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Unreasonably Dangerous Products in Strict Tort Liability: The Search for a Standard

Bert Riddell Cramer

purpose. *Peregoy v. Western Maryland Ry. Co.*, 202 Md. 203, 95 A.2d 867 (1953). The only duty the occupier of the land owes to a licensee is that if he becomes aware of the licensee's presence he must not injure him wilfully or wantonly or entrap him. *Bramble v. Thompson*, 264 Md. 518, 287 A.2d 265 (1972).

An invitee is one who is invited or permitted to enter or remain on another's property for purposes connected with or related to the owner's business. The property owner must use reasonable care to keep his premises safe for the invitee and to protect him from harm caused by an unreasonable risk, which the invitee will not discover even when ordinary care is excercised on part of the invitee. *Gray v. Sentinel Auto Parks Co.*, 265 Md. 61, 288 A.2d 121 (1972); *Lloyd v. Bowles*, 260 Md. 568, 273 A.2d 193 (1971).

Traditionally, policemen have been held in most jurisdictions to be licensees. The rationale for this classification is that they are likely to enter at unforeseeable times, upon unusual parts of the premises and during emergencies. The authorities state that placing a duty upon the property owner to keep his premises reasonably safe would be too severe.

The plaintiff in this case advanced two principle arguments. First, he asserted that the licensee status given him had changed to invitee after the initial period of his anticipated occupational risk had passed. That is, when the suspects had been apprehended. The court was of the opinion, however, that the plaintiff was injured during, and not after, the initial period of his anticipated occupational risk and from a hazard reasonably foreseeable as a part of that risk. Therefore, the plaintiff was not afforded the invitee status.

The plaintiff's second argument was that Maryland should abolish the common law classifications of invitee, licensee and trespasser and instead hold the property owners to a general negligence standard of ordinary reasonable care.

The trend now exists where courts have either abandoned in part or in whole the common law status classifications. The trend's driving force began in *Rowland v. Christian*, 69 Cal.2d 108, 443 P.2d 561, 70 Ca. Rptr. 97 (1968), where the common law classifications were rejected. The court stated that:

> "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values."

69 Cal. 2d 118, 443 P.2d 568, 70 Cal. Rptr. 104.

Instead of using the standard of classifications the California Court found the proper test to be:

> "whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative."

Id. at 119, 443 P.2d 568, 70 Cal. Rptr. 104.

In *Woodward v. Newstein*, 37 Md.App. 285, 377 A.2d 535 (1977), The Maryland Court of Special Appeals took note of the modern trend of cases that would abolish the classes of invitee, licensee, and trespassers. In that case the Court declined to rule on the merits of the new wave of cases as the question was not properly raised in the Court below. The court further noted that the Court of Appeals should bear the burden of deciding the issue.

The dissent by Judge Levine, in which Judge Eldridge joined, strongly urged the abolition of the common law classification status in exchange for the acceptance of general negligence as the standard of care for the property owner. The dissent stated that the common law approach was necessary to protect a landowner's right to free use and enjoyment of his property, but now, society's interest in the safety of people outweighs its interest in the property owner's unrestricted use of his premises. Applying the common law classification generally results in the inordinately severe treatment of the injured entrants. The distinctions between the classifications is inconsistent with contemporary thinking about the function of tort law in society. The dissent argues that the traditional rule affords a property owner a special privilege to be careless.

It is only a matter of time before this jurisdiction imposes upon landowners a duty not to create unreasonable risks of harm to persons entering upon their premises. The dissenting opinion suggests that the standard of care would depend upon such factors as: (1) The likelihood that the conduct in question will result in harm to others; (2) The gravity of such harm; and (3) The cost of preventing the risks of injury.

Resolution of the issue presented here must wait for another day. When that day arrives, and the issue is properly presented, the Maryland Court will probably abandon the old common law status of invitee, licensee, and trespasser and apply instead the standard of ordinary negligence in determining the liability of landowners to persons injured on their property.

