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Recent Decision

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fact that they are unsafe does not affect his liability for injuries resulting from such conditions. Yet if the defect which caused the injury was not known to the proprietor and could not have been known in the exercise of due care the proprietor is not liable. But no duty rests on the proprietor of a public place of amusement to warn patrons of obvious or known risks or dangers to which they voluntarily subject themselves.

Howard Jeffers.

RECENT DECISION

AUTOMOBILES—LIABILITY OF DEALER FOR INJURIES CAUSED BY DEFECTIVE CONDITION OF USED CAR IN COURSE OF DEMONSTRATION.—A salesman in the employment of the defendant, a dealer in second-hand automobiles, had conveniently, but without authority, transferred custody of a used car to his wife for the purpose of demonstrating the car to the plaintiff, a prospective purchaser, who was a sister of the salesman's wife. During the course of the demonstration, one of the wheels collapsed, and plaintiff was injured in the crash that followed. In an action for damages, the defendant contended that the salesman's wife was not his agent. *Held,* for defendant, on an instructed verdict. *Sandlin v. Hamilton Auto Sales Co.,* 197 N. E. 238 (Ohio, 1934).

The plaintiff's complaint was framed in two counts, one charging the defendant for the negligence of his employee, the second charging him with knowledge of the defective wheel, as a result of which plaintiff was injured. On the first ground, the trial court was doubtless correct in finding that, as a matter of law, the relationship of principal and agent did not exist, that the salesman had exceeded the scope of his authority, and that, therefore, the defendant was not liable for the negligence of the substitute driver. There may appear to be a conflict of authority as to the master's liability for the negligent acts of the substitute driver, but such conflict is generally resolved on the question of fact whether the servant had the express or implied authority to thus permit another to act for him. The query always is, Has the servant acted within the scope of his employment? In two cases somewhat resembling the state of facts in the principal case it was held that he had. Thus in *Wooding v. Thom,* 132 N. Y. S. 50 (1911), where the agent had the duty to demonstrate the car for the benefit of the prospective purchaser and allowed the servant of the latter to drive, it was held the servant had acted in the scope of his employment. And, in *Hoffman v. Roehl,* 203 Pac. 349 (Mont. 1921), the master was likewise held liable for the negligence of the daughter of the prospective purchaser who was permitted to drive the car on an errand of her own. Without going into the merits of these two cases, the facts of the principal decision can be readily distinguished. The agent delivered the car to a party within the immediate household of the buyer, in one case to a member of the immediate household, in the other to a servant in the employ of the buyer. The court, in each instance, obviously believed that such act was in the furtherance of the agent's legitimate employment, that is, the sale of the car to the prospective buyer. In the case under examination, however, the salesman delivered the car without authority to his wife, a person in no legal privity with the

buyer, whatever the affirmative of that proposition is worth in the above cases commented on. The fact that the wife was a sister of the prospective buyer seems entirely irrelevant, and should not change the effect of the salesman's transfer of the car to her. And, of course, she was not an employee of the dealer. The reader is recommended to examine, in addition, the numerous factual situations reported in the Annotations in 20 A. L. R. 194 and 50 A. L. R. 1931, which set forth other sets of circumstances under which the courts have held the salesman's transfer of the car to another during the demonstration an act within the scope of his employment.

Some of the courts adopt the idea of constructive identity, in this regard. Thus is has been held that the acts of one permitted by the servant to operate the automobile in the latter's presence are the acts of the servant with respect to the liability of the master therefor. *Marchand v. Russell,* 241 N. W. 209 (Mich. 1932); *City of Indianapolis v. Lee,* 132 N. E. 605 (Ind. 1921); *Irwin v. Williamson Candy Co.,* 255 N. W. 400 (Mich. 1934); Annotation, 54 A. L. R. 852; Annotation, 98 A. L. R. 1046. The doctrine certainly could not apply in the principal case. The well-recognized rule of agency, that the master is not liable for the negligent acts of a third person, unless the servant in so allowing him to act was himself acting within the scope of his employment, would be applicable. *Williams v. Cohen,* 206 N. W. 823 (Iowa 1926); *Neuman v. Steurnagel,* 22 Pac. (2d) 780 (Cal. 1933); RESTATEMENT OF THE LAW OF AGENCY § 81.

