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ARE AUTOMOBILES INHERENTLY DANGEROUS TO THE PURCHASER?

The question of the liability of manufacturers of chattels for their negligence to persons not in privity of contract with them, which has occupied the courts for years, has taken on a new importance with the common use of automobiles and the dangers incident to the use of heavy vehicles travelling often at the speed of an express train over the highways.

Motor vehicles go ordinarily from the manufacturer to the dealer who buys outright, and from the dealer to the purchaser, who may be skillful, careful and intelligent, or who may be clumsy, careless and unteachable. They are distributed far and wide in the hands of those who have no contractual relation with the manufacturer.

Among the many thousand cars so placed on the market annually, all are not perfect and without flaw, and among those defective in their parts some will break and injure the occupants and others. If the maker of such a car, knowing of a defect, conceals the fault for the purpose of making a better sale, the authorities are agreed that he is liable to persons injured thereby. Thus in *Kuelling* v. *Lean*, 183 N. Y. 78, the land roller, ordinarily an innocuous farm implement, was put into the market with a weak tongue due to a knot hole concealed by putty and paint which made it dangerous. The manufacturer, in an action for personal injuries, was held liable for fraudulent concealment.

But the liability of the manufacturer for mere negligence rests on a different basis. We may start with two fundamental rules:

1. It is the duty of the vendor of an article which, although properly made, is dangerous in its nature to life and limb, or likely to become so in the course of the ordinary usage to be contemplated by the vendor, either to exercise due care to warn users of the danger or to take reasonable care to prevent the article sold from becoming dangerous, and the manufacturer is liable for injury due to breach of this duty to a third person not a party to the contract for sale. (*Thomas* v. *Winchester*, (drugs dangerous to human life) 6 N. Y. 397; *Devlin* v. *Smith*, (scaffold ninety feet high) 89 N. Y. 470; *Torgesen* v. *Schultz*, (bottles for aerated water likely to explode) 192 N. Y. 156; *Statler* v. *Ray*, (a battery of coffee urns in a public restaurant) 195 N. Y. 478.)

2. With this exception, when the defective article has been sold and delivered to the original purchaser, the manufacturer is

not liable for injuries subsequently sustained by a third person in consequence of the manufacturer's negligence merely, where there is no fraudulent concealment. (*Huset* v. *Threshing Co.* (a threshing machine) 120 Fed. 865; *Gerkin* v. *Brown & Sehler Co.* (poisonous dye in a fur coat) 177 Mich. 45; *Loop* v. *Litchfield,* (balance wheel on a horse power circular saw) 42 N. Y. 351; *Losee* v. *Clute,* (steam boiler) 51 N. Y. 494.)

The reason for the rule has been variously stated. Lord Abinger in the leading English case of *Winterbottom* v. *Wright,* 10 M. & W. 109, (the mail coach case) says that "the most absurd and outrageous consequences, to which I can see no limit, would ensue" if the rule were extended. Alderson, in the same case, said: "The safe rule is to confine the right to recover to those who enter into the contract."

Professor Bohlen, in his recent valuable work on Torts, speaking of such things as cars or carriages, states the reason in terms of logic rather than convenience, and says that "injury to third persons is not the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated and because (2) an independent cause,—the responsible human agency of the purchaser . . . intervenes . . . ."

The substantial explanation of the limitation of liability seems to be that if the thing properly made is safe for normal use, the liability of the manufacturer for negligent construction must not be extended so as to restrict and hamper trade and commerce and make the manufacturer practically the insurer of the safety of all who come near the product of his skill and industry. The proposition is one of policy rather than of law or logic.

Unusual difficulties have attended the application of the rule in the case of automobiles and the decisions are not harmonious. The Appellate Division, 3rd Department, has allowed a recovery against the manufacturer for injuries due to a defective wheel negligently inspected, in *MacPherson* v. *Buick Motor Car Co.* (160 App. Div. 55) and the Circuit Court of Appeals, 2d Circuit, has denied liability on similar facts, *Cadillac* v. *Johnson* (221 Fed. 801.) In a dissenting opinion in the latter case, Coxe, J., states the plaintiff's point with his customary clearness and accuracy. He says: "If the law, as stated in the prevailing opinion, is sustained, the owner of an automobile, entirely free from fault, may be injured for life by the collapse of a decayed wheel, occurring a few months after its purchase, and be absolutely without redress. . . . If this be so it follows that an injury may be

occasioned by the grossest negligence and no one be legally responsible. Such a situation would, it seems to me, be a reproach to our jurisprudence." In the case of *Olds Motor Co.* v. *Shaffer* (145 Ky. 616) it is reasoned that because an automobile is dangerous *unless it is safely and properly constructed,* the rule might properly be extended "to hold manufacturers of articles intended for public use, and that are liable, if *defectively* constructed, to inflict harm, responsible to third parties." But to square such a result with leading New York cases, it would seem necessary to hold that an automobile is *per se* inherently dangerous to the purchaser and Justice Woodward has said in *Quackenbush* v. *Ford* (167 App. Div. 433), in substance that a modern automobile, properly equipped with brakes and assembled in harmony with the plans underlying the construction, is *not* inherently a dangerous machine, but it becomes inherently unsafe and a menace to the safety of the public if the manufacturer fails to use proper materials and due care in construction, and that the manufacturer's duty *to the public* is to be careful.

The difference between mail coaches and automobiles is one of degree, but on such differences the law often draws distinctions, *e. g.,* in determining the criminal liability of a child, competency to contract etc.

The new rule or the novel application of the old rule suggests as a basis of liability the following:

1. An automobile properly made is safe for normal use, but
2. By negligent construction, injuries to third parties, purchasing of dealers, or not in privity with the manufacturer, might be reasonably expected, because
3. The *defect* renders the automobile imminently dangerous so that injury to the party using it and others is a natural and probable consequence of its use, therefore
4. It is the duty to the public of manufacturers of automobiles to be careful as to (*a*) construction and (*b*) inspection, and it follows
5. They are liable, independent of contractual relation, to those injured by their negligence.

But it is impossible at this time to foresee the ultimate result. The prevailing opinion in the *Cadillac* case *supra* is a strong presentation on precedent of the case against liability and the dissenting opinion presents forcibly the reasons for imposing a more drastic rule.

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