—Ronald Frank Greenbaum

Unreasonably Dangerous Products in Strict Tort Liability: The Search for a Standard

In products liability design defect cases, in order for a seller to be strictly liable under Section 402A of the Restatement (Second) of Torts, it generally must be shown that: (1) the product was in a defective condition at the time it left the possession or control of the seller; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the injuries; and (4) that the product was expected to and did reach the consumer without substantial change in its condition.

California, however, holds otherwise. In *Barker v. Lull Engineering Company, Inc.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the Supreme Court of California restated its elimination of the unreasonably dangerous requirement, and further held that a trial judge may properly instruct the jury that a product is defective in design if (1) the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner, or if (2) the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove that, on balance, the benefits of the

challenged design outweigh the risk of danger inherent in such design.

In *Barker*, the court was presented with a situation in which the plaintiff-employee was injured because of an alleged design defect in a fork-lift loader leased by plaintiff's employer from a co-defendant of manufacturer Lull Engineering. The trial court instructed the jury that strict liability for a design defect would have to be based on a finding that the product was unreasonably dangerous for its intended use. The verdict was in favor of the defendant. Barker appealed, contending that such an instruction was ambiguous, and clearly contrary to the holding in *Cronin v. J.B.E. Olsen Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), decided subsequently to Barker's trial.

Acting Chief Justice Tobriner, writing for the court, agreed, stating that the instruction failed in two respects. It did not give adequate consideration to either (1) consumer expectations which are often determinative of the defectiveness issue regardless of any unreasonable danger rubric or (2) the product's reasonably foreseeable use and not simply its intended use. *Barker, supra,* 20 Cal. 3d 413, 426-427, 573 P.2d 443, 451-452, 143 Cal. Rptr. 225, 233-234.

Defendant Lull Engineering contended that the rejection of the "unreasonably dangerous" criterion should be limited to cases alleging *manfacturing* defects, and that in *design* defect actions, plaintiff should have to prove the defect made the product unreasonably dangerous, since, defendant argued, a defect in design is defined by reference to the unreasonably dangerous standard. 20 Cal. 3d at 424, 573 P.2d at 450, 143 Cal. Rptr. at 232.

The court disagreed, noting that in California there is no real distinction between manufacturing and design defects when plaintiff is able to show the existence of a defect, and further that "the Restatement's 'unreasonably dangerous' formulation represented an undue restriction on the application of strict liability principles." *Id.* at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.

The court thus reiterated its flat rejection of the argument that recovery should be permitted only if a product is more dangerous than the potential of risk contemplated by the average consumer, thereby refusing to "permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibility for injuries caused by that product." *Id.* Therefore, a consumer may recover from an injury even though the defect in the product was patent and the risk and resultant injury foreseeable.

After discarding the unreasonably dangerous standard, the court reviewed a number of California cases, discussing the definition of defect and the allocation of the burden of proof with respect to the considerations relevant to a determination of the adequacy of a product's design.

The court found that when a product fails to satisfy ordinary consumer expectations as to safety in its intended or reasonably foreseeable use, the manufacturer is strictly liable for resulting injuries. Under this standard, defectiveness can often be demonstrated by circumstantial evidence, including situations where there is no specific identification of the defect at fault. *Id.* at 430, 573 P.2d 454, 143 Cal. Rptr. 227.

However, the expectation of the ordinary consumer is not the exclusive yardstick for evaluating design defectiveness; often the "consumer would not know what to expect, because he would have no idea how safe the product could be made." 20 Cal. 3d 430, 573 P.2d 454, 143 Cal. Rptr. 234.

The court thus postulated another standard by which a jury may impose liability if it finds that the risk of danger inherent in the challenged design outweighs the benefits of that design. *Id.*

The court noted that a principal purpose behind the strict liability doctrine is to remove evidentiary burdens from a plaintiff otherwise required in negligence actions. Therefore, once a plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the *burden of proof* shifts to the defendant who must then prove by either circumstantial or direct evidence that the product is not defective. *Barker v. Lull Engineering Co., Inc., supra,* 20 Cal. 3d 431, 573 P.2d 455, 143 Cal. Rptr. 237.