However, the question is (and this Note is mainly directed to this inquiry), Is the doctrine of *respondeat superior* correctly applied on the facts? The doctrine efficiently enough disposes of the first count. But the second count sets up matter, although in a poorly framed manner, which, if supported by any evidence, should have been allowed to go to the jury for consideration. That count alleges that "the defendant in error [defendant] knew, or by the exercise of reasonable and ordinary care should have known, that one of the front wheels upon such automobile was defective, and by reason of such defect, while being negligently operated by an employee of and for the benefit of the defendant in error, the wheel collapsed, which caused the automobile to overturn and injure plaintiff in error." In the writer's opinion, counsel should have clearly and unambiguously set up an independent and distinct ground of liability, as, for instance, the defective wheel and the defendant's duty of prior inspection, and have avoided all reference to the negligence of the defendant's employee. However that may be, there appears to have been some factual evidence supporting the charge of a defective wheel. The salesman's wife testified to the peculiar sway of the car before the accident, witnesses testified as to the dry rotted condition of the wheel, and of course the very fact that the wheel collapsed under ordinary driving conditions had some probative value. Usually, wheels do not break of their own weight. The writer does not wish to appear as passing on the quality of the evidence or of its persuasiveness. He simply submits that the evidence as to the wheel should have been submitted to the jury, and the jury should have been allowed to pass on its weight. He further submits that the doctrine of *respondeat superior* was not properly controlling. It is generally agreed that said doctrine is dependent for its application in any given case on the *action* of the servant, negligent or otherwise. Wherever it is applied, the master is held liable for the negligent action of his servant. Conversely, unless the servant has been negligent, the master cannot be proceeded against. *Bennett v. Eagleke,* 148 Atl. 197 (N. J. 1930), and Comment, 79 UNIV. PA. L. REV. 348. The reader is asked to tax his imagination sufficiently to conjecture on what ground the Ohio Appellate Court

would have held defendant liable, if at all, had his salesman personally conducted the demonstration, the other given facts occurring. It is apparent, assuming no negligence on the part of the driver, and it is to be noted that it does not appear in the principal case that the substitute driver was negligent, that there would have been no call for the doctrine of *respondeat superior*. The court would have been driven irresistibly to the only true consideration, to wit, the duty of the defendant to reasonably inspect his secondhand cars and put them out on the market in a reasonably safe condition. The probative value of the evidence going to the defective wheel was not for the court to pass on, and in the opinion of the writer, both the trial court in directing the verdict, and the appellate court in affirming that course of action, committed error. The dissenting jurist alone drew attention to the defective wheel, inferring an analogy to the manufacturers' cases. and concluding that if the defendant knew of the defect he should be liable. It should be noted that actual knowledge of a condition such as a dangerous wheel is not required. The jurist would have been more accurate if he had placed liability at the defendant's door in the event the latter, in the exercise of ordinary care, *ought to have known* of the defect. HARPER, LAW OF TORTS 243, 246; RESTATEMENT OF THE LAW OF TORTS § 402.

Our attention is then narrowed to this inquiry: Should a secondhand dealer, who has sent out a used car for demonstration purposes, be liable to the prospective purchaser injured in the course of the demonstration due to a dangerously defective part of the car, irrespective of any application of the doctrine of *respondeat superior*? It is impossible and unnecessary to cite cases covering the specific facts. But principles broad enough to enscope the problem can be presented. There is first of all, the proposition of law that where a dealer sells an article to another which is not only unfit for the purpose for which he sells it, but owing to some defect therein, is dangerous for the use for which it is designed and intended to be used, and such defect was discoverable by the dealer in the exercise of due care, and not likely to be discovered by the purchaser, the former is liable to the buyer for injuries resulting to him from the use of the article. In *Gerkin v. Brown & Sehler Co.*, 143 N. W. 48 (Mich. 1913), the purchaser of a fur suffered skin poisoning about the neck due to a dye in the fur sold by defendant fur dealer, and recovered damages therefor. In *Garvey v. Namm*, 121 N. Y. S. 442 (1910), a dealer in ladies' garments was held liable to a purchaser for injuries caused latter by a concealed needle imbedded in the garment. While a warranty was alleged in the first case, both decisions were predicated on the ground of the defendant's negligence in failing to properly inspect the article. In this type of case the courts frequently adopt the view that the defendant has impliedly warranted the article as fit for the contemplated use. Note, 40 HARV. L. REV. 886.

The modern tendency is no longer illustrated by the famous case of *Winterbottom v. Wright*, 10 M. & W. 109 (1842). In the manufacturers' cases, the courts frankly admit that the producer of an automobile, who fails to use reasonable care in inspecting and testing the car and its parts, is liable to a purchaser injured in an accident caused by a dangerously defective part, without concerning themselves with the patent lack of privity between manufacturer and purchaser. *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 (C. C. A. 2nd, 1919); *Rotche v. Buick Motor Co.*, 193 N. E. 529 (Ill. 1934). Courts no longer interpose the lack of privity of contract to defeat the plaintiff's claim in this field. They insist that a prime requisite to the manufacturers' liability be that the defect is of a part such as will make the automobile a thing of danger to persons who should be expected to come in contact with it while used in a manner for which it was designed or intended to be used. *Cohen v. Brockway Motor*

