge's Tigress cologne was the perfume used.

51. See, *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966), cert. denied, 385 U.S. 836; but see *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Badorek v. General Motors Corp.*, 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970); *Volkswagen of America Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1975); *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969).

52. *Moran v. Faberge, Inc.*, 273 Md. 538, 544-45, 332 A.2d 11, 15 (1975). Cf. *Twombly v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960); *Katz v. Arundel-Brooks Concrete Corp.*, 220 Md. 200, 151 A.2d 731 (1959).

53. *Moran v. Faberge, Inc.*, 273 Md. at 544-46, 332 A.2d at 15-16.

54. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83-84 (4th Cir. 1962); *Hall v. E.I. DuPont De Nemours & Co.*, 345 F. Supp. 353, 363 (E.D.N.Y. 1972). Cf. RESTATEMENT (SECOND)

proposition is equally well-founded that where the use made of a product is so remote from that intended as to render such use unforeseeable, the manufacturer of the product incurs no liability for failure to warn of latent dangers inherent in such use.⁵⁵

Moran ultimately held as a matter of law that the issue of Faberge's negligence was a factual question for sole determination by the jury and reversed, remanding the case to the Court of Special Appeals.⁵⁶ This conclusion was reached after an exceedingly thorough evaluation by the court⁵⁷ of prior decisions based on factual analysis of whether the latent dangers inherent in the products in question would reasonably follow from their foreseeable use. Several are worthy of mention.

A supplier of shoes is not liable in failing to warn a woman that if she knowingly wears shoes which are two sizes too small she creates a risk of injury,⁵⁸ nor is a producer responsible for failure to warn that "a knife . . . will . . . cut or a hammer . . . will . . . mash a thumb or a stove . . . will . . . burn a finger."⁵⁹ Citing Harper and James' treatise on Torts,⁶⁰ the *Moran* court indicated the following instances where there are latent dangers that might foreseeably accompany the use of the particular product:

Hair dye will be applied to hair and will touch the skin; cosmetics will be applied to faces; underclothes will be worn next to the skin; tractors will get mired; food will be eaten; and so on.⁶¹

Other cases cited by *Moran* affirm that it is foreseeable that a baby might consume furniture polish;⁶² that a painter might inadvertently splash paint in his eye,⁶³ and that use of an automobile encompasses its involvement in vehicular collisions.⁶⁴ Conversely, it has been held as a

OF TORTS, § 395, comment K:

Foreseeable uses and risks. The manufacturer may, however, reasonably anticipate other uses than the one for which the chattel is primarily intended. The maker of a chair, for example, may reasonably expect that someone will stand on it; and the maker of an inflammable cocktail robe may expect that it will be worn in the kitchen in close proximity to a fire. Likewise the manufacturer may know, or may be under a duty to discover, that some possible users of the product are especially susceptible to harm from it . . . and he fails to take reasonable precautions, by giving warning or otherwise, against harm to such person.

55. *Smith v. Hobart Mfg. Co.*, 185 F. Supp. 751 (E.D. Pa. 1960), citing HARPER & JAMES, § 28.6 and PROSSER, *supra* note 3, at 503 (2d ed. 1955).

56. 273 Md. at 555, 332 A.2d at 21.

57. *Id.* at 545-50, 332 A.2d at 16-18.

58. *Dubbs v. Zak Bros. Co.*, 38 Ohio App. 299, 175 N.E. 626 (1931).

59. *Jamieson v. Woodward & Lothrop*, 247 F.2d 23 (D.C. Cir. 1950), *cert. denied*, 355 U.S. 855 (1957).

60. HARPER & JAMES, § 28.6.

61. 273 Md. at 546-47, 332 A.2d at 16-17.

62. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962).

63. *Haberly v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958).

64. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974).

matter of law that a manufacturer could not reasonably foresee that a housewife in the course of housework could spatter cleaning fluid in her eye,⁶⁵ nor could an automobile manufacturer, as a matter of law, foresee that an automobile's intended use included its involvement in collisions.⁶⁶ This is confusing in light of *Volkswagen of America, Inc. v. Young*. The facts of the cases are analogous yet the results are opposite.

A further maxim of the *Moran* decision is the utility the court makes of the language in *Palsgraf v. Long Island R. Co.*⁶⁷ bearing upon the foreseeable "zone of danger." *Palsgraf* dictated that so long as the distinct possibility of an accident to the plaintiff was readily foreseeable to the defendant, even though the precise and particular set of circumstances which contrived the accident was not at all apparent, the defendant would nevertheless be liable to the plaintiff.⁶⁸ The *Palsgraf* doctrine retained its resiliency throughout several decades, and had been implicitly adopted in Maryland in *Segerman v. Jones*⁶⁹ where the court stated: "[T]he question is whether the actual harm fell within a general field of danger which should have been anticipated."⁷⁰

The relative significance of *Moran* in this regard is two-fold: first, it affirmed the Maryland adoption of the *Palsgraf* "general zone of danger" rationale; and second, it constituted the first Maryland extension of the doctrine to the product liability situation where an absence of sufficient warning is alleged. The court cited Harper⁷¹ with approval:

[T]here is no liability for damage that falls entirely outside the *general threat of harm* which made the conduct of the actor negligent. *The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there*

65. *Sawyer v. Pine Oil Sales Co.*, 155 F.2d 855 (5th Cir. 1946).

66. *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1966).

67. 248 N.Y. 339, 162 N.E. 99 (1928). Judge Cardozo stated:

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye. *Id.* at 344, 162 N.E. at 100.

68. *Id.*

69. 256 Md. 109, 259 A.2d 794 (1969).

70. *Id.* at 132, 259 A.2d at 805 quoting from *McLeod v. Grant County School Dist.*, 42 Wash. 2d 316, 255 P.2d 368 (1953).

71. F. HARPER, A TREATISE ON THE LAW OF TORTS 7 (1933).

*may be liability, provided other requisites of legal causation are present.*⁷²

Here again liability is co-extensive with foreseeability. Summarily, then, the court, applying the above doctrine to the facts and circumstances of the case at bar, concluded that it was not necessary to the imposition of liability that the defendant Faberge had foreseen that the cologne would be poured on the candle. The manufacturer must foresee instead that the perfume, within the environment of its use, might come near enough to some type of flame to explode and directly and proximately cause injury to an individual, such as Nancy Moran, in the immediate area.⁷³

While certain courts have objected to the central assumption that liability should be co-extensive with foreseeability; some even holding that an attempt to confer liability for negligence on the "gossamer" of foreseeability was undeviating fantasy,⁷⁴ the principle nonetheless retains its viability. The apparent diametric opposition in the result of several cases⁷⁵ containing analogous facts and circumstances stems from disagreement concerning the factual presence or absence of foreseeability of harm. The concept of foreseeability must, therefore ultimately be construed as the genuine line of demarcation for the battle between the manufacturer and the consumer over the duty to warn of latent hazards.

Giant Steps

RES IPSA LOQUITUR Revitalized

Further novel, vital and dramatic modulations in the Maryland law of product liability have resulted from the case of *Giant Food, Inc. v. Washington Coca-Cola Bottling Co., Inc.*⁷⁶ *Giant* is like *Moran* in that it effectively interpreted, extended, and interpolated within modern law certain common law principles of consumer protection. The *Giant* court, however, evinced a predilection toward avoidance of the foreseeability question⁷⁷ instead electing to construe the issues raised in light of the doctrines of *res ipsa loquitur* and Uniform Commercial Code contract interpretation.

In *Giant*, the customer had taken a six-pack carton of Coca-Cola from a display bin at one of the defendant's supermarkets and had placed it in his shopping cart for the purpose of purchasing it. En route to the checkout counter, one of the bottles exploded, dripping liquid

72. 273 Md. at 551-52, 332 A.2d at 19.