The court concluded by noting that this two-pronged test of defectiveness "subjects the manufacturer to liability whenever there is something wrong with its product's design. . .while stopping short of making the manufacturer an insurer for all injuries which may result from the use of its product." Page 432 of 20 Cal. 3d, 573 P.2d 456, 143 Cal. Rptr. 238.

Maryland differs from the *Barker* approach in at least three respects. In Maryland, in order to demonstrate liability, plaintiff must prove not only the existence of a defect proximately causing injury, but also that the product was dangerous to a degree beyond that which the ordinary consumer would expect; the ordinary consumer is held to a knowledge common to the community as to the product's characteristics. Thus, while California focuses on individual expectations, Maryland looks to the reasonable man standard usually applicable in negligence cases and to comment i of section 402A of the Restatement. *See Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976).

In addition, Maryland distinguishes between defects in design and defects in manufacture. In *Volkswagen of America v. Young*, 272 Md. 201, 321 A.2d 737 (1974), the Court of Appeals, in construing the applicability of strict liability in a second-collision, design defect case, held that the "thrust of Sec. 402A is that a seller of any product in a defective condition is liable to a user for harm caused by that defective condition even though the seller has exercised all possible care in the preparation and sale of his product. This principle obviously changes the standard of care with regard to a construction defect, but as to a defect in design, it has no special meaning." 272 Md. 221, 321 A.2d 747.

This conclusion explains the third distinquishing characteristic between strict liability design defect cases brought in Maryland and those litigated in California. In Maryland, strict liability is not applicable in cases where liability is dependant upon the showing of a design defect. In *Phipps, supra,* the Court of Appeals concluded that where a product is in a condition not intended by the seller, there is less difficulty in applying the defectiveness test of section 402A. However, where a design defect is alleged, traditional negligence standards apply, since the element of unreasonable danger requires a weighing of the utility of the benefits inherent in the design against the magnitude of the risk. *Phipps, supra,* at 345, 363 A.2d at 959.

Even Maryland, however, recognizes that "unreasonably dangerous" is not the same in different contexts, and plaintiff's proof will vary depending on the very nature of the product involved. Thus in *Eaton Corporation v. Wright*, 281 Md. 80, 375 A.2d 1122 (1977), the plaintiff, by showing merely that highly flammable gas continued to be released from a hand-held propane gas canister after the torch head was properly removed, presented a prima facie showing of unreasonable danger. 281 Md. at 89, 375 A.2d 1127.

Since strict liability does not require a perfectly safe product, but rather one that is reasonably safe, the *Barker* court may have gone too far in holding a manufacturer liable for a defect. Nevertheless, the court made clear that a case-by-case analysis would be proper, and a working definition of "defect" could be established based on case law decisions involving similar

circumstances or products.

Whether one accepts or rejects the unreasonably dangerous test in the Restatement's language, proof of a defect is a *sine qua non* in products liability actions. Hopefully, the developing case law will provide a more workable standard by which defectiveness can be measured; until then, the *Barker* case represents a positive attempt to eliminate negligence principles from strict liability in tort.

—Bert Riddell Cramer

Residual Hearsay Exceptions & Confrontation: Continuing Constitutional Dilemma

by Thomas G. Ross

While there are numerous exceptions to the general rule that hearsay evidence is inadmissible in formal court proceedings, Rule 804 (b) of the Federal Rules of Evidence provides for only five categories of hearsay exceptions where the declarant is unavailable.[1] The basic premise behind admitting such evidence is the reliability factor surrounding the circumstances at the time a statement was made. These circumstances provide a substitute guarantee of reliability. Such guarantee is necessary in order to admit testimony which may be crucial to the outcome of the case.