Truck Corporation, 268 N. Y. S. 545 (1934). The famous and oft quoted case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916), clarified the view of the courts on this proposition, taking the position, now widely followed, that if the nature of the thing manufactured is such that it is reasonably certain to place life and limb in peril when negligently made, the manufacturer owes the purchaser a duty to exercise care in making it even though the chattel is not necessarily dangerous when properly made. The periodical and text-book writers point out that the *MacPherson* case and later New York cases discard the cumbersome technique of fitting facts into some one of the exceptions to the general rule of the manufacturer's immunity in the absence of privity. 32 MICH. L. REV. 1007. Liability is placed squarely on principles of negligence at common law. The issues resolve themselves into these: Has the defendant the duty to inspect? Has he breached that duty? And has the plaintiff's injury been the proximate result of that breach?

Of course the objection will be at once forthcoming that the manufacturer's liability must be distinguished. His negligence, it is said, consists of positive action. It is affirmative. In the *production* of his article, be it a car or something else, he has *installed* or used defective parts or materials, dangerous to life or limb because of the contemplated use of the article. The argument will doubtless follow, that the used car dealer has done nothing, that, if anything, his negligence consists of inaction. But that argument is as outworn as the doctrine of *Winterbottom v. Wright*. It is true that the great majority of the cases are concerned with negligent actors, and that courts are perhaps a little less disposed to place liability on the one whose negligence consists of inaction. However, a sound public policy is behind the reasoning in the manufacturers' cases and should likewise be behind those of the nature of the principal case. Needless to say, the courts hold that there is a duty to inspect.

The Restatement of the Law of Torts (Student edition) covers the situation in concise language. Section 401 is as follows: "A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use." In the Comment to this section, the Reporter draws particular attention to the dealer who has kept the article in storage wherein it is likely to dangerously deteriorate unless properly kept. While this instance is obviously most pertinent to the meat dealer, query, Should it not be as applicable to a used car lot? The Reporter further comments on those cases in which the dealer selects the article wherein the purchaser is entitled to expect that he will exercise reasonable care in selecting from his stock a specimen fit for the contemplated use. Query, Has not the dealer in selecting the used car to be sent out to the prospective purchaser brought himself precisely within this Comment? That the plaintiff is but a prospective purchaser cannot anywhere or in any manner change the dealer's duty to him. Certainly he owes him the same duty to use care during the course of the demonstration, if not more, than he would to one who had completed purchase.

It is true that the automobile is not generally regarded as an inherently dangerous instrumentality. HUDDY ON AUTOMOBILES (7th ed.) 797. Therefore its owner is not absolutely liable for whatever happens, as in the case of ownership of a ferocious animal, or of high explosives. But it may become a dangerous agency if equipped with a weak wheel or a defective steering apparatus, and if so equipped when put out on the market or furnished to a prospective purchaser, for the use for which it was reasonably intended, it would seem that liability should attach. Liability in the instant case could certainly not be placed on the

manufacturer, for the defective wheel was not installed as such by him. Rather the defect is peculiarly due to a rotted and weakened condition of the wood, a condition which the dealer in the exercise of reasonable care and by inspection could have prevented, at least have discovered in time to warn the plaintiff. That the dealer's negligence has been characterized by inaction does not change the dangerous condition of the automobile he has thus allowed to be sent out to the plaintiff for demonstration purposes. That courts are even tending to attach strict liability to ownership of automobiles is indicated by the reading of two recent Florida cases: *Miami Transit Co. v. McLin,* 133 So. 99 (Fla. 1931); *Greene v. Miller,* 136 So. 532 (Fla. 1931). See, also, Annotations in 16 A. L. R. 270 and 68 A. L. R. 1002. The majority holding is contra. *Brinkman v. Zuckerman,* 192 Mich. 624, 159 N. W. 316 (1916); *Fisher v. Fletcher,* 133 N. E. 834 (Ind. 1922). But it is conceded that the automobile may become a *per se* dangerous agency if equipped with a weak wheel or a defective steering apparatus for example. If so equipped when put out on the market or for demonstration to a prospective purchaser, the secondhand dealer should be chargeable, if not absolutely, at least in the same manner as liability is placed on the manufacturer, that is, so far as the defect might have been discovered by a reasonable inspection. That courts are adopting this public policy is illustrated by the cases. In *Faherty v. Helfont,* 122 Atl. 180 (Me. 1923), it was held that liability does not arise from the mere ownership of a defective car where the injury is not shown to have been the result of the defect. In this case, the car was delivered to and was being driven away by the prospective purchaser's agent at the time of the accident. The court conceded the general agency proposition that the defendant would not be liable for any negligence on the part of the buyer's agent, but adds, that "in case of substances whose dangerous qualities are latent and not obvious, manufacturers, vendors, and distributors who negligently fail to inform persons dealing with them of such qualities are, notwithstanding want of privity, liable for injuries caused thereby to persons whose exposure to the danger could have reasonably been contemplated." Certainly if evidence to support the allegations in the plaintiff's petition in that case that the defective steering wheel was the cause of his injury had been forthcoming, who will dispute that the court would have found the defendant liable, nothwithstanding, as it says, "want of privity"?