73. *Id.* at 553-54, 332 A.2d at 20.

74. *Frericks v. General Motors Corp.*, 20 Md. App. 518, 530-31, 317 A.2d 494, 501 (1974), cert. granted July 5, 1974 to Md. Court of Appeals.

75. See notes 63-67 *supra*.

76. 273 Md. 592, 332 A.2d 1 (1975).

77. It should in all fairness be noted that there is a substantial and viable argument that the facts of *Giant* did not lend themselves to a "foreseeability"-type evaluation.

onto the floor, which caused the customer to slip and fall, sustaining severe personal injuries. He thereafter initiated an action based upon two grounds—*res ipsa loquitur* as the basis for allegations of negligence, and breach of implied warranty,⁷⁸ against the retailer, Giant Food, Inc., and against the bottler, Washington Coca-Cola Bottling Co., Inc. The cause of action was upheld against the retailer on both theories, but held ineffective, on both theories, to impose liability upon the manufacturer, Coca-Cola. Both *Siegel* and *Giant* were granted certiorari by the Court of Appeals of Maryland, which affirmed the decision rendered by the Maryland Court of Special Appeals relative to the liability of defendant Giant and the non-liability of defendant Coca-Cola under *res ipsa* and warranty theories.

The salient feature of the doctrine of *res ipsa loquitur* rests in its apparent exception to the general rule that negligence must be proved, and shall never be presumed.⁷⁹ It is said that the fact that an accident or injury has occurred, with nothing further indicated, is insufficient evidence of negligence. However, when there is evidence from which reasonable persons might infer that, upon the whole, it is more likely than not that the injury was caused by negligence, so long as certain further criteria which subsequently shall be discussed are present, a presumption of negligence is permitted to arise.⁸⁰ The operation of the doctrine has been illustrated best by the two "banana peel" cases.⁸¹ While the single fact of the existence of a banana peel on a floor is alone insufficient to indicate that it has been there long enough for the

78. MD. ANN. CODE, Comm. L. Art., § 2-314 (1969). The statute reads in full:
§ 2-314. Implied warranty; merchantability; usage of trade.

(1) Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Notwithstanding any other provisions of this subtitle, in §§ 2-314 through 2-318 of this subtitle, "seller" shall include the manufacturer, distributor, dealer, wholesaler or other middleman, and/or the retailer; and any previous requirement of privity is abolished as between the buyer and any of the aforementioned parties in any action brought by the buyer. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.

79. PROSSER, *supra* note 3, § 39 at 211.

80. *Id.*

81. *Id.* at 212-13.

defendant in the exercise of reasonable care to remove it,⁸² if it is "black, flattened out and gritty,"⁸³ the inference in reasonable minds is that it is more likely than not that the banana was on the floor for an extended length of time and the doctrine may consequently be invoked.

The doctrine saw a slow acceptance in Maryland in the product liability situation. Early cases summarily rejected application of the doctrine on a multiplicity of theories. It was held that the doctrine would not apply if the plaintiff pleaded specific acts of negligence,⁸⁴ if the evidence was capable of two inferences,⁸⁵ or if the plaintiff failed to show that the thing which caused the injury was in the exclusive control of the defendant.⁸⁶ The harshness of a literal interpretation of these rules has been alleviated significantly. In 1963, it was held that only three elements were necessary for the invocation of the doctrine:

1. A casualty of a sort which usually does not occur in the absence of negligence.
2. Caused by an instrumentality within the defendant's exclusive control.
3. Under circumstances indicating that the casualty did not result from the act or omission of the plaintiff.⁸⁷