Historically, the best safeguard against unreliable testimony has been the right of opposing parties to cross-examine adverse witnesses. The admission of hearsay evidence restricts this ability in that it depends for its probative value upon the testimony of someone not subject to cross-examination. For this reason, the Rule 804 (b) exceptions are limited to circumstances that are theoretically so reliable as to overcome the right in the opposing party to cross-examine the declarant.

The recent decision in *United States v. West*, 574 F.2d 1131 (4th Cir. 1978), addresses itself to the admission of hearsay testimony of an unavailable declarant and the defendants' right of confrontation.

At trial in the United States District Court for the Eastern District of Virginia, West and his two co-defendants were convicted of distribution of heroin and possession with intent to distribute heroin, both violations of the Controlled Substance Act, 21 U.S.C. §841 *et seq.*[2]

The trial judge allowed the admission of the grand jury testimony of Michael V. Brown, the unavailable declarant, under Rule 804 (b) (5) of the Federal Rules of Evidence.[3] He noted that "under the circumstances, it [a transcript of Brown's grand jury testimony] was essential and trustworthy." 574 F.2d at 1134.

The government's evidence at trial included photographs, the transcript of Brown's grand jury testimony, testimony by an expert in voice identification, and the purchased heroin. Also offered as further corroboration of Brown's testimony were tapes of Brown's conversations with the defendants and testimony of Drug Enforcement Administration agents regarding their observations. Arrest records, as well as transcripts of Brown's tape-recorded conversations with the defendants were made available to defense coursed.

I. HEARSAY

> Hearsay evidence is testimony, in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the *credibility* of the out-of-court asserter. (emphasis added)

McCormick, *Evidence*, §246 at 584 (2d Edition, 1972).

Defendants contended that the trial court erred in admitting the transcript of Brown's grand jury testimony. While it was not contested that the transcript of that testimony met the necessary criteria of clauses (A), (B) and (C) of Rule 804 (b) (5) of the Federal Rules of Evidence, the defendants argued that the provision had not been satisfied because the admitted statements failed to have the requisite "equivalent circumstantial guarantees of trustworthiness" as statements admitted under any of the preceding four paragraphs of the rule (Rule 804 (b) [1]-[4]). Their contention was that the admission of Brown's grand jury testimony was far less trustworthy than the other Rule 804 (b) provisions required, and that the legislative history of the rule provided that the provision was to be applicable only

1. 1) Former testimony; 2) Dying declaration; 3) Statement against Interest; 4) Statement of personal or family history; 5) Other exceptions.

2. FACTS: The testimony of an unavailable declarant, Michael V. Brown, played a critical role in the convictions of West and his co-defendants. Brown had volunteered to assist the Drug Enforcement Administration (DEA) in its investigation. At the time, he was incarcerated with a pending drug charge as well as a parole violation detainer.

Under police surveillance, Brown purchased heroin from the defendants. Several of his telephone calls to the defendants in which he set up a "buy" were monitored; a transmitter was concealed on Brown to tape-record the conversations; law enforcement officials observed and photographed Brown's meetings with the defendants.

Before each transaction, Brown was searched for drugs and given money to purchase heroin. According to the government's evidence, transactions took place between Brown and West on three occasions, and three similar "deals" were made between Brown and the two co-defendants.

After each transaction, DEA agents would search Brown and his car for contraband. Brown would then return to the DEA office where he would meet with a DEA agent to discuss and compose a summary of the events that took place. They would also listen to the tape-recordings.

On March 8, 1976, the defendants were indicted without Brown's testimony. On March 16, 1976, however, Brown testified before a grand jury investigating Virginia drug traffic.

In exchange for his cooperation, the government entered a *nolle prosequi* to the pending drug charge against Brown and dismissed the detainer. He was given $855 as a form of "protection" and released. On March 19, 1976, Brown was murdered "contract-style," i.e. four bullets into the back of his head while he was driving his car.

3. Rule 804 (b) (5) provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.