In this connection it is important to note that the manufacturer or vendor should be liable only for injuries received by one who uses the article or preparation in an ordinary, expected manner. *Genesee County Patrons F. R. Ass'n v. L. Sonneborn Sons,* 189 N. E. 551 (N. Y. 1934); Note, 9 NOTRE DAME LAWY. 443. Bohlen says that "Where . . . the article can be used only for the very purpose for which it is dangerously unfit and the vendor knows that the purchaser is buying it, with the intention of putting it at once to such use . . . the courts should . . . hold the vendor liable for what he must, had he thought, have realized would probably result from his conduct." BOHLEN, STUDIES IN THE LAW OF TORTS 115, 116. That the use of the car during the course of the demonstration was an ordinary and expected one is entirely too patent to warrant further discussion.

In *Flies v. Fox Bros. Buick Co.,* 218 N. W. 855 (Wis. 1928), it was held that the duty of a secondhand dealer to exercise care with respect to its equipment so that it may be kept in control and not become a menace to life and limb, is the same as that of the manufacturer of a new car, especially where he has represented that the car was furnished with standard equipment. It should be noted that the defendant dealer therein had rebuilt the car and therefore the case falls in line with the manufacturers' cases. However, as the court remarks, the duty to carefully construct is cast on the manufacturer for the purpose of preserving life and limb.

Harper, in his work on the Law of Torts (p. 245), states: "Both the manufacturer and vendor of an article intended for certain purposes owe a duty to warn of any concealed defect which is dangerous to life or limb, of which the manufacturer or vendor has knowledge or of which he should have knowledge, and which the person for whose use it is intended is not likely to discover." This last qualification is important. Certainly the prospective purchaser, during the course of the demonstration, is not likely to discover the dangerously defective wheel, which the dealer in the exercise of careful inspection, should have discovered. He is not expected to make a detailed inspection of the car; and he has a right to rely on the judgment and competence of the dealer, and to expect that a car reasonably safe for the contemplated demonstration would be sent to him. RESTATEMENT OF THE LAW OF TORTS § 401. While the automobile is not inherently dangerous, its nature and anticipated use is such that it is imminently dangerous. *Jaroniec v. Hasselbarth,* 228 N. Y. S. 302 (1928). The secondhand dealer, having reason to believe that such persons as the plaintiff in the principal case will come in contact with the car, where he knows or should know, by the exercise of ordinary diligence, that the vehicle is in an imminently dangerous condition, should owe such persons a common law duty, and be liable for any injury suffered because of the dangerous and defective condition of the automobile he has sent out, while the vehicle was being used in a reasonable and ordinary manner. See Annotation, 60 A. L. R. 371, wherein the writer thereof admits the cases are not in accord with this doctrine of liability, but is of the opinion that the trend is in that direction.

The case of *Schweinhaut v. Flaherty,* 49 Fed. (2d) 533 (1931) (commented on in 7 NOTRE DAME LAWY. 261), is of interest in this connection, further illustrating the tendency of the courts to adopt a construction more in alignment with sound public policy, in preference to the alternate of being hidebound by an overworked rigid rule of law. Therein, it was held by the Court of Appeals of the District of Columbia, that the Taxicab Company was liable for one of its driver's negligence, while the latter was transporting a girl friend free and in violation of company rules. Despite the fact that the driver was clearly acting outside the scope of his employment, so that the doctrine of *respondeat superior* would not seem to be applicable, the court deemed it good public policy to require the cab company to hire competent drivers and to use reasonable means to enforce its rules of safety.

The writer wishes to conclude by remarking that inasmuch as the modern trend is to put liability firmly on the grounds of common law negligence principles where the dealer or manufacturer stands in some relation to an article which while not inherently dangerous to life and limb, can become so if negligently made, it must be recognized that an imminently dangerous condition to life and limb can be caused by negligent *omission and failure to inspect carefully,* as well as by negligent installation of a defective part. A like duty must, as a matter of public policy, be imposed in both instances. If in the principal case, then, the plaintiff's injuries were caused, not by any negligence of the substitute driver, but by a dangerously defective part of the car, any application of the doctrine of *respondeat superior* to defeat the plaintiff's cause of action would appear misplaced, and evidence going to the defective condition of the wheel should have been submitted to the jury.

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