Subsequent cases⁸⁸ recognized, as did the *Giant* court,⁸⁹ that the basic problem with the above formula rested in the second criterion, the requirement that the plaintiff must conclusively establish the exclusive control of the instrumentality by the allegedly negligent defendant. The essence of *Giant*, however, lies in its mitigation of the absolute rule. Citing the *Leikach v. Royal Crown Bottling Co. of Baltimore*⁹⁰ decision, the court indicated:

[Plaintiff] is not required to exclude every possible cause for her injuries other than that of negligence; she is only required to show a greater likelihood that her injury was caused by the defendant's negligence than by some other cause. . . .⁹¹

The operative effect of this holding is profound; plaintiff's burden no longer is to show absolutely exclusive control of the injurious

82. *Goddard v. Boston & Maine R.R. Co.*, 179 Mass. 52, 60 N.E. 486 (1901).

83. *Anjou v. Boston Elev. R.R. Co.*, 208 Mass. 273, 94 N.E. 386 (1911).

84. *Joffe v. Canada Dry Ginger Ale, Inc.*, 222 Md. 1, 158 A.2d 631 (1960).

85. *Preston v. Safeway Stores, Inc.*, 163 F. Supp. 749 (D.C. 1958).

86. *Lee v. Housing Authority of Baltimore City*, 203 Md. 453, 101 A.2d 832 (1954).

87. *Compare Munzert v. American Stores*, 232 Md. 97, 192 A.2d 59 (1963) with *Liekach v. Royal Crown Bottling Co. of Balto.*, 261 Md. 541, 547-48, 276 A.2d 81, 84 (1971).

88. *Liekach v. Royal Crown Bottling Co. of Balto.*, 261 Md. 541, 276 A.2d 81 (1971); *Zarling v. LaSalle Coca-Cola Bottling Co.*, 2 Wisc. 2d 596, 87 N.W.2d 263 (1958).

89. 273 Md. at 597-98, 332 A.2d at 4.

90. *Liekach v. Royal Crown Bottling Co. of Balto.*, 261 Md. 541, 276 A.2d 81 (1971).

91. 273 Md. at 598, 332 A.2d at 5.

instrumentality, but is merely to indicate to some definitive degree that the injury was more likely than not occasioned by the negligence of the particular defendant upon whom liability is sought to be imposed. Indeed, this interpretation is most enlightened and laudatory in consideration of the nature of our modern day stream of commerce where an article can seldom be deemed to have been within the "exclusive" control of a specific individual. Successive transfers from manufacturer, to distributor, to wholesaler, to retailer encompass a multiplicity of control, which would preclude *in toto* any recourse to the *res ipsa* doctrine if the exclusivity principle were to be literally taken. Hence, evidence presented in *Giant* to the effect that the explosion of the bottle could neither have been caused by thermal shock nor any other defect in manufacture was held, pursuant to the rule as mitigated, sufficient to show a greater likelihood that plaintiff's injury was caused by the retailer's (*Giant's*) negligence than some other cause, therefore entitling the plaintiff to apply *res ipsa loquitur* to infer the negligence of the retailer.⁹²

It should be noted parenthetically that the *Giant* decision still operates to shift the burden of proof to but one defendant, and not multiple defendants. While two states⁹³ have taken the doctrine one step further and have directed application of *res ipsa* once prima facie negligence is indicated, thereby shifting the burden of proof to multiple defendants, the Maryland courts are loathe to tread that path absent a showing of joint negligence.⁹⁴ It is therefore a further legal tenet of *Giant* that the doctrine of *res ipsa loquitur* is not applicable against more than a solitary defendant unless it is shown that multiple defendants' liability was joint, or that such defendants were in joint or exclusive control of the injury-producing factor; or that the true tortfeasor among the various defendants is not identified.⁹⁵ Beyond this limitation, however, the extended and simplified applicability of the *res ipsa* doctrine within the parameters of the product liability action in Maryland is a tree bearing positive fruit for the consumer.

Warranty and Contract Formation Revitalized

A further transition in Maryland law engendered by the *Giant* decision was the enlightened recognition by the court of the positive,

92. *Id.* at 598-99, 332 A.2d at 5-6.

93. *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953). The court in *Giant* notes: "The essence of this concept is that the evidence of the cause of injury is not equally available to both sides, but is exclusively . . . within the possession of the defendants." *Id.* at 600, 332 A.2d at 6. Citing *Prosser, The Fall of the Citadel*, 50 MINN. L. REV. 791, 847 (1966), the court stated: "The reasoning in these cases as to the meaning of 'exclusive control' is not very convincing; and they are quite evidently deliberate decisions of policy, seeking to compensate the plaintiff and to require the defendants to fight out the question of responsibility among themselves." *Id.* at 600, 332 A.2d at 6.

94. 273 Md. at 601, 332 A.2d at 7.

95. *Id.*

flexible approach to contract formation espoused by the Uniform Commercial Code. The existence of a contractual relationship between plaintiff and defendant is required for the existence of a warranty of merchantability under Section 2-314 of the Uniform Commercial Code.⁹⁶ The retailer's primary defense in *Giant* rested upon the asserted non-existence of any warranty because of the asserted non-existence of any contract. In support of this contention, the defendant retailer argued that the plaintiff's failure to pay for the coca-cola by the time the bottles exploded created a unilateral contract which could be accepted only by performance, as opposed to an executory bilateral contract which would exist when the bottles were removed from the shopping cart even though no payment had been effected.⁹⁷

The defendant's argument would have seen greater success under the Uniform Sales Act,⁹⁸ abrogated by Maryland in 1963 in favor of the Uniform Commercial Code.⁹⁹ The fallacy of theory upon which contract formation under the Sales Act rested was in the absolutes which it decreed: the "lump-concept"¹⁰⁰ approach. This approach dictated that the court should:

[D]ecide under the specific facts of a case that the "title" was in the seller or the buyer, a wide-premise decision; which then dictated the answer to many unrelated problems such as risk of loss, liability for price . . . standing . . . and the like. A decision on title in one case was authority for a decision on title in another, even though the particular issues to be decided in the two cases were radically different.¹⁰¹

Thus, the relevant inquiry under the Uniform Sales Act was the location of the title to the goods in question.

In sharp contrast, the Uniform Commercial Code adopted a more "flexible contractual approach instead of following the more rigid concept of title to which the Sales Act adhered."¹⁰² Section 2-401 of the Code speaks directly to the issue, formally and efficiently derogating the applicability of the "title" argument:

96. See note 79 *supra*. Official Comment 13 to the above-cited statute provides in part:

In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained.

97. 273 Md. at 602-03, 332 A.2d at 7.

98. Law of Feb. 1, ch. 538, § 1 [1964] Laws of Maryland 749.

99. MD. ANN. CODE, Comm. L. Art., §§ 1-101 to 10-104 (1975). The UCC has been in effect in Maryland since February 1, 1964.

100. W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE, § 1.2401 at 143 (1964).

101. *Id.*

102. *Wilke, Inc. v. Commins Diesel, Inc.*, 252 Md. 611, 250 A.2d 886 (1969), cited in *Giant*, 273 Md. at 604, 332 A.2d at 8.

Each provision of this subtitle with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods.

The *Giant* court, citing Official Comment 1 to Section 2-401, reinforced the apparent Code rejection of the Uniform Sales Act "title" doctrine by adopting the following language:

1. This subtitle deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed.¹⁰³

Therefore, the predominant significance of the *Giant* decision rests upon its interpretation of when a contract is created in the self-service retail situation, the court holding ultimately, in accord with the "flexible contract approach" of the UCC,¹⁰⁴ that the retailer defendant's act of placing the bottles in question upon the shelf with the price stamped thereon manifested an intent to offer them for sale, and the plaintiff's act of taking physical possession of the goods with the intent to purchase manifested an intent to accept the offer, creating a valid contract for the sale of the goods. Therefore, with a contract extant, a retailer's warranty of merchantability arises not only when goods are paid for at the check-out counter, but also when the customer, with intent to purchase, places or attempts to place them in his shopping cart en route to the check-out counter for the purpose of effecting a purchase.¹⁰⁵ A synthesis of similar reasoning in other jurisdictions¹⁰⁶ has resulted in the holding akin to *Giant* that in the context of a self-service supermarket, a contract for sale may arise before goods are actually bought. Implicit within the *Giant* court's opinion is the recognition that the retailer who seeks to avail himself of the expediency and great profit of the self-service sales systems¹⁰⁷ must

103. 273 Md. at 604, 332 A.2d at 8.

104. The court emphasized the flexibility of the UCC approach to contract formation by quoting several sections with approval. Some sections cited together with relevant text therefrom, are as follows:

§ 2-204. Formation in general. (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

Further, and most significantly:

§ 2-206. Offer and acceptance in formation of contract. (1) Unless otherwise unambiguously indicated by the language or circumstance

(a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstance.

105. 273 Md. at 605, 332 A.2d at 8.

106. *Gillispie v. Great Atlantic and Pacific Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972); *Sanchez-Lopez v. Fedco Food Corp.*, 27 Misc. 2d 131, 311 N.Y.S.2d 953 (1961).

107. The court noted:

[T]he customer who is welcomed into the retailer's store is faced with no choice.

correspondingly accept court determination of increased breadth and depth of contract formation, and consequent relations, duties and obligations of warranty which they impose. As with the *res ipsa loquitur* issue treated above, the basic common law principles of offer and acceptance again effect a positive and vital change for consumer reform when extended and expanded in the modern-day product liability situation.

CONCLUSION

What should be conclusively realized from an analysis of the respective decisions of *Moran v. Faberge, Inc.*, and *Giant Food, Inc. v. Washington Coca-Cola Bottling Co., Inc.*, is that Maryland has directly effectuated significant master-strokes for the contemporary consumer crusade not through adoption of a modern standard of strict liability, but rather through the adoption and extension of common law principles to current product controversies. While these measures do provide effective consumer safeguards, it must be realized that they are a product of the refusal of the Maryland courts to adopt the strict liability standard, for no common law standard can supplant the doctrine's effectiveness as a salutary consumer tool. Notwithstanding adverse criticism,¹⁰⁸ the doctrine provides a manifestly more just and less arbitrary criterion for determination of liability. The burden on the manufacturer is not unfairly excessive. The manufacturer is under no duty to make an accident-proof or fool-proof product,¹⁰⁹ nor is it automatically held liable as an insurer against consumer injury¹¹⁰—the law is clear on this point. It imposes upon the manufacturer a responsibility to take reasonable steps to market a product that will not deleteriously affect those members of the general public who use it. A manufacturer who markets a defectively constructed item should be forestalled from escaping liability at the expense of the consumer injured as a consequence of defective and dangerous construction.

Although the Maryland judiciary has not adopted the strict liability standard, its recent opinions express a laudable concern that he who seeks to introduce goods into the stream of commerce must stand ready

If he chooses to shop in that store, he must do so under the terms imposed by the retailer. He must select goods, place them in a cart provided by the retailer, and then tender payment at the check-out counters located near the exit. Thus, the only reasonable manner in which a customer of a self-service establishment can accept the store's offer is by taking the goods into his possession. 273 Md. at 607, 332 A.2d at 9.

108. See note 32 *supra*.

109. *Gosselt v. Chrysler Corp.*, 359 F.2d 84 (6th Cir. 1966); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

110. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Evans v. General Motors Corp.*, 359 F.2d 495 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1966); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974).

to assume responsibility and concurrent liability for any injuries resulting from their use which were or should have been foreseeable. Apparently, the courts have decided that the ever-increasing technological expertise possessed by today's manufacturer gives rise to an ever-increasing responsibility to the public.

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